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THE EVOLVING VICE PRESIDENCY

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I. INTRODUCTION

The Vice Presidency has evolved into an institution far different from its original design. The founding luminaries assembled at the Constitutional Convention of 1787 conceived the Vice Presidency as little more than a postscript to the text of the Constitution, an afterthought whose eventual creation was virtually accidental.¹ In the intervening years since that revolutionary gathering, the Vice Presidency has blossomed into an office of international reach and influence whose occupant enjoys a springboard to the Presidency—a dramatic transformation that lays bare the vastly enhanced significance of the Vice Presidency in the modern American polity. Yet this expansion of power and prestige has been nothing if not eventful, each chapter written in response to a crisis, either imminent or lived.

There have been four pivotal constitutional moments in vice presidential history. First, in the early nineteenth century, an electoral crisis—the nearly disastrous election of 1800 in which presidential hopefuls Thomas Jefferson and Aaron Burr both implausibly garnered the same number of Electoral College votes—precipitated the Twelfth Amendment, a rehabilitative remedy to the poorly crafted constitutional mechanism for presidential and vice presidential selection.² Second, an imminent crisis of congressional tyranny gave rise to the Twentieth Amendment, advancing the date of the quadrennial presidential and vice presidential inaugurations and consequently neutralizing the subversively undemocratic machinations that an outgoing Congress might plot against an incoming administration.³ Third, shortly following Franklin Delano Roosevelt's unprecedented fourth election to the Presidency, the American people again rallied for constitutional change—this time to avert the hastening crisis of an imperial executive. The increasing concentration of state power in the hands of the President and Vice President triggered deafening calls for the Twenty-Second Amendment, limiting Presidents to two elective terms in office and Vice Presidents to no more than ten total years of presidential service.⁴ Fourth, at the height of the Cold War in an era of newly emergent threats amid concerns about presidential health, the Twenty-Fifth Amendment constitutionalized a congressional procedure for nomination and confirmation in the event of a vice presidential vacancy.⁵

Today, the Vice Presidency confronts yet another crisis. Unlike the actual or anticipated crises that have quickened vice presidential constitutional change in the

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1. JULES WITCOVER, *CRAPSHOOT: ROLLING THE DICE ON THE VICE PRESIDENCY* 12 (1992).

2. See *infra* Subsection III.B.1 for an analysis of the catalytic role of this electoral stalemate in the evolution of the Vice Presidency.

3. See *infra* Subsection III.B.2 for a discussion of this crisis of congressional tyranny.

4. See *infra* Subsection III.B.3 for a review of the events prompting presidential term limits.

5. See *infra* Subsection III.B.4 for a history of the Twenty-Fifth Amendment.

past—an electoral crisis, a congressional crisis, an executive crisis, and a continuity crisis—the Vice Presidency must now contend with an amorphous and much less tangible crisis: popular illegitimacy.

The Vice Presidency has long been mercilessly disparaged as irrelevant and distantly removed from the spheres of influence and power in Washington, but its evolution into a vital command post in the national and international affairs of state—second only to the Presidency in power, now in *fact* not just in *name*—has since quieted detractors.⁶ This contemporary status is the bountiful harvest of seeds sowed nearly one century ago. Alongside constitutional amendments to the Vice Presidency, the office has furthermore developed as a matter of both substance and practice. Substantively, Presidents have made progressively greater use of their deputies in the elaboration and marketing of domestic and foreign policy. Indeed, the Vice Presidency has matured exponentially since the founding era, the most critical phases of transformation having arisen in the latter half of the twentieth century. Politically and structurally, the contemporary constitutional edifice of the Vice Presidency has conspired with the new functional scope of the office to propel its occupant to certain contention for her party's presidential nomination.

Yet despite this staggering progress, the Vice Presidency has descended into popular illegitimacy. The Vice President takes office—and accepts the vast power it confers upon its occupant—at the invitation *not* of the people *but* of the President. It has long been the prerogative of a presidential nominee to bestow the Vice Presidency upon any constitutionally eligible individual without any measure of popular input or consent. This arrangement may have been tolerable in the past when the Vice President was a mere minion wielding only negligible influence upon the organs of government. But the modern power and prestige of the Vice Presidency—which now holds prime ministerial dominion in America and commands transnational authority—calls for the popular legitimization of the office. As the Vice Presidency continues to stand only one heartbeat from the Presidency in the precarious international context governing American interaction with friend and foe alike, the office can no longer defensibly remain the exclusive province of the President. The United States must democratize the Vice Presidency with some form of popular consent buttressing this focal post in American government, at last liberating the office from its crisis of popular illegitimacy.

In Part II of this Article, I review the foundations of the Vice Presidency. I focus primarily on the constitutional and political origins of the office, including the compromises and concessions that led to its creation. Part III canvasses the evolution of the Vice Presidency from the founding to the present day, framing its constitutional transformation as discrete steps prompted by various crises. This Part also illuminates the structural, substantive, and political axes along which the Vice Presidency has ripened since the eighteenth century. Parts II and III are deployed in the service of Part IV, which develops a model for legitimizing the Vice Presidency according to popular will and consent. Part V frames the modern profile of the Vice Presidency in the larger political context and concludes with a few parting thoughts.

6. See *infra* Section III.A for a survey of the increasing prominence of the Vice Presidency since the creation of the office.

II. FOUNDATIONS

In his influential contribution to the study of the Vice Presidency, vice presidential scholar Joel Goldstein has ascertained three principles that inform the Founders' blueprint for the Vice Presidency as a visionary model of prudent statecraft.⁷ Goldstein is correct to state that the structure of the Vice Presidency reflects far more than an "absolute devotion to popular sovereignty."⁸ To be sure, the Founding Fathers could have established a self-standing electoral mechanism for filling the second highest executive office, wholly independent from the procedures established for electing the commander in chief. But the Founders chose otherwise, recognizing that "too frequent elections" could "jeopardize other goals," including their wise objective "to mitigate the influence of popular opinion and to lend stability to government."⁹ Consistent with their lofty aspirations for the nascent American federal democracy, the Founders designed the Vice Presidency to serve the interest of effective democratic government insofar as its design exhibited the primary American democratic values of popular consent, stability, and competence.¹⁰

Consider, for instance, how the Founders' designation of the Vice President as successor to the President advances each of these three values. A Vice President who succeeds to the Presidency in the event of death, incapacity, or otherwise will likely mirror the policies of her predecessor, in so doing sheltering herself under the cover of the most recent national expression of popular will in support of the incapacitated President and thus legitimizing her inherited authority.¹¹ Similarly, the organs of government remain stable and unshaken in the course of a vice presidential succession to the Presidency largely because only the Vice President occupies a position to "provide a smooth transfer of power."¹² Likewise, as the presidential understudy, the Vice President learns to navigate the ducts of public administration and acquires a certain measure of experience that is unavailable to all but one other civil officer, thus rendering the stand-in "prepared to assume control immediately."¹³ These three values—popular consent, stability, and competence—inform the common understanding of the Vice Presidency, both in its origins and evolution, and vindicate the far-sighted judgment of the Founders.

In the study of the foundations of the Vice Presidency, considerations of process and substance ought to occupy distinct spheres of inquiry. Process—the order and manner in which various issues wound their way to the floor of the Constitutional Convention for deliberation—differs from substance, meaning the actual content and timbre of the resolutions presented for debate and resolution. True, it was a late addition to the Convention agenda, but the Vice Presidency in no way emerged in the Founders' final design from a careless *mélange* of last-minute proposals and

7. JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY* 209-20 (1982).

8. *Id.* at 209.

9. *Id.*

10. *Id.* at 209-10.

11. *Id.* at 217.

12. GOLDSTEIN, *supra* note 7, at 210.

13. *Cf. id.* at 220 (stating that any successor to chief executive—particularly under adverse conditions—"must be prepared to assume control immediately").

compromise. On the contrary, though the Vice Presidency does not today retain its flawed founding framework, the Founders indeed gave careful thought to the role, responsibility, and constitutional structure of the Vice Presidency (although the office was admittedly no more than “a constitutional luxury”¹⁴). The Framers’ labors produced an office that—in a single station—has pulled together executive duties, legislative tasks, caretaker responsibilities, and both national and international functions. Yet it was this very practical multiplicity of roles—an anomalous amalgam within the American constitutional order¹⁵—that aroused powerful dissenting voices at the Constitutional Convention.

A. *Origins*

The Vice Presidency merited little attention at the Constitutional Convention of 1787.¹⁶ Only near the close of the Convention was the office even considered, raised as an option, and subsequently introduced for debate and discussion.¹⁷ Yet, in fashioning the Vice Presidency, the Founders did not operate in vacuity, devoid of any conception of political and practical workability. Quite the reverse, in fact, for before them stood the existing 1777 Constitution of the State of New York, which featured a lieutenant governorship—an executive office bearing a striking resemblance to the very office the Founders ultimately enshrined in the U.S. Constitution as the Vice Presidency. Indeed, the New York lieutenant governorship served as a model for the Founders—namely those writing to the citizens of New York under the penname *Publius* urging ratification of the proposed federal Constitution—in elaborating their own rendering of a second-in-command.¹⁸

Specifically, the American Vice President shares similarities with the New York lieutenant governor on each of the three bases that were determinative in shaping the Vice Presidency: (1) selection; (2) vacancy; and (3) Senate leadership. The 1777 New York Constitution provided that the lieutenant governor was to “be elected in the same manner with the governor,”¹⁹ a stipulation revealing a similar solicitude for the popular

14. Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 16 (1997) (“Although the Twenty-Fifth Amendment dramatically narrows this window of vulnerability, our Constitution also allows Congress to provide for Presidential succession without Vice Presidents, making them, ultimately, a constitutional luxury.”).

15. George Anastaplo, *Constitutionalism, The Rule of Rules: Explorations*, 39 BRANDEIS L.J. 17, 102 n.221 (2000-2001) (“The Vice-President created by the Constitution has always had an anomalous position in the American constitutional system.”).

16. See Neals-Erik William Delker, *The House Three-Fifths Tax Rule: Majority Rule, the Framers’ Intent, and the Judiciary’s Role*, 100 DICK. L. REV. 341, 350 (1996) (“The debate at the Constitutional Convention on the position of the Vice President is sparse.”).

17. John D. Feerick, *Writing Like a Lawyer*, 21 FORDHAM URB. L.J. 381, 382 (1994).

18. See THE FEDERALIST No. 68, at 366 (Alexander Hamilton) (J.R. Pole, ed., 2005) (“It is remarkable, that in this as in most other instances, the objection, which is made, would lie against the constitution of this state. We [in New York] have a lieutenant governor chosen by the people at large, who presides in the senate, and is the constitutional substitute for the governor in casualties similar to those, which would authorize the vice-president to exercise the authorities and discharge the duties of the president.”).

19. N.Y. CONST. art. XX (1777) (“That a lieutenant-governor shall, at every election of a governor, and as often as the lieutenant-governor shall die, resign, or be removed from office, be elected in the same manner with the governor, to continue in office until the next election of a governor . . .”).

legitimacy of the deputy chief executive that is also evident in the Founders' chosen method for selecting the Vice President.²⁰ Moreover, just as the New York Constitution authorized the lieutenant governor to succeed to the governorship in the event of the governor's inability to serve,²¹ the Founders likewise delegated an analogous responsibility to the Vice President.²² Finally, the Founders looked favorably upon the lieutenant governor's appointment to preside over the state senate,²³ so much so that they devolved comparable powers upon the Vice President, whose station similarly straddled the boundary separating executive and legislative functions.²⁴ These three issues in particular—(1) presidential selection; (2) presidential vacancy; (3) Senate leadership—appear to have catalyzed the creation of the Vice Presidency.

1. Presidential Selection

More than perhaps anything else, the Vice Presidency owes its existence to the Founders' search for a way to neutralize the advantage presidential candidates would enjoy from their respective home states. Specifically, the delegates to the Constitutional Convention feared that electors would look favorably upon *only* presidential candidates from their own state, to the detriment of preferable continental figures who could better lead and unify the several states of the new union.²⁵ The Framers successfully hurdled this favorite-son problem—or so they thought²⁶—by establishing an electoral device that required an elector to cast two votes for President, one of which had to count toward the tally of a candidate hailing from a state different from the elector's own.²⁷ The Framers had a twofold impetus for creating this double-vote solution. First, to minimize the possibility of deadlock among electors, whose ballots for the election of a President required a majority vote.²⁸ Second, in the words

20. U.S. CONST. art. II, § 1, cl. 3.

21. N.Y. CONST. art. XX (1777) (“And in the case of the impeachment of the governor, or his removal from office, death, resignation, or absence from the State, the lieutenant-governor shall exercise all the power and authority appertaining to the office of governor until another be chosen, or the governor absent or impeached shall return or lie acquitted . . .”).

22. U.S. CONST. art. II, § 1, cl. 6 (“In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.”).

23. N.Y. CONST. art. XX (1777) (“[A]nd such lieutenant-governor shall, by virtue of his office, be president of the senate, and, upon an equal division, have a casting voice in their decisions, but not vote on any other occasion.”).

24. U.S. CONST. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”).

25. JAMES W. CEASER, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 79-80 (1979).

26. To consider whether the Framers may have been mistaken in their assessment, see *infra* Section III.B.

27. CEASER, *supra* note 25, at 79-80.

28. WITCOVER, *supra* note 1, at 14 (“Because it had been decided that election of the president would require a majority vote, a deadlock would result if each state cast all of its votes for a favorite-son—a not unreasonable assumption. To avoid the favorite-son problem, the convention struck on the idea that each

of Connecticut delegate Roger Sherman, to counteract the anticipated tendency of the electorate to “vote for some man in their own state” thus “never giv[ing] a majority of votes to any one man,” with the result that “the largest states will have the best chance for appointment.”²⁹

This latter motivation—recognizing that voters in a given state would possess insufficient information to measure the candidacies of out-of-state nominees and thus automatically support their home-state candidate, likely the only one personally known to them³⁰—figured prominently in the Founders’ calculations. Presidential historian James Ceasar explains that the elector’s first of two votes would almost certainly be cast for her favorite-son candidate but the second vote (reserved for a candidate from another state) would likely crystallize around one or more candidates of national stature, whose reputation and influence transcended the boundaries of their respective home states.³¹ Convention delegates—holding steadfastly to the notion of presidential selection immediately, or at least mediately, by the electorate³²—had envisioned only the most virtuous and politically disinterested “continental characters” vying for the Presidency.³³ The intent of this double-vote device was therefore plain: to “give a boost to national candidates—respected statesmen who might be everyone’s second choice after the local favorite son.”³⁴ Ever so skeptical, the Founders did not simply *hope* that this electoral system would lead to the election of a truly national President, whose appeal extended beyond the territorial confines of her home state. They added a further wrinkle to the double-vote device, reckoning that electors might otherwise feel strategically inclined to discard their second vote in order to assure the election of their favorite-son to the Presidency.

The new wrinkle was the Vice Presidency. Convention delegates aimed to discourage electors from throwing away their second vote by stipulating that the runner-up in the presidential race would become Vice President. Under the Founders’ plan, no elector would actually vote for a Vice President. Rather, all electors would

elector would cast two votes for president, one of which would have to go to an individual not of the same state as the elector. Each vote in this ‘double-balloting’ procedure would count equally, and the assumption was that this process would minimize the chances of a deadlock.”)

29. CEASER, *supra* note 25, at 78 (“[T]he people will never be sufficiently informed of characters and besides will never give a majority of votes to any one man. They will generally vote for some man in their own state, and the largest states will have the best chance for appointment.” (quoting Roger Sherman)).

30. Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 688 (2002) (“Although voters in a given state would know enough to choose between leading state candidates for House races and for the governorship, these voters would likely lack information about which out-of-state figure would be best for the Presidency.”).

31. CEASER, *supra* note 25, at 79-80.

32. Elisabeth M. Gillooly, Comment, *LaRouche v. Kezer: A Cursory Look at Connecticut’s Hopelessly Vague Media Recognition Statute*, 15 QUINNIPIAC L. REV. 269, 273 n.26 (1995) (explaining that Convention delegate James Wilson endorsed “presidential selection ‘mediately or immediately by the people’”) (citations omitted).

33. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1785-86 (1996) (“The Convention opted for this indirect method partly to placate the advocates of vestigial state sovereignty and partly to insure that only the most virtuous, disinterested individuals—in Wilson’s phrase ‘Continental Characters’—would gain the office.”) (citations omitted).

34. Vikram David Amar, *The Cheney Decision—A Missed Chance to Straighten Out Some Muddled Issues*, 2004 CATO SUP. CT. REV. 185, 201 (2004).

cast two votes for President, one of which *had* to count toward a candidate from a different state.³⁵ If any candidate earned a majority of the whole number of electors, she became President.³⁶ If no candidate achieved a majority, the House of Representatives was to choose the winner by ballot, with the presidential candidate scoring the second highest popular vote total becoming Vice President (unless a tie resulted among runner-ups, in which case the Senate would choose the winner by ballot).³⁷

Thus, the Vice Presidency served the dual purpose of dissuading electors from jettisoning their second vote, and encouraging them to take seriously their mandate to cast two substantive votes. Faced with the task of filling the nation's two highest executive offices—including one whose holder would succeed to the Presidency in the event of the President's inability to serve—the electors, thought the Founders, “would have reason to cast their second votes for the best man from some other state rather than for a nonentity.”³⁸ The Founders' injection of the Vice Presidency into constitutional negotiations underscores the gravity of their insistence that an elector cast her second vote only after careful deliberation. And with reason, for after all the Vice Presidency would be filled by the presidential candidate who had garnered the second highest tally for President.³⁹

Looking back on the Founders' deftness to keep the electors honest in the enterprise of selecting a chief executive, their strategy meaningfully attended to each of the principal democratic values served by the Vice Presidency: (1) popular consent; (2)

35. CEASER, *supra* note 25, at 79-80.

36. *Id.* at 80.

37. The U.S. Constitution states:

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom at least one shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

art. II, § 1, cl. 3.

38. Walter Berns, *The Insignificant Office: What the Framers Thought of the Vice Presidency*, NAT'L REV. ONLINE, July 9, 2004, <http://www.freerepublic.com/focus/f-news/1168305/posts>.

39. WITCOVER, *supra* note 1, at 14 (“In a large sense, it was from this solution to the potential favorite-dilemma in presidential balloting that the office of vice president was made part of the American political structure. And in it could be seen the clear intent of the Founding Fathers that its occupant be that person esteemed by his peers second only to the individual elected president, since each elector was to cast two votes for president, not one for president and the other for vice president. Thus, an elector's second vote could not, or should not, have been cast cavalierly.”).

competence; and (3) stability. By naming the second-place presidential aspirant to the Vice Presidency, the Founders entrusted the office to a candidate who would in at least some measure be: (1) clothed in popular legitimacy; (2) regarded by the electorate as a competent leader capable of managing the affairs of the state; and (3) prepared to assume the reigns of power seamlessly without disruption in the event of the elected President's inability to serve.

2. Presidential Vacancy

Delegates to the Constitutional Convention also appreciated the need to establish a mechanism by which to assure an orderly transition of power in the event of the President's inability to serve. However, early discussions appeared to lack the necessary urgency that this significant matter of constitutional design probably should have commanded. Nevertheless, in due course the Framers elected to designate the Vice President as first successor to the President in the event of the President's death, resignation, or inability to otherwise discharge the duties and responsibilities of the Presidency.

Presidential succession should probably have been an issue of the first order in deliberating the scope and function of the Vice Presidency, but the Convention relegated succession debate to secondary importance.⁴⁰ The issue lay unresolved until the closing days of the revolutionary assembly.⁴¹ This does not suggest, however, that the constitutional drafting committees minimized the importance of the succession deliberations. The committees took the Vice Presidency quite seriously. This is evident in the Convention's measured deliberation of a proposal to name the Chief Justice of the United States as successor to an incapacitated or deceased President.⁴² It is also evident in the work of the Committee of Eleven—consisting of delegates from each of the eleven former colonies represented at the Convention⁴³—that incorporated into its draft succession provision a resolution put forth by Virginian delegate Edmund Randolph⁴⁴ authorizing the Congress to designate an official order of succession.⁴⁵ The proposal then made its way to the Committee on Style, which subsequently crafted what became the nation's founding succession rule.⁴⁶ But the Convention ultimately failed to provide a mechanism to fill a vice presidential vacancy occasioned when the Vice President succeeded to the Presidency.⁴⁷

40. *Id.* at 17 (“The convention, ironically, seemed much more concerned with whether the vice president would serve as president of the Senate than with the infinitely more important matter of his succession to the presidency if fate or circumstance dictated.”).

41. Feerick, *supra* note 17, at 382.

42. Joel K. Goldstein, *An Overview of the Vice-Presidency*, 45 *FORDHAM L. REV.* 786, 789 (1977).

43. Sarah Helene Duggin & Mary Beth Collins, *Natural Born, in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 *B.U. L. REV.* 53, 67 (2005).

44. For more on Randolph, see generally JOHN J. REARDON, *EDMOND RANDOLPH* (1974).

45. WITCOVER, *supra* note 1, at 17-18.

46. *Id.*

47. Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 *WAKE FOREST L. REV.* 505, 512 (1995) (“Moreover, if the framers thought the vice presidency uniquely suited to solve that riddle [of presidential succession], they would presumably have arranged to fill a vice presidential vacancy. The framers

Writing in *The Federalist Papers*,⁴⁸ Alexander Hamilton defended the proposal to assign succession responsibilities to the Vice President over other possible successors. In view of the Vice President's weighty role, wrote Hamilton, it was appropriate that she be selected in the same manner as the President.⁴⁹ As reviewed above, the original method for selecting the President also produced the Vice President.⁵⁰ But Hamilton's enthusiasm for the succession provision may have blinded him to a not immaterial shortcoming in the Convention's design of the Vice Presidency. Consider the text of the succession clause, which states that upon the President's "[i]nability to discharge the Powers and Duties of [the Presidency], the Same shall devolve on the Vice President."⁵¹ This passage reflects a latent ambiguity as to whether the Vice President—upon succeeding to the Presidency—actually *becomes* President or merely *acts* as President. The provision leaves unclear whether "the Same" refers to "office" of the Presidency or simply to the "powers and duties" of the Presidency.⁵² Nonetheless, despite its arguably careless wordsmanship, the Convention adopted the clause by a vote of eight to two.⁵³

Ambiguity aside—which, by the way, endured until the twentieth century⁵⁴—the Framers exhibited farsightedness and political acumen in choosing the Vice President to succeed to the Presidency when circumstances so dictated. Three reasons bear this out. First, the choice furthered the interest of stability insofar as the Framers put the electorate and foreign observers on notice that a pre-selected individual would assume the leadership of the nation in the event that the sitting leader became unable to serve. Second, as an officer whose functions would place her in both the executive and legislative spheres of government, the Vice President would acquire a certain competence that would serve her in good stead should she be called to manage the affairs of state. Finally, the selection of the Vice President as successor to the

made no such provision.”).

48. For a strong criticism of scholarly reliance upon *The Federalist Papers*, see Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601 (2003).

49. THE FEDERALIST NO. 68, at 366 (Alexander Hamilton) (J.R. Pole, ed., 2005) (“The other consideration is, that as the vice-president may occasionally become a substitute for the president, in the supreme executive magistracy, all the reasons, which recommend the mode of election prescribed for the one, apply with great, if not with equal force to the manner of appointing the other.”).

50. See *supra* Subsection II.A.1 for a discussion on presidential selection.

51. U.S. CONST. art. II, § 1, cl. 6 (stating further that “the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.”).

52. Joel Goldstein acknowledges this ambiguity but concludes from his study of Convention debates that the Framers intended the Vice President simply to act—and not become—President. See GOLDSTEIN, *supra* note 7, at 203-04 (“Study of the records of the Constitutional Congress makes clear that the framers intended the Vice President merely to ‘discharge the powers and duties’ of the President in all situations.”); Goldstein, *supra* note 47, at 517 (“If the textual argument is not dispositive, the debates at the Convention reveal the framers’ intent that the Vice President simply act as, but not become, President.”).

53. Goldstein, *supra* note 42, at 789.

54. The ambiguity besieging the phrase “the same,” for instance, whether it referred broadly to the actual “office” of the Presidency or narrowly to the “powers and duties,” was first clarified by bold presidential action and ultimately by constitutional amendment. See *infra* Section III.B.2.

Presidency demonstrates the Framers' conviction that the moral leader of the nation should be sustained by popular consent. In view of the Founders' original electoral design—which selected the President and Vice President pursuant to the same electoral mechanism—both the sitting President and a Vice President succeeding to the Presidency could rest their authority to govern upon some measure of democratic legitimacy.

3. Senate Leadership

Having created the executive office of the Vice Presidency, the Founding Fathers appropriately thought it necessary to charge its occupant with at least one official function. Though the Vice Presidency had been designated a member of the executive branch, her only role was to serve patiently as first successor to the President. Seeking to expand the Vice President's responsibilities, the Framers sealed the void with the Presidency of the Senate.⁵⁵ As Senate President, the Vice President's principal function—as envisioned by the Framers—would be to cast the final ballot in the event of a tie among the sitting members of the Senate, a task whose value Congress debated at great length when weighing whether or not to pay the Vice President an annual salary.⁵⁶ Several considerations figured prominently in the Framers' thinking on naming the Vice President to lead the Senate, particularly the risk of diluting the vote of duly elected Senators. However, this anxiety proved misplaced. What should have instead given pause to the Senate was the prospect of conflicting allegiances coming to bear upon the Senate President.

The Framers expressly rejected the suggestion that sitting Senators should elect the Senate President.⁵⁷ Their primary motivation for choosing otherwise was to ensure that a preferably impartial officer would intervene to bring about a “definitive resolution of the body” in the event of a stalemate among voting Senators.⁵⁸ Thus, in accounting for the contingency of a tie in the Senate, convention delegates preferred not to devolve this power unto a sitting Senator because the practical result would have been to either confer an additional vote upon a state or withhold from a state its justly deserved participation in the resolution of a Senate ballot.

Had the Framers named a sitting Senator to preside over the Senate and cast a tie-breaking vote when the Senators were deadlocked, two possibilities—both inequitable—would have arisen. First, the Senator-named-President would cast two votes, the first on the issue brought to the Senate floor, and the second to break a tie

55. U.S. CONST. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”).

56. Kent Greenfield, *Original Penumbra: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79, 124-125 (1993) (outlining congressional debate on vice presidential remuneration).

57. John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 149 n.46 (1995) (“It is worth noting that in the Convention the principal alternative to a Vice President appeared to be a President of the Senate selected from among the Senators.”).

58. THE FEDERALIST No. 68, at 366 (Alexander Hamilton) (J.R. Pole, ed., 2005) (“It has been alleged, that it would have been preferable to have authorised the senate to elect out of their own body an officer, answering to that description. But two considerations seem to justify the ideas of the convention in this respect. One is, that to secure at all times the possibility of a definitive resolution of the body, it is necessary that the president should have only a casting vote.”).

where circumstances so warranted. This would have conferred an unfair advantage of overrepresentation upon the Senate President's home state. Alternatively, the Senator concurrently presiding over the chamber would have been prevented from casting a ballot on Senate resolutions, bills, and other official business *unless* a tie among voting Senators should ever happen to materialize. Convention delegates raised this very objection, protesting that "if an elected senator presided over the Senate regularly and voted only in the event of a tie, the state from which he came would be deprived of a vote on all other occasions."⁵⁹ In the words of Hamilton, this would have unwisely exchanged "a constant for a contingent vote."⁶⁰

The Framers found both options equally imprudent. Either the Senate President's home state would receive an enlarged franchise, in which case it would unjustly amplify the voice of one state over the others—in the process weakening the vote of the other states—or the Senate President's home state would find itself virtually divested of its full and equitable representation. Each option displayed variations on the same debilitating liability: uniformly subverting the stated motivation in designing the Senate as a deliberative body anchored in the principle of equal representation, in contrast to the model of proportional representation that underpinned the House of Representatives.⁶¹ As a solution to the puzzle of the Senate Presidency, the Founders therefore installed the Vice President, a stand-alone officer whose vote would, in theory at least, neither diminish nor augment any one state's representation.

Yet by endowing the Vice President with the Senate leadership, the Framers failed to foresee instances in which the Vice President would be conflicted in her role as President of the Senate. For instance, as Bruce Ackerman and David Fontana demonstrate, it was a flagrant misstep to permit the Vice President, as Senate President, to preside over the electoral vote count.⁶² This creates a particularly disquieting situation as a matter of political optics,⁶³ given that a sitting Vice President presiding over the Senate may not infrequently find herself in the position of opening certificates and counting electoral votes⁶⁴ cast for herself and her opponent in a presidential race.⁶⁵

59. WITCOVER, *supra* note 1, at 15.

60. THE FEDERALIST No. 68, at 366 (Alexander Hamilton) (J.R. Pole, ed., 2005) ("And to take the senator of any state from his seat as senator, to place him in that of president of the senate, would be to exchange, in regard to the state from which he came, a constant for a contingent vote.").

61. THE FEDERALIST No. 62, at 332 (James Madison) (J.R. Pole, ed., 2005) ("If indeed it be right, that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government; and that among independent and sovereign states bound together by a simple league, the parties, however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason, that in a compound republic partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation.").

62. Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 90 VA. L. REV. 551, 552 (2004) (arguing that Jefferson, as Senate President, "made a questionable ruling that enhanced his chances of becoming the next President of the United States, rather than John Adams or Charles Cotesworth Pinckney").

63. See, e.g., Michael J. Glennon, *Nine Ways to Avoid a Train Wreck: How Title 3 Should be Changed*, 23 CARDOZO L. REV. 1159, 1187 (2002) ("This can lead to a massive conflict of interest when the Vice President is also a candidate for President."); James C. Ho, *Running for the White House from the Hill*, 7 GREEN BAG 2D 205, 205 (2004) ("The potential for conflicts of interest is obvious.").

64. See Lynne H. Rambo, *The Lawyers' Role in Selecting the President: A Complete Legal History of*

Nonetheless, it remains the case today—as in the first presidential election of 1789⁶⁶—that the Vice President as Senate President counts the Electoral College votes and tabulates the score in the presence of members of Congress.⁶⁷ Several sitting Vice Presidents have had the delicious pleasure of declaring themselves the winner of the Presidency, including most recently George H.W. Bush. Others, perhaps most prominently Al Gore, have experienced the sorrow of announcing that their fellow citizens had opted to elect a bitter adversary as President.⁶⁸

Together, these three issues conspired to convince the Founders that the nation would be better served with an understudy. Principally, the Vice Presidency arose as an answer to the Framers' pursuit of a system of presidential selection that would neutralize the advantage that presidential candidates would enjoy from their respective home states. Filling a presidential vacancy in the event of the President's inability to serve also played a role in the creation of the Vice Presidency, as did the need to give the Vice President an official function beyond simply preparing for misfortune to befall the President and tragedy to strike the nation.

B. *Dissenting Voices*

But the call for a Vice Presidency was far from harmonious. Amid burgeoning support for the creation of the office, dissenting voices resounded discernibly through the halls of the Constitutional Convention. The anti-Federalists, standing in fierce opposition to the Federalists, refused to accede to any constitutional measure that threatened to undermine the otherwise strict delineation of popular authority that sustained each of the executive, legislative, and judicial spheres, together constituting the three principal organs of government.

The anti-Federalists were a group of statesmen who opposed the Constitution for several reasons: (1) concern that the federal courts would abuse the power of constitutional interpretation,⁶⁹ (2) the unacceptable exclusion of natural rights from the

the 2000 Election, 8 TEX. WESLEYAN L. REV. 105, 146 (2002) (describing procedure for opening certificates and counting votes).

65. The Constitution directs the Senate President to preside over the chamber in a joint session of Congress, where she opens all Electoral College certificates and counts votes for the Presidency. U.S. CONST. art. II, § 1, cl. 3.

66. Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 705 (1996).

67. One scholar describes this scenario as one that only “[a]n unusually imaginative author might have created.” Gary C. Leedes, *The Presidential Election Case: Remembering Safe Harbor Day*, 35 U. RICH. L. REV. 237, 253-54 (2001).

68. The case of Richard Nixon as Senate President in 1961 illustrates the awkward and prickly circumstances under which a sitting Vice President must announce that the people have sent his presidential rival to the White House. See Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1421 n.55 (2001) (recounting Nixon's decision as Senate President to count Hawaii's votes in favor of his Democratic opponent, John F. Kennedy, even as the validity of Kennedy's victory remained in doubt).

69. Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 16 (1992); see also Raoul Berger, *Reflections on Constitutional Interpretation*, 1997 BYU L. REV. 517, 524 (1997) (stating that Federalists prevailed over anti-Federalists “on the basis of assurances that the dread of illimitable power was groundless”).

Constitution;⁷⁰ (3) constraint on future generations by overzealous predecessors;⁷¹ (4) the absence of a Bill of Rights to check the central government;⁷² and (5) a belief that far-reaching constitutional change—like the wholesale revision diagrammed by the new Constitution—would prove unwise.⁷³

In the eyes of the anti-Federalists, the Federalists' model of the Vice Presidency—a nominally executive office whose occupant at once stands poised to succeed the Presidency while serving as President of the Senate—put in irreparable peril the fundamental separation of powers doctrine. The anti-Federalists remained so committed to keeping executive and legislative powers actually and symbolically detached from one another that their member Senators did not acknowledge the vice presidential role of the nation's first Vice President, John Adams, instead recognizing him only as Senate President when he presided over the chamber.⁷⁴ Beneath this ostensible reverence for formality lay the anti-Federalist fear of the executive

70. Frederick Mark Gedicks, *The "Embarrassing" Section 134*, 2003 BYU L. REV. 959, 966-67 (2003).

71. William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1942 (1993) ("Anti-Federalists, for example, opposed the Constitution in part on the grounds that its flexibility and purported ability to adapt to the future was a weakness, not a strength. They claimed that the dead hand control that the Constitution represented would unfairly burden future generations; better to have a time-bound constitution that would be repealed, rather than one that sought to constrain governmental decision-making for all time.").

72. Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181, 232 (2002); Sol Wachtler, *Judging the Ninth Amendment*, 59 FORDHAM L. REV. 597, 600 (1991) ("The anti-federalists seized upon the omission of a bill of rights as a reason to oppose the ratification of the Constitution."). See also James Huffman, *Governing America's Resources: Federalism in the 1980s*, 12 ENVTL. L. 863, 869 (1982) ("The Anti-Federalists opposed the Constitution not only because they believed it threatened the future viability of the states, but also because they believed that state governments were less likely to infringe upon and more likely to protect the rights of individuals.").

73. Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 22-23 (1995) ("The Anti-Federalists who opposed the Philadelphia draft felt that constitutional change should be limited to revision of the Articles of Confederation, as envisioned by the original charge to the Philadelphia Convention."). The Anti-Federalists opposed the Constitution for a number of other reasons. See, e.g., Carl A. Auerbach, *Is Government the Problem or the Solution?*, 33 SAN DIEGO L. REV. 495, 497 (1996) (maintaining that "the Anti-Federalists, who opposed ratification, argued for a state-centered federalism"); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 264 n.172 (1988) ("The Anti-Federalists bitterly opposed the Constitution, in part, because they felt it was vague and indefinite."); Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353, 388 (2002) ("Anti-Federalists opposed the new Constitution in part because they believed it would foster dependence."); Jennifer Nedelsky, *Democracy, Justice, and the Multiplicity of Voices: Alternatives to the Federalist Vision*, 84 NW. U. L. REV. 232, 240 (1989) (stating that "one of the reasons the Anti-Federalists opposed the new Constitution was that it would create gross disparities of wealth"); James Etienne Viator, *The Losers Know Best the Meaning of the Game: What the Anti-Federalists Can Teach Us About Race-Based Congressional Districts*, 1 LOY. J. PUB. INT. L. 1, 21-22 (2000) (explaining that "the Anti-Federalists also opposed the Constitution's system of representation because they feared it would lead to the exclusion of the lower and middle classes from what nowadays we would describe as the right to an effective vote—that is, the ability to elect one of their own").

74. David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 168 (1995) ("An important symbolic issue was at stake, however, when Adams insisted on signing official Senate documents as 'John Adams, Vice President.' 'Sir,' Maclay recorded himself as saying, 'we know you not as Vice President within this House. As President of the Senate only do we know you, as President of the Senate only can you sign or authenticate any Act of that body.'") (citation omitted).

overpowering the legislature through the Vice Presidency—precisely the opposite apprehension of Federalists, who worried that the legislature would smother the executive.⁷⁵ Incidentally, the anti-Federalists' concern has yet to materialize.⁷⁶

1. Permissive Fusion

Federalist and anti-Federalists both subscribed to a similar theory of separate government powers. Both feared the concentration of disparate government functions in the hands of any one of the three branches, and both therefore thought it prudent to establish checks and balances that granted each branch of government certain preventive powers over the others.⁷⁷ However, the Federalists and anti-Federalists diverged in mediating the elusive balance between, on the one hand, applying an exacting rule of separated powers that zealously defended the boundary demarcating one sphere of governmental authority from another and, on the other, adhering to a more permissive standard that accommodated the changing conditions of the day while not straying so perceptibly far from the tenets of separation as to disembowel the doctrine of any substantive meaning. Anti-federalists were resolutely perched on the side of strict separation. Federalists lay somewhere in the middle.

Despite their passionate good faith efforts, anti-Federalists could not persuade Federalists of the imprudence of authorizing the Vice President to serve concurrently in the executive branch as an officer of the administration and presidential successor, and in the legislative branch as Senate President. The anti-Federalists' failure to win over the Federalists is not attributable to the Federalists' indifference to the separation of powers doctrine, but rather to Federalists' particular rendering of the doctrine, which allowed for greater nodes of interchange among the branches than was commonly advanced in anti-Federalist circles. To be sure, the Federalists regarded separated governmental powers as a necessary feature of republican government, a "powerful means" to cultivate its virtues while also palliating its deficiencies.⁷⁸ Indeed, the

75. See THE FEDERALIST No. 49, at 275 (James Madison) (J.R. Pole, ed., 2005) ("We have seen that the tendency of republican governments is to an aggrandizement of the legislative, at the expense of the other departments."); THE FEDERALIST No. 48, at 268, 269 (James Madison) (J.R. Pole, ed., 2005) ("The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex. . . . [I]t is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions."); see also THE FEDERALIST No. 71, at 383 (Alexander Hamilton) (J.R. Pole, ed., 2005) (calling attention to "the tendency of the legislative authority to absorb every other"); THE FEDERALIST No. 73, at 392 (Alexander Hamilton) (J.R. Pole, ed., 2005) (referring to "[t]he propensity of the legislative department to intrude upon the rights, and to absorb the powers of the other departments").

76. William S. Jordan, III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1, 23 n.138 (1994) ("One possible formal source of executive control during the legislative process is the role of the Vice President as President of the Senate, but this has not been a source of significant power for the executive branch.").

77. Samuel W. Cooper, Note, *Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361, 362, 364 (1994).

78. THE FEDERALIST No. 9, at 42 (Alexander Hamilton) (J.R. Pole, ed., 2005) ("The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments—the introduction of legislative ballances and checks—the institution of courts composed of judges, holding their offices during good behaviour—the representation of the people in the legislature by deputies of their own election—these are either wholly new

Federalists rejected any effort to enshrine only nominal separation in the Constitution⁷⁹ and likewise let it be known that any evidence of fusion of powers in the proposed Constitution would marshal their bitter disapproval.⁸⁰

Under Federalist philosophy, the two signposts of the separation of powers doctrine were functional separation and genuine independence.⁸¹ On the first tenet, “where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.”⁸² In addition to foreclosing the direct and complete control by one branch over the powers constitutionally retained by another, the second tenet of Federalist separation of powers doctrine forbade “an overruling influence” possessed by one over another.⁸³

Yet the Federalists exhibited a certain permissiveness on separated powers, recognizing the sheer impossibility of keeping the executive, legislative, and judicial arms of government fully separate from one another. At the time, the existing constitutions of the several colonies—which uniformly exhibited a certain measure of fused powers—largely informed the Founders’ adoption of this pragmatic approach to constitutional theory and practice.⁸⁴ When measured against the state constitutions, the proposed Federal Constitution was generally more deferential to the separation of powers doctrine and reflected fewer instances of fused governmental powers, each of which the Federalists could readily tolerate in view of the larger purpose served.

The Federalists—citing, for example, the difficulty of ensuring separate and self-standing mechanisms for appointments to the various branches of government—nevertheless insisted that “each department must have a will of its own,” but also understood that the practical administration of government would require some measure overlapping authority and “some deviations therefore from the [separation of

discoveries, or have made their principal progress toward perfection in modern times.”).

79. THE FEDERALIST No. 71, 383 (Alexander Hamilton) (J.R. Pole, ed., 2005) (“To what purpose separate the executive, or the judiciary, from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a separation must be merely nominal, and incapable of producing the ends for which it was established.”).

80. THE FEDERALIST No. 47, at 261-62 (James Madison) (J.R. Pole, ed., 2005) (“Were the federal constitution therefore really chargeable with this accumulation of power or with a mixture of powers having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.”).

81. THE FEDERALIST No. 71, at 383 (Alexander Hamilton) (J.R. Pole, ed., 2005) (“The same rule, which teaches the propriety of a partition between the various branches of power, teaches us likewise that this partition ought to be so contrived as to render the one independent from the other.”).

82. THE FEDERALIST No. 47, at 263 (James Madison) (J.R. Pole, ed., 2005).

83. THE FEDERALIST No. 48, at 268 (James Madison) (J.R. Pole, ed., 2005) (“It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers.”).

84. THE FEDERALIST No. 47, at 264 (James Madison) (J.R. Pole, ed., 2005) (“If we look into the constitutions of the several states we find that notwithstanding the emphatical, and in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.”).

powers] principle must be admitted.”⁸⁵ As additional examples, Federalists pointed to the presidential treaty-making power requiring a supermajority of concurring Senators for ratification⁸⁶—thought to foster “the intermixture of powers”⁸⁷—and to the Constitution’s designation of the Senate as the court of impeachments,⁸⁸ a constitutional provision that purportedly “confound[ed] legislative and judicial authorities in the same body.”⁸⁹ In response to the former, Federalists advanced an exception to the strict rule of separate powers for the treaty-making prerogative because this necessary intersection of presidential and senatorial action fulfilled what was, at its core, a contract binding the United States to a sister nation.⁹⁰ Thus a treaty differed, argued the Federalists, from the laws that the Senate passed and the President executed in the normal course of their respective duties. In reconciling the latter, the Federalists argued that the uniqueness of impeachment trumped the model of strict separation of powers such that getting impeachment right as a matter of constitutional design and workable administration warranted a certain measure of intermingling between the legislative and judicial functions.⁹¹

Federalist philosophy on separating powers was practical yet nonetheless firmly moored in theory.⁹² Whereas Federalists endorsed just as exacting a demarcation between governmental powers as the anti-Federalists, in the overwhelming majority of

85. Madison explained:

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent, is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted, that the members of each should have as little agency as possible in the appointment of the members of the others. Where this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies, should be drawn from the same foundation of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties however, and some additional expence, would attend the execution of it. Some deviations, therefore, from the principle must be admitted.

THE FEDERALIST No. 51, at 280 (James Madison) (J.R. Pole, ed., 2005).

86. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

87. THE FEDERALIST No. 75, at 399 (Alexander Hamilton) (J.R. Pole, ed., 2005).

88. U.S. CONST. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”).

89. THE FEDERALIST No. 66, at 354 (Alexander Hamilton) (J.R. Pole, ed., 2005).

90. See THE FEDERALIST No. 75, at 400 (Alexander Hamilton) (J.R. Pole, ed., 2005) (“Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.”).

91. THE FEDERALIST No. 66, at 354 (Alexander Hamilton) (J.R. Pole, ed., 2005) (“This partial intermixture is even in some cases not only proper, but necessary to the mutual defence of the several members of the government, against each other. An absolute or qualified negative in the executive, upon the acts of the legislative body, is admitted by the ablest adepts in political science, to be an indefensible barrier against the encroachments of the latter upon the former.”).

92. THE FEDERALIST No. 47, at 262 (James Madison) (J.R. Pole, ed., 2005) (stating that “[t]he oracle who is always consulted and cited on [the theory of separation of powers] is the celebrated Montesquieu” and comparing the theoretical dimensions of the British doctrine of fused powers with existing state constitutions exhibiting the rudiments of separate powers).

circumstances, the Federalists' pragmatic model of republican government was sufficiently supple as to permit "a partial intermixture of those departments for special purposes."⁹³ One such special purpose was the office of the Vice Presidency. Federalists favored vesting the administrative leadership of the Senate in the hands of the Vice President, if only because the Vice President required some official function to discharge alongside serving as a ceremonial deputy to the President.⁹⁴

But anti-Federalists argued otherwise, particularly through primary spokespersons George Mason⁹⁵ and Elbridge Gerry.⁹⁶ Mason held firm to his conviction that the Vice President should not simultaneously serve as Senate President for three reasons: (1) separated governmental powers was an inviolable principle; (2) merging the roles of Vice President and Senate President risked compromising the independence of the Senate; and (3) under no justifiable theory may one give an undue advantage to the Vice President's home state, which could occur when the Vice President casts a tie-breaking vote during Senate deliberations.⁹⁷ As an alternative to appointing the Vice President as Senate President, Mason proposed the converse: appointing the President of the Senate as Vice President.⁹⁸ Federalists duly considered this idea,⁹⁹ but ultimately rejected it.¹⁰⁰ Gerry was equally candid about his views on the Vice Presidency.

93. THE FEDERALIST No. 66, at 354 (Alexander Hamilton) (J.R. Pole, ed., 2005) ("The true meaning of this maxim has been discussed and ascertained in another place, and has been shown to be entirely compatible with a partial intermixture of those departments for special purposes, preserving them in the main distinct and unconnected.").

94. Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 398 (2004).

95. George Mason was a key delegate who participated in the debates of the Constitutional Convention. Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 360 (1989). Mason moved that the Committee be instructed to formulate qualifications regarding property and citizenship. Richard A. West, Jr., *We the People: Limitations on Congressional Terms are Unconstitutional Content-Determinative Regulations*, 46 RUTGERS L. REV. 1787, 1793 (1994). Mason ultimately refused to endorse the Constitution. Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. REV. 647, 665 (1995).

96. Elbridge Gerry was a delegate to the Constitutional Convention later elected to Congress and he won election as governor of Massachusetts in 1810. Paul V. Niemeyer, *The Gerrymander: A Journalistic Catch-Word or Constitutional Principle? The Case in Maryland*, 54 MD. L. REV. 242, 250 (1995). For more on Elbridge Gerry, see GEORGE NATHAN BILLIAS, *ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN* (1976); ANN W. HAFEN, *ELBRIDGE GERRY* (1968); Samuel Eliot Morison, *Elbridge Gerry, Gentleman-Democrat, in BY LAND AND BY SEA: ESSAYS AND ADDRESSES* 181 (1953).

97. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 171, 174 (Ralph Ketcham ed., 1986) ("Colonel Mason, thought the office of vice president an encroachment on the rights of the Senate; and that it mixed too much the Legislative and Executive, which as well as the Judiciary departments, ought to be kept as separate as possible. . . . Hence also sprung that unnecessary officer the vice president, who for want of other employment is made president of the Senate, thereby dangerously blending the executive and legislative powers, besides always giving to some one of the States an unnecessary and unjust preeminence over the others.").

98. Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 345 (2004).

99. THE FEDERALIST No. 68, at 366 (Alexander Hamilton) (J.R. Pole, ed., 2005) ("It has been alleged, that it would have been preferable to have authorised the senate to elect out of their own body an officer, answering to that description.").

100. On August 6, 1787, the Constitutional Convention's Committee of Detail recommended that "the Senate shall choose its own President" and that the Senate president would succeed to the Presidency where

Fearing that conferring a legislative function to an executive officer would emasculate the very foundation of American constitutionalism, Gerry expressed his dissatisfaction with what he regarded as the Federalists' brazen defiance of the separation of powers doctrine, declaring that they "might as well put the President himself as head of the legislature."¹⁰¹

2. Compromise and Concession

Federalists gave due audience to anti-Federalist objections that the Vice Presidency was a "superfluous, if not mischievous" office that diluted the force and effect of other innovations emerging in the Convention's pioneering project of constitutional design.¹⁰² But Federalists could not be convinced that the threat posed by innocuously merging the executive and legislative domains in the person of the Vice President so far prevailed over the countervailing suitability of the Vice President to the role of Senate President as to demand *either* the abolition of the Vice Presidency entirely *or* its amendment in part. Federalists did, however, yield on at least two important separation of powers scores: (1) vice presidential liability for libel; and (2) Senate Presidency during presidential impeachment.

First, although the Vice President is (at least nominally) a member of the Senate and (in the exercise of her duties unmistakably) one of its officers, she is of course not a Senator. Consequently, the Constitution bars a Vice President from retreating to the constitutional protections expressly enumerated for legislators, meaning, for instance, that she may not brandish the congressional speech privilege clause¹⁰³ as a shield to civil actions brought against her for libel.¹⁰⁴ Second, the Constitution designates the Senate as the sole court of impeachment.¹⁰⁵ Anticipating that impeachment would be a rare and momentous occasion in American history, delegates to the Constitutional

necessary. These draft proposals met with no objection. One month later, on September 4, 1787, the Committee of Unfinished Portions, having created the Electoral College system, recommended that the Vice President be designated *ex officio* President of the Senate. This amendment passed with overwhelming endorsement. United States Senate, *The Senate and the United States Constitution, President of the Senate*, http://www.Senate.gov/artandhistory/history/common/briefing/Constitution_Senate.htm (last visited Feb. 18, 2006).

101. MARK O. HATFIELD ET AL., *VICE PRESIDENTS OF THE UNITED STATES, 1789-1993*, 61, 65 (Wendy Wolff ed., 1997), available at http://www.Senate.gov/artandhistory/history/resources/pdf/elbridge_gerry.pdf. One wonders whether Gerry adopted a different view of the second office when he himself later became Vice President. See Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMM. 159, 173 (1996) (noting that Gerry was a "non-signing framer of the Constitution who later became Madison's vice-president").

102. THE FEDERALIST No. 68, at 366 (Alexander Hamilton) (J.R. Pole, ed., 2005).

103. U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives shall receive a Compensation for their services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and *for any Speech or Debate in either House, they shall not be questioned in any other Place.*") (emphasis added).

104. *But see* Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 17 n.40 (1998) (stating "the Vice President must obviously be immune from a libel suit for things he says in the Senate, even though he is not, strictly speaking, a Senator covered by the words of the Article I speech clause . . .").

105. U.S. CONST. art. I, § 3, cl. 6.

Convention disrobed the Vice President of her legislative function to preside over the Senate in a presidential impeachment trial.¹⁰⁶ Surely this tip of the hat to anti-Federalists made sense in and of itself, particularly given that, otherwise, the Vice President would have been thrust into the delicate—and clearly gainful—position of presiding over a trial that could serve as her own veritable springboard to the Presidency.¹⁰⁷ One can therefore understand the reasoning driving the Framers' removal of the Vice President and their consequent selection of the Chief Justice of the United States to preside over presidential impeachments.¹⁰⁸ One can make even further sense of this forced vice presidential recusal by reference to the Founding period, during which, Akhil Amar underscores, unlike the modern era "Presidents did not hand-pick their Vice-Presidents, who were more likely to be rivals than partners."¹⁰⁹

Each of these provisions confirms that there was a ceiling to the Federalists' permissiveness on adhering to the doctrine of separating governmental powers. The first compromise—vice presidential liability for libel—provides that the Vice President may *act* as Senate President but she is not an *actual* member of the Senate insofar as she is not entitled to invoke certain legislative protections that extend as a matter of course only to members of Congress. The second compromise—shifting the Senate Presidency during presidential impeachment—sends the similar message that the Vice President, although she is President of the Senate, may not assume the full scope of the official powers of the Senate Presidency when doing so would stretch the tolerable bounds of even a permissive rendering of the separation of powers doctrine. Coupled with the Federalists' broad endorsement of separate government powers and their corresponding rejection of fused government powers except in narrowly circumscribed

106. But whether the Vice President may preside over his *own* impeachment remains an unsolved puzzle. Compare Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 CONST. COMMENT 245, 245-46 (1997) (arguing that Vice President may preside over own impeachment), and Richard M. Pious, *The Intersection of Constitutional and Popular Law*, 43 ST. LOUIS U. L.J. 859, 862 n.15 (1999) ("A vice president who is impeached could claim the right to preside over his own trial since he is also the president of the Senate."), with Joel K. Goldstein, *Can the Vice President Preside at his Own Impeachment Trial?: A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849, 870 (2000) (concluding that "[t]he Constitution would not support an effort of a vice president to preside over his own impeachment"). However, the 1777 Constitution of New York, whose lieutenant-governorship inspired the Founders' creation of the Vice Presidency, set forth less ambiguous language on this question. N.Y. CONST. art. XXI (1777) ("That whenever the government shall be administered by the lieutenant-governor, or he shall be unable to attend as president of the Senate, the senators shall have power to elect one of their own members to the office of president of the Senate, which he shall exercise *pro hac vice*. And if, during such vacancy of the office of governor, the lieutenant-governor shall be impeached, displaced, resign, die, or be absent from the State, the president of the Senate shall, in like manner as the lieutenant-governor, administer the government, until others shall be elected by the suffrage of the people, at the succeeding election.").

107. Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657, 1661 (1997) (stating that the Chief Justice presides in presidential impeachments "[b]ecause otherwise the presiding officer would ordinarily be the Vice President, who is *ex officio* President of the Senate and he should not be presiding in a trial that could vault him into the oval office").

108. See U.S. CONST. art. I, § 3, cl. 6. Furthermore, "[n]o Person shall be convicted without the Concurrence of two thirds of the Members present." *Id.*

109. Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 312 (1999); see also Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 794-95 (1996) ("Especially since the Vice President originally could have been an adversary of the President, this self-interest and potential disloyalty would have posed a conflict.").

instances, these compromises uncover the not insignificant effort the Framers devoted to the design of the Vice Presidency.

III. EVOLUTION

The Vice Presidency has evolved along several axes—substance, structure, and politics—since the founding. Substantively, Presidents have made progressively greater use of their deputies in the development and marketing of domestic and foreign policy. Structurally, constitutional amendments have both directly and diagonally visited important modifications to the office. Politically, ticket balancing and other strategic considerations have dramatically changed the modalities of vice presidential selection. The substantive, structural, and political transformation of the Vice Presidency is best assessed as an interlaced series of occurrences, which, together, illustrate the increasing transnational profile of the Vice Presidency.

A. Substantive Function

For most of American history, Vice Presidents have been consigned to a largely ceremonial role devoid of any real involvement in the functioning of government and the elaboration of national policy.¹¹⁰ The Vice Presidency has long been an easy target for critics, with some questioning the utility of the office¹¹¹ and others viewing it with pity and derisory humor.¹¹² Colorful misanthropists have even included sitting Presidents and Vice Presidents themselves. For instance, John Adams, the nation's first Vice President, felt powerless and often ignored in his office,¹¹³ calling the Vice Presidency “the most insignificant office that ever the invention of man contrived or his imagination conceived.”¹¹⁴ One hundred and fifty years later, little seemed to have changed as Franklin Delano Roosevelt's understudy, John Nance Garner, remarked that accepting the vice presidential nomination was “the worst damn fool mistake I ever made.”¹¹⁵ In the 1960s, President John F. Kennedy said that his Vice President,

110. See Brian Lamb, *Vice Presidential Haunts*, CHI. TRIB., Sept. 22, 2002, at C1 (“Their [the Vice Presidents'] job was to help the president get elected. Success at that task consigned them to attending funerals and fairs, making speeches and wondering whether history would ever call for them to step forward into the top post.”).

111. See generally William B. Welsh, *The Not-So-Imperial Vice-Presidency*, 21 PERSP. ON POL. SCI. 23, 26-28 (1992) (arguing that occupants of Vice Presidency would have made greater contribution to nation in other capacity); see also Richard E. Neustadt, *Training Time*, NEW REPUBLIC, June 21, 1999, at 26 (“Until the 1950s, American vice presidents had been in the position of crown princes in most monarchies: confined to asking daily, as one of ours once said, about the ruler's health and otherwise excluded from the real business of government.”).

112. See, e.g., Ralph Z. Hallow, *Edward's Goal Now a More Potent Post*, WASH. TIMES, Oct. 5, 2004, at A8 (“But for most of its history, the office has been the butt of jokes such as the story of two sons: one who went to sea and the other who became vice president. Neither was ever heard of again.”); Todd S. Purdum, *The Most Insignificant Office*, N.Y. TIMES UPFRONT, Apr. 26, 2004, available at 2004 WLNR 9604671 (“For much of American history, the vice presidency has been more a target for jokes than a sought after job.”).

113. John E. Ferling, *An Office of Unprofitable Dignity*, AM. HIST. ILLUSTRATED, Mar. 1989, at 12.

114. Editorial, *The Importance of the No. 2 Candidates*, CINCINNATI ENQUIRER, Oct. 5, 2004, at 6C (“John Adams, the nation's first vice president, called the job ‘the most insignificant office that ever the invention of man contrived or his imagination conceived.’”).

115. Dennis Rogers, *No. 2 Job isn't Worth it*, NEWS & OBSERVER (Raleigh), July 7, 2004, at B1

Lyndon B. Johnson, had “the worst job in Washington.”¹¹⁶ When Johnson later succeeded to the Presidency, he could not help but follow Kennedy’s example of debasing the Vice Presidency.¹¹⁷ And as recently as the 2004 presidential election, Senator John McCain conveyed a similar lack of enthusiasm, likening the vice presidential nomination to being “fed scraps.”¹¹⁸

Yet these criticisms belie the gradually increasing prominence of the Vice Presidency since the founding. One measure of the maturation of the office is its steady advance toward and ultimately into influential circles. As early as 1791, and continuing intermittently throughout the nineteenth century, Vice Presidents have participated in cabinet meetings and have consulted with various cabinet secretaries pursuant to presidential instructions, though only in 1921 did a Vice President first attend cabinet meetings as an official member, in this case Calvin Coolidge participating at the invitation of President Warren G. Harding.¹¹⁹ Franklin Delano Roosevelt subsequently elevated the status of the Vice Presidency by tasking his first deputy, John Nance Garner, with the responsibility of serving as a liaison between executive and legislative officials.¹²⁰ Roosevelt later assigned his second Vice President to run the Economic Defense Board during World War II,¹²¹ an appointment that saw Henry Wallace become “heavily engaged in winning a war.”¹²²

Paradoxically—though Roosevelt did enlarge the sphere of influence of the Vice Presidency by entrusting his first two Vice Presidents with weighty assignments—even in reversing course and refusing to keep his third Vice President (Harry Truman) apprised of such critical information as the existence of an atomic bomb in the American military arsenal,¹²³ Roosevelt actually catalyzed a historic broadening of the

(“Former Vice President John Nance Garner said the job wasn’t worth ‘a bucket of warm spit.’ He also said being vice president under Franklin D. Roosevelt was ‘the worst damn fool mistake I ever made.’”).

116. Andrew Cohen, Editorial, *A Political Partnership that Works*, EDMONTON J., July 13, 2004, at A14.

117. Steven Dornfeld, *Vice Presidency is No Longer Something to Spit at*, ST. PAUL PIONEER PRESS, May 6, 2002, at A10 (canvassing history of Vice Presidency and recounting “indignities that [President Lyndon B. Johnson] heaped upon his vice president [Hubert H. Humphrey]”).

118. Editorial, *Spit and Scraps*, ST. LOUIS POST-DISPATCH, July 26, 2004, at B6 (“As far as me and the Vice Presidency is concerned . . . I spent a number of years in a North Vietnamese prison camp in the dark and (was) fed scraps, and I don’t know why I would want to do that all over again.” (quoting United States Senator John McCain)).

119. See generally Charles O. Paullin, *The Vice President and the Cabinet*, 29 AM. HIST. REV. 496 (1924) (documenting vice presidential interaction with cabinet from Washington through Harding presidencies).

120. Paul T. David, *The Vice Presidency: Its Institutional Evolution and Contemporary Status*, 29 J. OF POL. 721, 725 (1967) (“Garner became Vice President in 1933 with a definite understanding that he would attend cabinet meetings and assist in maintaining liaison between the Executive and Legislative Branches, as he did for several years.”).

121. Blake Hurst, Book Review, *Lord Corn Wallace*, AM. ENTERPRISE, Dec. 31, 2000, at 52 (reviewing JOHN C. CULVER & AMERICAN DREAMER: A LIFE OF HENRY A. WALLACE (2000)), available at 2000 WLNR 4648138 (“At the beginning of Roosevelt’s third term, Wallace was entrusted with huge responsibilities as head of the Economic Defense Board and may well have been the most powerful Vice President in American history.”).

122. Chalmers M. Roberts, Book Review, WASH. MONTHLY, May 1, 2000, at 41 (reviewing JOHN C. CULVER & AMERICAN DREAMER: A LIFE OF HENRY A. WALLACE (2000)), available at 2000 WLNR 6398726.

123. See Todd S. Purdum, *Bush Team’s 2001 Transition is Re-Examined in Light of Sept. 11*, INT’L

vice presidential mandate. Pledging that no Vice President would ever be as inadequately prepared as he had himself been under Roosevelt,¹²⁴ Truman wasted little time once he became President to translate his humbling experience as Vice President into concrete steps to prepare his own Vice President to assume the reigns of government.¹²⁵ Truman sponsored the *National Security Act of 1947*,¹²⁶ which established the National Security Council,¹²⁷ and gave the Vice President *ex officio* membership to its board—Truman’s most powerful contribution to the institution of the Vice Presidency.¹²⁸

Credit for the next great leap in the growth of the Vice Presidency belongs to President Dwight D. Eisenhower and his Vice President Richard Nixon. Over the course of their eight-year alliance, Eisenhower delegated several domestic and foreign projects to Nixon,¹²⁹ who set the precedent for meaningful vice presidential participation in foreign affairs.¹³⁰ Indeed, Nixon’s performance as Vice President is widely regarded as masterful, so much so that his successful “efforts to strike a proper balance between being prepared for power but not overeager for it became the model for future Vice Presidents.”¹³¹

HERALD TRIB., Apr. 5, 2004, at 5, available at 2004 WLNR 5267567 (“No one disputes that the process of preparing to assume the Presidency has improved a lot since Harry S. Truman took office on the death of Franklin D. Roosevelt without knowing even of the existence of the atomic bomb, which he would drop four months later.”); see also Alen J. Salerian & Gregory H. Salerian, *A Review of FDR’s Mental Capacity: During His Fourth Term and Its Impact on History*, FORENSIC EXAMINER, Mar. 22, 2005, at 131, available at 2005 WLNR 4256382 (suggesting that Roosevelt’s diminishing mental capacity accounted for his failure to actively and adequately prepare his Vice President for ascension to Presidency in event of Roosevelt’s inability to serve).

124. Lynda Hurst, *A Step from Power, or Oblivion?*, TORONTO STAR, July 10, 2004, at A14.

125. Joshua Spivak, *A Strong VP is Good for the Country*, USA TODAY, July 8, 2004, at A13 (“The rehabilitation of the office began with Harry Truman, who assumed the Presidency in the waning days of World War II with almost no preparation for the immense job before him. Truman saw to it that Alben Barkley, his vice president after 1948, would be at least somewhat prepared, and he made the VP a member of the National Security Council. Subsequent presidents have added substantially to the vice president’s portfolio.”).

126. 50 U.S.C. §§ 401-42 (2003).

127. The National Security Council consists of several principals, including the President, Vice President, Secretaries of State and Defense, Director of Central Intelligence, and, among others, the Chairperson of the Joint Chiefs of Staff. Loch K. Johnson & Karl F. Inderfurth, *The Evolving Role of the National Security Adviser: From Executive Secretary to Activist Counselor*, 4 WHITE HOUSE STUD. 3265 (2004), available at 2004 WLNR 17670147.

128. Paul Kengor, *The Vice President, Secretary of State, and Foreign Policy*, 115 POL. SCI. Q. 175, 176 (2000) (“President Truman took steps, both statutory and informal, to make the Vice President more involved in foreign policy, including making him a statutory member of the National Security Council.”).

129. See Steve Neal, *An Uneasy Marriage of Destiny*, CHI. SUN-TIMES, Jan. 20, 2001, at 12, available at 2001 WLNR 4490944 (“Julie Nixon Eisenhower says that Ike pulled her father aside before they delivered their acceptance speeches at the ‘52 convention in Chicago and promised that he would make the Vice Presidency a real job. Eisenhower delivered on that promise, giving Nixon a role in foreign and domestic policy.”).

130. See generally PAUL KENGOR, WREATH LAYER OR POLICY PLAYER? THE VICE PRESIDENT’S ROLE IN FOREIGN POLICY 49-73 (2000) (examining vice president Nixon’s involvement in foreign affairs).

131. Alvin S. Felzenberg, *The Vice Presidency Grows Up*, POL’Y REV., Feb. 1, 2001, at 7, available at 2001 WLNR 7716792 (charting evolution of Vice Presidency).

After the Eisenhower-Nixon years, the institutionalization of the Vice Presidency accelerated over a series of discrete steps, including: (1) in 1961, vice presidential offices moved from Capitol Hill to the executive compound, closer to the White House; (2) the executive budget for the first time, in 1969, listed a line item for the Vice President under “Special Assistance to the President,” a formulation that has survived to this day; (3) in 1974, the Vice President was given a distinct support staff, freed from relying on White House administrative support; and, among others; (4) vice presidential offices again moved, this time in 1977, from the executive compound into the West Wing, an indication of the Vice Presidency’s growing cachet.¹³²

The Carter administration, which paired President Jimmy Carter with Walter Mondale, set in motion the contemporary transformation of the Vice Presidency.¹³³ The Mondale vice presidential model changed the office¹³⁴—permanently it appears¹³⁵—into an active participant in executive government.¹³⁶ Mondale had advocated aggressively for—and received—a central role in the administration.¹³⁷ He was also granted a weekly luncheon with the President, an office in the West Wing—thus giving Mondale easy and regular access to the President¹³⁸—and, among other items that signified the burgeoning influence and independence of the Vice Presidency, his own government airplane.¹³⁹ Forming a genuine partnership with President

132. PAUL C. LIGHT, VICE PRESIDENTIAL POWER 67-78 (1984) (detailing steps in institutionalization of Vice Presidency).

133. See Robert Schmuhl, Editorial, *Next Election May be First in 56 Years Without Incumbent: Vice Presidents Now do More than Cast Tie-Breaking Senatorial Vote*, CHI. SUN-TIMES, Dec. 10, 2004, at 57 (“Beginning with Walter Mondale’s policy involvement under Carter and especially with Cheney’s influential clout throughout the current administration, vice presidents (who, constitutionally, act as president of the Senate) now do more than cast the occasional tie-breaking senatorial vote or serve as “stand-by equipment” in case something happens to the president.”).

134. See Charles E. Walcott & Karen M. Hult, *The Bush Staff and Cabinet System*, 32 PERSP. ON POL. SCI. 150, 151 (2003) (noting trend in modern Vice Presidency starting with Mondale).

135. See William B. Falk, *Chance to Hold No. 2 Office Can Make or Break a Political Career*, BUFFALO NEWS, Aug. 12, 1996, at A5, available at 1996 WLNR 1102236 (quoting vice presidential scholar Joel Goldstein’s statement that, “[n]o future president could significantly diminish the vice president’s role without major political embarrassment”).

136. See Robert A. Rankin, Editorial, *Gore Expands Role of Vice Presidency*, MIAMI HERALD, Dec. 5, 1993, at M1 (stating that the Mondale Vice Presidency “set the model for the modern vice presidency as the president’s senior advisor on virtually everything”); see also Judith Yates Borger, *Mondale: “I am So Proud of this State,”* DULUTH NEWS TRIB., Nov. 7, 2002, at A5 (arguing that the Mondale Vice Presidency will be remembered “for changing the vice presidency to a position of participating in governing”); Rose DeWolf, *A Bucket of Warm Spit: Thanks to Rocky and Fritz, The Vice Presidency is Somewhat More Influential Today*, PHILA. DAILY NEWS, Oct. 5, 1988, at 42, available at 1988 WLNR 509005 (quoting vice presidential scholar Paul Light’s statement that, “there is wide agreement that Mondale has been the most effective vice president to date”).

137. See Steven Thomma, *Mondale Advises Quayle to Fight for Office’s Stature*, MIAMI HERALD, Dec. 8, 1988, at A30, available at 1988 WLNR 817546 (explaining that “Mondale took with him a copy of a memo he wrote 12 years ago to Jimmy Carter, then the president-elect, arguing for a more activist vice presidency.”).

138. Hugh Sidey, *Mondale: Certain to be in Our Future*, BOSTON GLOBE, Aug. 14, 1980, available at 1980 WLNR 42635.

139. See Alexandra Starr, *The Running Mates*, WASH. MONTHLY, July 1, 1999, at 12, available at 1999 WLNR 5240870 (explaining that the weekly luncheon, West Wing office, and airplane allowed the Vice Presidency to become “more than a spare tire in the automobile of government”).

Carter,¹⁴⁰ Mondale redefined the Vice Presidency into a focal office.¹⁴¹ This movement toward greater vice presidential prominence has kept pace since then. On the strength of hints during the 1992 presidential campaign that Bill Clinton and Al Gore would govern as co-Presidents,¹⁴² Gore's vice presidential performance and achievements—particularly in foreign policy¹⁴³—further augmented the power and prestige of America's understudy.¹⁴⁴ Most recently, the rich and extensive public

140. William J. Clinton, *Remarks at a Democratic National Committee Dinner in Greenwich, Connecticut*, 36 WEEKLY COMP. PRES. DOC. 1136 (May 22, 2000), available at 2000 WLNR 4264290 (“Then, to be fair, the first big breakthrough came with Jimmy Carter, who made Walter Mondale a genuine partner in the Vice Presidency.”).

141. See Timothy Walch, *The Evolving Power of the Vice President*, MILWAUKEE J. SENTINEL, Jan. 14, 2001, at 1, available at 2001 WLNR 2929773 (“With the support of President Jimmy Carter, Mondale became a partner in leading the nation. In fact, Mondale redefined the office in ways unforeseen by the Founding Fathers. He became, without question, this nation’s most important vice president up to that time.”); see also Morton Kondracke, *Mondale on Mondale: Is the Vice Presidency a School for Presidents?*, NEW REPUBLIC, Apr. 4, 1983, at 15, available at 1983 WLNR 408666 (“There was no precedent for the Vice Presidential role that Carter and Mondale fashioned—that of intimate advisor, free-floating trouble-shooter, personal diplomatic representative, and political advocate.”); David E. Rosenbaum, *Bush Plans to Emulate Mondale Role*, N.Y. TIMES, Jan. 21, 1981, at B3 (“‘My conclusion is that the Mondale model is a very good model,’ Vice President Bush said in an interview.”).

142. Andrew Sullivan, *Gore’s Faustian Deal Sours*, SUNDAY TIMES (U.K.), Aug. 31, 1997, at 6, available at 1997 WLNR 5317228 (“From the beginning, they presented themselves as a yuppie co-presidency, with Gore being connected with the workings and decisions of the administration as no other vice-president before.”); Michael Nelson, *Vice President’s Expectations are Probably Too High*, ALBANY TIMES UNION, Jan. 17, 1993, at E1, available at 1993 WLNR 233862 (“It was Clinton, after all, who publicly proclaimed before the election that there would be a ‘full partnership’ in the Clinton administration between him and Gore.”); see also Chris Reidy, *Spittin’ Image Gore is Remaking the Vice Presidency*, BOSTON GLOBE, Aug. 29, 1993, at 67, available at 1993 WLNR 1932284 (“While Bill Clinton and Al Gore have yet to develop the sort of co-presidency they seemed to hint at during the 1992 campaign, the new vice president nevertheless looms large as a potentially influential player in the administration.”).

143. See Marianne Means, *Gore Closest Thing to Co-President Constitution Allows*, SEATTLE POST-INTELLIGENCER, Dec. 23, 1993, at A8, available at 1993 WLNR 1537135 (“In one of the fastest transformations in history, Vice President Al Gore has suddenly become our designated heavy hitter in foreign policy, outdoing President Clinton and Secretary of State Warren Christopher.”); see generally Paul Kengor, *The Foreign Policy Role of Vice President Al Gore*, 27 PRESIDENTIAL STUD. Q. 14 (1997) (describing foreign policy role and achievements of Vice President Gore).

144. James W. Brosnan, *Clinton Found His Legacy in Nation’s Ideological Center*, MEMPHIS COM. APPEAL (Memphis, Tenn.), Jan. 22, 2001, at A7 (“Clinton’s legacy is Al Gore’s legacy, too, but Gore has one of his own: Gore changed the Vice Presidency from a third wheel to a vital power center in the White House with its own responsibilities.”); Larry Bumgardner, *Gore is Poised to Become a Force in Administration*, DAILY NEWS (L.A.), Jan. 10, 1993, at V1, available at 1993 WLNR 1251167 (“But Gore is well positioned to become one of the more powerful vice presidents this nation has ever seen.”); Jodi Enda, *For Gore, Homework and Persistence are Keys on the Subject of the Environment—An EPA Proposal for Tighter Smog Controls, A Conference in Japan on Global Warming—He Used his Clout*, PHILA. INQUIRER, Nov. 5, 2000, at D3, available at 2000 WLNR 2377381 (“So central was Gore to White House decisions that he ‘had an agreement with the President that he would get a copy of every paper the President got,’ said George Frampton, head of the White House Council on Environmental Quality and a Gore lawyer.”); Linda Feldmann, *Capital Assets with VP Picks, Intelligence Wins Out*, RECORD (Bergen County, N.J.), Aug. 13, 2000, available at 2000 WLNR 7418743 (stating that “Gore has filled the role of major governing partner”); Mimi Hall, *Gore Supporters See Silver Lining for 2000 Race*, USA TODAY, Feb. 12, 1999, at A4, available at 1999 WLNR 3314694 (“Gore has been able to reinforce his image as a co-president and co-architect of popular administration policies that have helped fuel the strong economy.”); Glenn Kessler, *So Much for Mr. Clean*,

service experience that its current occupant has brought with him to the office has elevated the Vice Presidency to its apex as a veritable ganglion of political influence and authority.¹⁴⁵ The critical observation is that the Vice Presidency has traveled light

BUFFALO NEWS, Oct. 19, 1997, at H1 (quoting a statement by Joel Goldstein, an expert on the Vice Presidency at St. Louis University, that “Gore has certainly been the most influential vice president in the 20th century, if not ever.”); Bill Nichols, *The Heir Apparent has Solid Record and Stolid Image*, USA TODAY, Aug. 29, 1996, at 6A (“Republicans and Democrats alike agree Al Gore has become a model for a new vice presidency in which the second in command has real power and influence—the ‘juice.’”); Christina Nifong, *Two Men on a (Vice) Presidential Mission*, CHRISTIAN SCI. MONITOR, Oct. 8, 1996, at 10 (stating that “Mr. Gore has chalked up a list of accomplishments that in the past were completely outside the realm of a vice president”); Andrew Sullivan, *Mr. Clean Finds It’s a Dirty Game*, SUNDAY TIMES (U.K.), Mar. 9, 1997, at 7, available at 1997 WLNR 5305960 (“He has transformed what was once called the ‘bucket of warm spit’ of the vice-presidency into something, well, far more agreeable.”).

145. See Carl M. Cannon, *The Point Man*, 34 NAT’L J. 2956 (2002), available at LEXIS (search “News & Business”; then “Individual Publications”; select “National Journal”) (tracing evolution of Vice Presidency and influence of current officeholder); see also Mike Allen, *Hill to See More of Cheney Treatment*, WASH. POST, Jan. 20, 2005, at A34 (“Given the broadest authority of any vice president in history, Cheney has exercised it aggressively but nearly invisibly.”); Elisabeth Bumiller & Eric Schmitt, *Cheney, Little Seen by Public, Plays a Visible Role for Bush*, N.Y. TIMES, Jan. 31, 2003, at A1 (“‘You feel when you’ve talked to the vice president you’ve talked to the president,’ said Representative Rob Portman, an Ohio Republican who attended the White House meeting.”); Peter S. Canellos, *Long Executive Reach Distinguishes Cheney*, BOSTON GLOBE, June 29, 2004, at A3 (“Dick Cheney occupies an unprecedented position in American history. There has never been such a powerful vice president. There has never been anyone other than a president as powerful as Cheney.”); Joel Connelly, *Cheney Epitomizes the Imperial Vice Presidency*, SEATTLE POST-INTELLIGENCER, Dec. 22, 2003, at A2 (“Given President Bush’s down-home tastes, and impatience with trappings, our current administration has been forced to develop something entirely new in America—an imperial vice presidency.”); Rupert Cornwell, *Virtue in Having a Good Vice*, HAMILTON SPECTATOR (Ont.), Apr. 17, 2004, at F10 (“Beyond a doubt, the hugely experienced Cheney (who headed Bush’s vice-presidential search team in 2000) is the most powerful holder of the office in modern U.S. history.”); Jodi Enda, *Cheney Adds Power to Vice Presidency*, PHILA. INQUIRER, Dec. 28, 2000, at A1 (“The soft-spoken, fly-fishing millionaire with the now-famous asymmetrical grin is on track to become the most powerful vice president in history, surpassing even his influential predecessor, Al Gore.”); Robert Kuttner, Editorial, *Cheney’s Unprecedented Power*, BOSTON GLOBE, Feb. 25, 2004, at A19 (“Dick Cheney is the most powerful vice president in U.S. history. Indeed, there is a fair amount of circumstantial evidence that Cheney, not Bush, is the real power at the White House and Bush the figurehead.”); Marc Sandalow, *Golden Age of the Second Banana*, S.F. CHRON., July 4, 2004, at A1 (“For all the ridicule and disrespect given to the No. 2 slot, the vice presidency has evolved into one of the world’s most powerful and influential posts.”); Eric Schmitt, *When “I’m No. 2” Becomes Something to Cheer About*, N.Y. TIMES, Dec. 31, 2000, § 4, at 3, available at 2000 WLNR 3231524 (“Mr. Cheney, who is heading the transition, is redefining the scope and influence of an office that John Nance Garner, a vice president under Franklin D. Roosevelt, is regularly quoted as having said wasn’t ‘worth a pitcher of warm spit.’”); Andrew Stephen, *A Heartbeat Away from Disaster*, NEW STATESMAN, Mar. 12, 2001, at 20 (detailing responsibilities of “most powerful vice-president in US history”); Richard W. Stevenson & Elisabeth Bumiller, *Cheney Exercising Muscle on Domestic Policies*, N.Y. TIMES, Jan. 18, 2005, at A1 (“But there is little doubt that, by dint of the trust Mr. Bush puts in him, the experience and expertise he brings to many domestic issues and the sheer force of his personality that Mr. Cheney is more than just another advisor.”); Helen Thomas, *Cheney Wields Considerable Power Behind the Scenes*, SEATTLE POST-INTELLIGENCER, Aug. 27, 2003, available at http://seattlepi.nwsourc.com/opinion/136675_helen27.html (“But I think the current vice president—Dick Cheney—may retire the title [of ‘the most powerful vice president in American history’], given his vast influence in the Bush administration. He makes his predecessors look like Little Leaguers.”); Kenneth T. Walsh et al., *The Man Behind the Curtain*, U.S. NEWS & WORLD REP., Oct. 13, 2003, at 26, available at 2003 WLNR 10998997 (“Not only has he [Cheney] served as Bush’s right hand man through the lesser tribulations of the Presidency, but he has also been his most important counselor after the 9/11 attacks and during the war in Afghanistan and the occupation of Iraq.”);

years since the founding, with the most important developments transpiring over the last half-decade or so.¹⁴⁶

B. Constitutional Structure

Alongside the substantive functional evolution of the Vice Presidency, a number of constitutional amendments have intervened to reshape the structure of the office. First, the Twelfth Amendment reconfigured the presidential and vice presidential electoral processes in order to avert the possibility of a stalemate. Then, the Twentieth Amendment sought to neutralize the threat of subversive or undemocratic machinations by an outgoing Congress, just as the Twenty-Second Amendment sought to deflate the rising imperial executive. Most recently, the Twenty-Fifth Amendment established an orderly procedure for vice presidential nomination and confirmation in the event of a vice presidential vacancy. Each of these amendments is consistent with the three democratic values reflected in the Founders' design of the Vice Presidency: popular consent, stability, and competence. Furthermore, each of these amendments—with the exception of the Twelfth Amendment, which is commonly and correctly regarded as undermining the potency of the Vice Presidency—strengthened the office and has driven the steady emergence of the office into its present structure and identity.

1. Electoral Stalemate

The Twelfth Amendment, observes Larry Lessig, emerged as “a response to an embarrassing logical omission in the procedure to elect the President.”¹⁴⁷ The original system engineered to choose the President was an unsustainable and volatile compromise¹⁴⁸ that contained “inherent mechanical flaws.”¹⁴⁹ These defects were

Lisa Zagaroli, *Cheney Keeps Demeanor Low-Key, to the Point*, DETROIT NEWS, Oct. 5, 2004 (Front), available at 2004 WLNR 13708298 (“Nevertheless, historians agree that Cheney may be the most powerful vice president ever.”). *But see, e.g.*, Richard Benedetto, *Cheney's Feet Solidly Planted in No. 2 Spot*, USA TODAY, Jan. 19, 2005, available at http://www.usatoday.com/news/washington/2005-01-19-cheney-usat_x.htm (“Stephen Wayne, a Georgetown University political scientist, says Cheney’s influence on policy might wane in a second term. ‘Some of his sheen has been diminished by his questionable advice (to go to war) in Iraq, create an energy policy and other issues that didn’t turn out so well,’ Wayne says.”).

146. See James A. Barnes, *The Imperial Vice Presidency*, 33 NAT’L J. 814 (2001), available at LEXIS (search “News & Business”; then “Individual Publications”; select “National Journal”) (chronicling evolving influence of Vice Presidency); see also Alan Freeman, *Fiery Cheney Slams Kerry as Being Weak on Defence*, GLOBE AND MAIL (Toronto), Sept. 2, 2004, at A12 (stating that “the strength and influence of the vice-presidency has been growing for 50 years”); Bruce J. Schulman, *Will the Veteran Overshadow the Novice?*, L.A. TIMES, Jan. 21, 2001, at M1 (“Over the past 40 years, vice presidents have occupied increasingly important roles in policymaking.”); Jules Witcover, Editorial, *Office of Veep Takes a Big Leap*, BALT. SUN, Dec. 12, 2001, at A27 (“In any event, there is no question today that the Vice Presidency has come a long way since the days of John Adams, as seen in the almost exalted position in which the once-dismal office is now occupied by the elusive Dick Cheney.”).

147. Lawrence Lessig, *The Limits of Lieber*, 16 CARDOZO L. REV. 2249, 2256 n.25 (1995).

148. Stephen M. Griffin, *The Nominee is . . . Article V*, 12 CONST. COMMENT 171, 171 (reviewing the flaws in the original system, specified in Article II, Sec. 1, which resulted in the need for the Twelfth Amendment only fourteen years after the Constitution was ratified).

149. Brett W. King, *The Use of Supermajority Provisions in the Constitution: The Framers, the Federalist Papers and the Reinforcement of a Fundamental Principle*, 8 SETON HALL CONST. L.J. 363, 381 (1998).

underscored in the near disastrous presidential election of 1800—an “electoral debacle,”¹⁵⁰ the “ultimate moment of crisis,”¹⁵¹ and a “near theft of the Presidency”¹⁵² according to various scholars—which ultimately spawned the Twelfth Amendment.¹⁵³

As early as the first presidential election of 1789, observers had discerned a dormant problem with the Constitution’s requirement that electors cast two undifferentiated votes for President and Vice President.¹⁵⁴ The Framers’ electoral system functioned as hoped in the first three presidential elections, but collapsed in the dramatic election of 1800.¹⁵⁵ This election resulted in incumbent President John Adams scoring fewer electoral votes than incumbent Vice President Thomas Jefferson and challenger Aaron Burr, the latter of whom was understood by all, including the electors, to be running for Vice President.¹⁵⁶ Indeed Burr had been specially nominated for the Vice Presidency in a congressional caucus.¹⁵⁷ Yet when Jefferson and Burr—both members of the same party¹⁵⁸—received the same number of electoral votes, Burr refused to cede the chance of becoming President and therefore forced the decision to the floor of the House of Representatives.¹⁵⁹

As the Constitution then mandated, the House was to select the President from the top five finishers—with each state delegation casting one collective vote—where no presidential candidate received a majority of electoral votes.¹⁶⁰ Jefferson and Burr had both merited seventy-three Electoral College votes, with sixty-five for Adams, sixty-

150. Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 171 (1998).

151. Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 YALE L.J. 1959, 1986 (1999). *But see* Abner J. Mikva, *Doubting Our Claims to Democracy*, 39 ARIZ. L. REV. 793, 800 (1997) (describing problems in presidential election of 1800 as “trivial”).

152. H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 589 (2000) (describing the “Twelfth Amendment as a response to the near theft of the Presidency by Aaron Burr”).

153. *See* David P. Currie, *The Constitution in Congress: Jefferson and the West, 1801-1809*, 39 WM. & MARY L. REV. 1441, 1442 (1998) (“The Twelfth Amendment, designed with the simple goal of avoiding the near disaster of the 1800 election, proved to be a surprising can of worms, a monument to the difficulty of constitutional drafting.”).

154. William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 154 (1996).

155. John V. Orth, *Presidential Impeachment: The Original Misunderstanding*, 17 CONST. COMMENT 587, 588 (2000).

156. Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 2001 (2003).

157. Alexander Hanebeck, *Democracy Within Federalism: An Attempt to Reestablish Middle Ground*, 37 SAN DIEGO L. REV. 347, 386 (2000) (“In 1800, a bitterly contested election featured two organized political parties, which had chosen their nominees for President and Vice President in congressional caucuses.”) (citations omitted).

158. *See* Donald Grier Stephenson, Jr., *The Waite Court at the Bar of History*, 81 DENV. U. L. REV. 449, 464 (2003) (“The election of 1800 yielded a tie between top electoral vote recipients Thomas Jefferson and Aaron Burr, both of them Democratic-Republicans.”).

159. Michael J. Gerhardt, *The Constitution Outside the Courts*, 51 DRAKE L. REV. 775, 784 (2003) (“While they (and their supporters) knew which had run as President and Vice President, and thus which should have been considered the victor in the presidential election, Burr’s refusal to acknowledge the obvious forced the House of Representatives to resolve which of the two men was President.”).

160. U.S. CONST. art. II, § 1, cl. 3.

four for Charles Pinckney,¹⁶¹ and one vote for John Jay.¹⁶² When the decision fell upon the House, the Federalists offered to shift their support to Burr on the condition that he govern as one of them (in an effort to withhold the Presidency from Jefferson), but Burr refused this entreaty.¹⁶³ Burr similarly rejected the contrived notion that—should the House select him to fill the Presidency and Jefferson to occupy the Vice Presidency despite Burr's acknowledged original candidacy for the Vice Presidency—Burr should immediately resign in order to trigger Jefferson's succession to the Presidency.¹⁶⁴ Ultimately, the House needed thirty-six ballots¹⁶⁵ and significant backroom bargaining¹⁶⁶—not to mention considerable pressure from Burr's New York rival, Alexander Hamilton¹⁶⁷—to eventually name Jefferson President and appoint Burr to the Vice Presidency.

The tie was a matter of mere happenstance. Republican electors held a majority over their Federalist counterparts and were thus mathematically assured of placing their own candidates in office: Jefferson for President and Burr for Vice President.¹⁶⁸ But as a result of the rise of political parties, electors who were affiliated with a political party predictably behaved strategically and cast both of their electoral ballots for their preferred candidates for President and Vice President.¹⁶⁹ This was a vote along straight party lines.¹⁷⁰ But in order to avoid a deadlock between Jefferson and Burr, a South Carolinian Republican elector had been instructed *not* to vote for Burr, but he nonetheless inexplicably voted for Burr.¹⁷¹

161. See Ackerman & Fontana, *supra* note 62, at 569 & n.45 (noting that Thomas Pinckney was John Adams' running mate in 1796 and Charles Pinckney (brother of Thomas) was Adams' running mate in 1800).

162. Christopher Scott Maravilla, *That Dog Don't Hunt: The Twelfth Amendment After Jones v. Bush*, 23 PACE L. REV. 213, 221 (2002).

163. Todd J. Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 BYU. L. REV. 1573, 1628-29 (2001).

164. Jennifer Van Bergen, *Aaron Burr and the Electoral Tie of 1801: Strict Constitutional Construction*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 91, 115-116 (2003) (recounting Burr's refusal to entertain the possibility of resigning if elected by the House to the Presidency).

165. Robert J. Lukens, Comment, *Jared Ingersoll's Rejection of Appointment as One of the "Midnight Judges" of 1801: Foolhardy or Farsighted?*, 70 TEMP. L. REV. 189, 208 (1997).

166. Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section 1 and its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 203 (1994) ("After much back room bargaining and more than thirty ballots later, the House elected Jefferson as President.").

167. John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 MINN. L. REV. 1435, 1439 (1999) (claiming that Burr lost the Presidency only because Alexander Hamilton used his influence in the House of Representatives to ensure that Jefferson would win the election).

168. Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 740 n.51 (2005).

169. Paul Boudreaux, *The Electoral College and its Meager Federalism*, 88 MARQ. L. REV. 195, 197 n.10 (2004).

170. J.M. Balkin, *The Constitution as a Box of Chocolates*, 12 CONST. COMMENT 147, 148 (1995) ("Incidentally, this unpleasantness occurred because the electors voted on straight party lines, something which the Founders never imagined would happen.").

171. Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 945 n.33 (1996).

In order to guard against a similar catastrophe of electoral stalemate in future elections, Congress crafted the Twelfth Amendment, which interceded to require electors to discriminate in their choice of President and Vice President, instead of continuing the practice of simply casting two votes for President, with the runner-up appointed Vice President.¹⁷² The Twelfth Amendment also features noteworthy clauses. First, the opening portion of its text includes an Inhabitant Clause, providing that electors cannot cast their respective ballots for a President and Vice President who inhabit the same state.¹⁷³ The Twelfth Amendment also reduces from five to three the number of candidates in the contingent House presidential election and from three to two the eligible candidates in the contingent Senate vice presidential election.¹⁷⁴ Finally, the amendment also retains the supermajority quorum provision requiring the presence of two-thirds of all states in order for the House of Representatives to select a President when the Electoral College fails to produce a winner.¹⁷⁵

172. The Twelfth Amendment states:

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person having a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. CONST. amend. XII.

173. For exceptional analyses of this clause in the context of the 2000 presidential election, see James C. Ho, *Much Ado About Nothing: Dick Cheney and the Twelfth Amendment*, 5 TEX. REV. L. & POL. 227 (2000); Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925 (2001).

174. Rhonda D. Hooks, Comment, *Has the Electoral College Outlived Its' [sic] Stay?*, 26 T. MARSHALL L. REV. 205, 210 (2001).

175. The Twelfth Amendment also establishes a supermajority quorum provision requiring the participation of two-thirds of Senators when the vice presidential selection passes to the Senate. See, e.g., John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 780 n.322 (2002); Saul Levmore, *Bicameralism: When are Two Decisions Better Than One?*, 12 INT'L REV. L. & ECON. 145, 153 n.22 (1992).

In responding to the demands of his constituents,¹⁷⁶ New York Senator DeWitt Clinton was the first to advocate the rule that ultimately became the Twelfth Amendment.¹⁷⁷ The amendment took life in 1803.¹⁷⁸ The rapid pace at which Congress assented to the amendment demonstrates the legislators' sense of urgency: the House proposed it on October 28, the Senate amended it on December 2, and the House assented to the Senate amendment on December 8.¹⁷⁹ Once both congressional chambers had passed the amendment, the several states spared no time ratifying it,¹⁸⁰ which was in part a concession to the anti-Federalists.¹⁸¹ During debate about the constitutional amendment, smaller states objected that the larger states would draw an advantage from the separation of presidential and vice presidential elections because electors representing the smaller states would be fewer in number—and thus in voice and influence—than those electors hailing from the larger ones.¹⁸² The rebuttal—a particularly effective one—was this: whatever their disadvantage at the front end of the electoral process, smaller states may neutralize any inequity at the back end when, if necessary, the presidential vote is thrown to the House of Representatives, where the vote proceeds by state delegation such that a single-member-state like Montana possesses the same voting power as the entire Californian delegation.¹⁸³ Nevertheless, states supported this revision to the electoral process because it protected the interest of state electors to determine the outcome of a presidential race.¹⁸⁴ The Twelfth Amendment became operative three months after its ratification.¹⁸⁵

176. Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. DAVIS L. REV. 1, 71 (1999) ("In the wake of the Jefferson-Burr contest for the Presidency in 1800-01, the legislature of New York instructed its senators to press for a revised system of electing Presidents.").

177. See Curtis A. New, Note, *Moore Establishment or Mere Acknowledgment: A Critique of the Marsh Exception as Applied in Glassroth v. Moore*, 29 U. DAYTON L. REV. 423, 434 n.88 (2004) (identifying Dewitt Clinton as first proponent of the Twelfth Amendment).

178. Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1291 (2002).

179. Ky Fullerton, Comment, *Bush, Gore, and the 2000 Presidential Election: Time for the Electoral College to Go?*, 80 OR. L. REV. 717, 726-27 (2001).

180. Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 855 (2002) ("The states quickly ratified this amendment, but never again effected any constitutional changes regarding the electoral-vote process.").

181. Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 428 (1983).

182. See Brendan Barnicle, Comment, *Congressional Term Limits: Unconstitutional by Initiative*, 67 WASH. L. REV. 415, 423 (1992) (describing the argument advanced by members of Congress that the Twelfth Amendment would benefit large states).

183. See Sanford Levinson, *Constitutional Populism: Is it Time for "We the People" to Demand an Article Five Convention?*, 4 WIDENER L. SYMP. J. 211, 217 (1999) (criticizing the selection mechanism instituted by the Twelfth Amendment, under which the House of Representatives votes by state delegation to determine the winner of the presidential election).

184. See Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 142 (1993) (asserting that Twelfth Amendment increases the likelihood that electors, appointed by state legislatures, will affect the outcome of presidential elections). *But see* Brendon Troy Ishikawa, *Everything You Always Wanted to Know About How Amendments are Made, but Were Afraid to Ask*, 24 HASTINGS CONST. L.Q. 545, 570 (1997) ("During the

Today, the Twelfth Amendment facilitates the practice of pairing candidates on a single ticket for the two executive offices.¹⁸⁶ Such a coupling of presidential and vice presidential candidates is typically possible only with organized political parties, whose rise and role in the American polity was implicitly recognized in the Twelfth Amendment.¹⁸⁷ This raises a striking irony, given that the Constitution had been fashioned in sizeable measure to discourage the growth of political parties.¹⁸⁸ The Framers viewed the party system as “government by ‘faction’ and ‘junto,’”¹⁸⁹ a state of affairs most prominently decried through the voice of James Madison in his famed appeal on how to contain factions.¹⁹⁰ Just as the Framers regarded factions quite unfavorably, they looked upon parties in the same way.¹⁹¹

Nonetheless, although Congress had designed the Twelfth Amendment in part to counteract growing factionalist tendencies in the new Union, the reverse occurred.¹⁹² The amendment consolidated the power of the majority party in Congress by making outright victory possible in both the presidential and vice presidential races.¹⁹³ The Twelfth Amendment has in effect constitutionalized politics¹⁹⁴ and harmonized the Electoral College with political parties,¹⁹⁵ a ubiquitous creature of modern politics that the Framers had not foreseen.¹⁹⁶

ratification of the Twelfth Amendment, New Hampshire’s governor vetoed the state legislature’s ratifying resolution.”).

185. Jol A. Silversmith, *The “Missing Thirteenth Amendment”: Constitutional Nonsense and Titles of Nobility*, 8 S. CAL. INTERDISC. L.J. 577, 592 (1999).

186. George Anastaplo, *Loyal Opposition in a Modern Democracy*, 35 LOY. U. CHI. L.J. 1009, 1011 (2004).

187. See Sanford Levinson, *Bush v. Gore and the French Revolution: A Tentative List of Some Early Lessons*, 65 LAW & CONTEMP. PROBS. 7, 37 (2002) (arguing that the role of political parties was “recognized most clearly in the Twelfth Amendment”).

188. Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1494 n.54 (1994).

189. Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn’t Either*, 38 WAKE FOREST L. REV. 553, 555 (2003).

190. See THE FEDERALIST No. 10, at 48-54 (James Madison) (J.R. Pole, ed., 2005) (extolling the virtues of a unified republic in dealing with factions).

191. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001).

192. See generally John J. Turner, Jr., *The Twelfth Amendment and the First American Party System*, 35 HISTORIAN 221 (1973) (arguing that the Twelfth Amendment was intended in part to neutralize factionalism but ultimately cultivated it).

193. TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804*, 172 (1994).

194. Theodore B. Olson, *Remembering Marbury v. Madison*, 7 GREEN BAG 2D 35, 37 (2003).

195. Thomas E. Baker, *Towards a “More Perfect Union”: Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 11 (2000) (“The Twelfth Amendment (1804) sought to harmonize political parties with the Electoral College to avoid the problems the House of Representatives had with the election of 1800 between Thomas Jefferson and Aaron Burr.”).

196. See George Anastaplo, *Law, Judges, and the Principles of Regimes: Explorations*, 70 TENN. L. REV. 455, 528 (2003) (stating that Framers “had evidently not foreseen in 1787 the emergence of strong party allegiances in national politics”). But see Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Electoral College, the Right to Vote, and Our Federalism: A Comment on a Lasting Institution*, 29 FLA. ST. U. L. REV. 879, 890 (2001) (“In the delegates’ defense, it may be said that they suspected that some semblance of party politics,

Though the Twelfth Amendment successfully intervened to address the Framers' failure to foresee the dominance of political parties, it reveals a number of intellectual gaps. Consider that its design would permit a candidate who had won both popular and electoral vote pluralities—and whose party held a majority of the House of Representatives—to lose the Presidency.¹⁹⁷ Moreover, it is not clear how Congress should treat electoral votes for deceased candidates.¹⁹⁸ Likewise, while it is a reasonable reading of the Twelfth Amendment that the Vice President could *not* vote in the Senate selection of a Vice President because she is not a member of the Senate, it remains unsettled who would cast a tie-breaking vote.¹⁹⁹ What is more, as Michael McConnell has observed, “it is unclear whether [the Senate President’s duty to count electoral votes] carries with it the power to determine *which* ballots count, or whether such a ruling would be subject to an appeal to the floor, and if so, on what basis the votes of the senators and representatives would be counted.”²⁰⁰ A related, though conjectural, question is whether the task of counting electoral votes is a ministerial or judicial task.²⁰¹ What is certain, though, is that the Twelfth Amendment empowers Congress to count state electors.²⁰²

Beyond these academic ambiguities, the Twelfth Amendment has been the subject of dueling interpretations. Succession crises have arisen approximately once every century.²⁰³ Most recently, the 2000 presidential election illuminated a textual ambiguity in constructing the Twelfth Amendment phrase “majority of the whole number of Electors appointed.”²⁰⁴ Prior to that election, the 1876 presidential race saw

however rudimentary, would creep into the presidential electoral process.”).

197. Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1, 5 n.16 (1996).

198. John C. Fortier & Norman J. Ornstein, *If Terrorists Attacked Our Presidential Elections*, 3 ELECTION L.J. 597, 606 (2004).

199. See Richard A. Posner, *The 2000 Presidential Election: A Statistical and Legal Analysis*, 12 SUP. CT. ECON. REV. 1, 29 (2004) (“The Twelfth Amendment provides that if no candidate for Vice President receives a majority of electoral votes, the Senate shall choose the Vice President—but to win, a candidate must receive a majority of the entire Senate, and the 50-50 split in the Senate would prevent this. (The Vice President is not a member of the Senate, and so he could not vote to break this tie.)”).

200. Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 127 (1994).

201. Benjamin C. Block, *Bradley, Breyer, Bush and Beyond: The Legal Realism of Legal History*, 15 U. FLA. J.L. & PUB. POL’Y 57, 63 (2003) (analyzing this question in context of 1876 presidential election).

202. Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1179-80 (2002) (“Finally, if a dispute over a state’s electoral votes persists, the Twelfth Amendment authorizes Congress to count—and, by implication, to determine the validity of—each state’s slate of electors.”).

203. Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 848 (2004).

204. U.S. CONST. amend. XII. Compare John Godfrey, *Voters Pick Electors, Instead of Candidates*, WASH. TIMES, Nov. 26, 2000, at C6, available at 2000 WLNR 353159 (“What is not clear is what ‘whole number’ means. Is it the current 538 Electoral College votes or the 513 votes that would remain, absent Florida’s votes?”), and Douglas Kiker, *Dramatic Script has Many Endings Despite Vote Results, Courts, Congress, College Could Hold Key to Outcome*, CHARLOTTE OBSERVER (N.C.), Nov. 20, 2000, at A6, available at 2000 WLNR 1959444 (“The dilemma, then, is the definition of ‘appointed,’ and whether it means the number of electors before, or after, the election.”), and Duane Marsteller, *Florida’s Electoral Votes May Not Count*, BRADENTON HERALD (Fla.), Nov. 14, 2000, at 1, available at 2000 WLNR 1011292 (“Without Florida, the candidate who garners the majority of the remaining electoral votes cast that day will win, they

Republicans arguing that the Senate President was authorized to choose among competing electoral certificates and Democrats contending that the House was charged under the Constitution with the task of electing the President in the event that no candidate received a majority of electoral votes.²⁰⁵

As a matter of constitutional theory, it is no accident that the Twelfth Amendment entrusts the resolution of electoral disputes to the House of Representatives, the “preeminently popularist institution” in the United States.²⁰⁶ As Laurence Tribe writes, delegating to Congress “the power to resolve disputes over the legitimacy of electoral votes constituted the grand finale of the Constitution’s deliberately contemplated political process.”²⁰⁷ It thus seems wholly uncontroversial to read the amendment as designating Congress to occupy the primary role in resolving disputed presidential elections.²⁰⁸ Indeed, adopted in part to “vindicate majoritarian popular will,”²⁰⁹ the Twelfth Amendment “deliberately and conspicuously excluded the courts.”²¹⁰

One consequence of the Twelfth Amendment has been to set in motion the development of a populist²¹¹ or plebiscitarian Presidency.²¹² But its most important immediate consequence for the Vice Presidency was to precipitate the decline of

said. But others disagree, saying the Constitution requires a majority of all 538 electoral votes—270—to win, regardless of how many are cast.”), and Alison Mitchell, *Counting the Vote: Congressional Republicans; G.O.P. Expresses Rancor Over Ruling; Lawmaker Threatens to Challenge Electors*, N.Y. TIMES, Nov. 23, 2000, at A33, available at 2000 WLNR 3200494 (“But does that mean that the majority would be 257 electoral votes if Florida’s electors are not accepted? Or does the number needed stay at 270?”), and William M. Welch, *Presidential Power Struggle Could Drag Congress Into Fray*, USA TODAY, Nov. 24, 2000, at A4, available at 2000 WLNR 3514967 (“There is some difference of opinion here.”), with Rupert Cornwell, *Electoral College—Party Hacks Who Might, Just Might, Have Minds of Their Own*, INDEP. (U.K.), Nov. 16, 2000, available at 2000 WLNR 5986939 (“The 12th amendment of the Constitution dictates that the winner merely needs ‘a majority of the whole number of electors appointed.’ In other words, if Florida has not got its act straight in time, the electoral college will shrink from 538 to 513 votes, and the required majority will be not 270 votes but 257.”), and Ann Coulter, *One’s a Loser, the Other a Yahoo*, CHI. SUN-TIMES, Nov. 14, 2000, at 33, available at 2000 WLNR 4629727 (“If Gore can prevent Florida from appointing its electors by Dec. 18, when the electors meet, Florida’s electors will be excluded.”).

205. John Copeland Nagle, *How Not to Count Votes*, 104 COLUM. L. REV. 1732, 1738 (2004).

206. Russell A. Miller, *Lords of Democracy: The Judicialization of “Pure Politics” in the United States and Germany*, 61 WASH. & LEE L. REV. 587, 621 (2004).

207. Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 CONST. COMMENT. 571, 592 (2002).

208. Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1226 (2002) (“Reading the Amendment, one certainly gets the general impression that Congress was supposed to play a large, and perhaps the only, role in resolving contested presidential elections.”); see also Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 278 (2002) (“The text of Article II—as amended by the Twelfth Amendment—makes clear, then, that Congress plays a vital role in the election of the President.”).

209. Vasan Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 125 n.10 (2001).

210. Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 157 (2001).

211. Akhil Reed Amar, *An(Other) Afterword on The Bill of Rights*, 87 GEO. L.J. 2347, 2359 (1999) (stating that later generations of Americans have “restructured the electoral college, via the Twelfth Amendment and other election reforms, precisely to facilitate such a presidency”).

212. Akhil Reed Amar, *The Constitutional Virtues and Vices of the New Deal*, 22 HARV. J.L. & PUB. POL’Y 219, 224-25 (1998) (linking Twelfth Amendment to rise of “modern-day plebiscitarian Presidency”).

America's second office. Under the amendment's proposed executive selection procedures, electors would cast one ballot for President and another for Vice President, meaning that candidates would be designated in advance for either of these two positions. No longer would candidates run just for the Presidency. The Twelfth Amendment created two tiers of candidates, with lesser candidates vying for the role of understudy. This anticipated effect was not lost on those debating the Twelfth Amendment in Congress, as South Carolina Senator Pierce Butler foretold that the amendment would weaken the Vice Presidency.²¹³ This prediction proved accurate,²¹⁴ as the office "was no longer a consolation prize for the presidential runner-up"²¹⁵ and consequently became regularly filled by occupants who scarcely fit the mold initially envisioned by the Founders.²¹⁶ This drift persisted at least until the early twentieth century, when circumstance shook the Vice Presidency from its moorings and dispatched the office on its great journey from pauper to principal.²¹⁷

2. Congressional Machinations

The Twentieth Amendment²¹⁸ is commonly known as the "Lame Duck Amendment."²¹⁹ This is a dual reference to a "lame duck" public official who fails to

213. EDGAR WIGGINS WAUGH, *SECOND CONSUL* 50-51 (1956).

214. *Id.* at 53-58 (mapping decline of Vice Presidency).

215. Goldstein, *supra* note 47, at 520.

216. WITCOVER, *supra* note 1, at 25-26. The Founders' initial vision saw the Vice Presidency occupied by an individual "esteemed by his peers second only to the man elected president." *Id.*

217. See *supra* Section III.A for a review of the Vice Presidency's transformation through the twentieth century.

218. U.S. CONST. amend. XX:

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

219. Joseph C. Sweeney, *The Prism of COGSA*, 30 J. MAR. L. & COM. 543, 559 n.119 (1999); see also

win reelection on Election Day,²²⁰ and to “lame duck” legislative sessions, during which sitting congressional members are affiliated with the existing Congress and not the newly-elected Congress.²²¹ The fundamental purpose of this appendage to the Constitution is to guard against the embittered or opportunistic designs of an outgoing Congress, or in the more vivid words of Bruce Ackerman, to check the power of a lame duck Congress to take meaningful action in “intolerable violation of democratic principles.”²²² Its proponents were primarily motivated by fears that defeated members of Congress might initiate disruptive legislative and other action in the interval between their defeat at the polls and the installation of the newly elected Congress.²²³ Yet Congress is not the lone target of the amendment, which by its very blueprint also curtails the ability of a repudiated President to continue enjoying the spoils of the office and discharging its untold power and influence.²²⁴ The Twentieth Amendment palliates the perceived disadvantages of the original four-month period between Election and Inauguration Day by also ensuring a sooner political transition from outgoing to incoming President.²²⁵

Introduced in 1932,²²⁶ the Twentieth Amendment was the first amendment to include an expiration date in its text.²²⁷ It was approved on February 6, 1933,²²⁸ with

Editorial, *The Long Arm of Nebraskan Norris*, OMAHA WORLD-HERALD, Jan. 7, 2001, at B10 (“After a decade of debate, the lame-duck amendment took effect in 1935 as the 20th Amendment.”); Patrick Oster, *Endgame*, NAT’L L.J., Jan. 11, 1999, at A26 (“It’s not a settled point, but its backers’ legal basis—the lame duck [20th] amendment of the Constitution—gives it some color and perhaps even a way for the Supreme Court to review what otherwise will be a political question over which it has no jurisdiction.”); John R. Vile, *Proposals to Amend the Bill of Rights: Are Fundamental Rights in Jeopardy?*, 75 JUDICATURE 62, 65 (1991) (stating that “the Twentieth Amendment was directed to the problem of lame duck representation.”).

220. One scholar identifies four possible definitions of a lame duck, suggesting that it is a public official who: (1) is barred from seeking another term; (2) has publicly announced her intention not to seek reelection; (3) fails to win on election day; or (4) whose successor has been formally designated. Settling on the third option as the correct one, Nagle finds deficiencies in each of the three others: the first and second options are overbroad; the fourth option is too narrow. The third option “properly focuses upon both the voice of the electorate and the status of the outgoing official.” John Copeland Nagle, *The Lame Ducks of Marbury*, 20 CONST. COMMENT. 317, 338 (2003).

221. Amy Keller, *Looking Back*, ROLL CALL, Nov. 18, 2002.

222. Harvey Berkman, *Can Lame-Duck Congress Impeach Mr. Clinton?*, NAT’L L.J., Dec. 21, 1998, at A7 (quoting Bruce Ackerman).

223. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1487 (2001).

224. See Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, 12 CONST. COMMENT. 183, 184-85 (1995) (questioning whether repudiated Presidents should exercise the benefits of the “most powerful political office in the world”).

225. See Thomas DiBacco, *Weather History, With Respect*, WASH. TIMES, Jan. 14, 1996, at B4 (“When the Inaugural date was changed to Jan. 20 by the 20th Amendment to the Constitution in 1933, the objective was good, namely, to ensure a faster political transition from the November election date.”); Edward Hartnett, *A “Uniform and Entire” Constitution; or, what if Madison had Won?*, 15 CONST. COMMENT. 251, 280 (1998) (stating that the Twentieth Amendment was “designed to eliminate lame duck sessions of Congress”); Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 632-633 (1999) (“[The Twentieth Amendment] shortens the terms of lame-duck Presidents and Congresses.”); John Copeland Nagle, *CERCLA’s Mistakes*, 38 WM. & MARY L. REV. 1405, 1458 (1997) (identifying the intent of the Twentieth Amendment as abolishing lame duck sessions of Congress).

226. 47 Stat. 745 (1932).

227. See Michael J. Lynch, *The Other Amendments: Constitutional Amendments That Failed*, 93 LAW

no state withholding its assent to ratification.²²⁹ The Twentieth Amendment covers at least three principal bases: (1) presidential, vice presidential, and congressional installation; (2) succession; and (3) annual congressional assembly.²³⁰ The text of the amendment reads clearly. Section one establishes that: (1) presidential, vice presidential and congressional successors take office at the end of their predecessors' respective terms; (2) presidential and vice presidential terms of office end at noon on January 20;²³¹ and (3) the terms of Senators and Representatives end two and one-half weeks earlier on January 3, also at noon.²³² Section two requires Congress to meet at least once every year on January 3 unless its members agree to a different date.²³³ Section three provides that the Vice President shall become President if the President dies before Inauguration Day.²³⁴ In the event Electoral College electors have yet to choose the President by this day, the Vice President shall assume the Presidency until the choice is settled.²³⁵ This section also assents in advance to the governing procedures established by Congress for presidential and vice presidential selection should neither office be filled by Inauguration Day.²³⁶ Section four authorizes Congress to legislate procedures for presidential selection when the choice falls to

LIBR. J. 303, 305 (2001) (demonstrating that beginning with the Twentieth Amendment, Congress has included a time limit for ratification in either the proposed amendment or joint resolution proposing the amendment).

228. Peter Suber, *Population Changes and Constitutional Amendments: Federalism Versus Democracy*, 20 U. MICH. J.L. REFORM 409, 456 (1987).

229. *Id.* at 474.

230. 16A AM. JUR. 2D *Constitutional Law* § 402 (2004).

231. See Scott E. Gant & Bruce G. Peabody, *Musings on a Constitutional Mystery: Missing Presidents and "Headless Monsters"?*, 14 CONST. COMMENT. 83, 83 (1997) (explaining that the demarcation between end and beginning is not entirely clear where the President and Vice President are reelected to a second term).

232. U.S. CONST. amend. XX, § 1.

233. This section is said to have repealed an existing provision of the Constitution, though not expressly. See Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 277 n.100 (2004) (discussing modification of Article 1, Section 4, Clause 2 of the United States Constitution).

234. Jules Witcover narrates an instance during the second presidential debate in 1988 pitting George H.W. Bush and Michael Dukakis in which Section three of the Twentieth Amendment was the focus of moderator Bernard Shaw's opening question to Bush. Quoting Section three's provision that the Vice President elect is to become President where the president-elect dies before Inauguration Day, Shaw asked pointedly "[A]utomatically, automatically, Dan Quayle would become the forty-first president of the United States. What have you to say about that possibility?" WITCOVER, *supra* note 1, at 354.

235. Though Section three provides that the Vice President shall act as President until a President qualifies, it offers no solution where a President has been chosen but the electors disagree as to who she is. See John Harrison, *Nobody for President*, 16 J.L. & POLY. 699, 714 n.35 (2000). See also *Law of Presidential Succession: Hearing Before Senate Subcomm. on the Constitution*, 103d Cong. (1994) (statement of Walter Berns, John M. Olin Professor of Law, Georgetown University), available at 1994 WL 212703 (testifying that "there may not be a president and vice president elect until Congress resolves all disputes (if any) concerning the regularity of the electoral vote and announces the results"). Section three likewise fails to offer any guidance for resolving the analogous situation involving the Vice President. See Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1809 n.607 (2002) (highlighting that Section three of the Twentieth Amendment does not answer who should act as Vice President in the event of a vacancy in that office due to disagreement among electors).

236. U.S. CONST. amend. XX, § 3.

either of its houses.²³⁷ Section five provides for the coming into force of the amendment, and Section six sets forth the rules for validating state ratification.²³⁸

One cannot fully appreciate the calculations that informed the drafting of Section three without the benefit of historical context. Consider the impetus to the prescription in this Section that “[i]f, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President shall *become* President.” As we learn from Jules Witcover, one of the foremost political historians, President William Harrison succumbed to death only one month into his Presidency in 1841, failing to conquer a persistent spell of pneumonia that he had developed after braving the harsh wintry elements to take the presidential oath of office and deliver a then-record two-hour inaugural address.²³⁹ Next in line was John Tyler, derisively named “His Accidency” as the first Vice President ever to succeed to the Presidency.²⁴⁰ But, queries Witcover, although Vice President John Tyler was indeed sworn in as President shortly after the death of Harrison, did Tyler in fact *become* President?²⁴¹

At the time, the terms of the original Constitution controlled the law of presidential succession, providing that:

[i]n the case of the removal of the President from Office, or of his Death, Resignation, or Inability to discharge *the Powers and Duties of the said Office, the Same* shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then *act as President*, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.²⁴²

The ambiguity as to whether Tyler actually became President upon the death of Harrison stemmed from the language of the succession clause, which, in stating only that “the same shall devolve on the Vice President,” left open the possibility that the Framers had intended merely that “the powers and duties of the said Office” devolve upon the Vice President instead of devolving *the Presidency* itself upon him. The second half of the clause further complicated matters by stating that the succeeding officer shall only “act as President” and not in fact become President.²⁴³ Casting aside all doubt,²⁴⁴ Tyler exhibited little reluctance in seizing the Presidency for himself,

237. *Id.* amend. XX, § 4.

238. *Id.* amend. XX, § 5.

239. WITCOVER, *supra* note 1, at 35-36.

240. Paul E. McGreal, *There is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 *FORDHAM L. REV.* 2393, 2399 (2001).

241. WITCOVER, *supra* note 1, at 36.

242. U.S. CONST. art. II, § 1, cl. 6 (emphasis added).

243. For instance, both the House of Representatives and the Senate heard motions proposing to withhold the title of President from newly-inaugurated President John Tyler. John McKeon, a New York member of the House of Representatives, favored referring to Tyler as “Vice-President, now exercising the office of President,” and Senator William Allen of Ohio suggested “the Vice-President, on whom, by the death of the late President, the powers and duties of the office of President have devolved.” David P. Currie, *His Accidency*, 5 *GREEN BAG 2D* 151, 152 (2002) (citations omitted).

244. But one scholar suggests that Tyler himself believed that he was merely Vice President acting as President, not an actual President. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, 60 (5th ed. 1984).

deeming it unnecessary to untangle the textual intricacy of the Constitution.²⁴⁵ He took the presidential oath of office, delivered his inaugural address less than a week following the death of his predecessor, and framed his succession as the first time the Vice President “has had devolved upon him the presidential office.”²⁴⁶ Tyler did not acknowledge the possibility that only the “powers and duties” of the Presidency had devolved upon him, thereby authorizing nothing further than to “act as President.”²⁴⁷ It therefore became purely academic to accuse Tyler of mounting an unconstitutional power grab,²⁴⁸ as some have in the intervening years.²⁴⁹

Thus, the Twentieth Amendment sought to assuage several doubts about succession—“succession wrinkles,”²⁵⁰ according to Akhil Amar—notably whether the Vice President *became* President or merely *acted* as President. By affirming that “the Vice President elect shall *become* President”²⁵¹ upon the death of the President, Section three constitutionalizes the decision of then-Vice President Tyler to assume the Presidency. Oddly enough, Section three may have been superfluous in light of the Tyler precedent because subsequent Vice Presidents succeeding Presidents who had died in office predictably followed Tyler’s example and unabashedly assumed the office of the Presidency, brushing aside constitutional arguments that may have cautioned otherwise.²⁵²

Section four of the Twentieth Amendment also reaches beyond its immediate text, tracking the language of the original Constitution that authorizes Congress to establish a line of succession to the Presidency.²⁵³ Congress has since passed three succession statutes, each of which repealed the former. The first, in 1792, named the President pro tempore of the Senate followed by the Speaker of the House of Representatives as the

245. Yet Tyler’s interpretation may have been mistaken. The leading authority on the Vice Presidency writes that “[s]tudy of the records of the Constitutional Congress makes clear that the framers intended the Vice President merely to ‘discharge the powers and duties’ of the President in all situations.” GOLDSTEIN, *supra* note 7, at 203-04.

246. WITCOVER, *supra* note 1, at 37.

247. See James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575, 583-84 (2000) (noting that “[t]he distinction between actual Presidents and acting Presidents is recognized throughout the text of the Constitution as well as the United States Code.”) (citations omitted).

248. But, true to form, Akhil Amar argues in persuasive fashion that neither Tyler’s formal presidential authority nor tenure turned on whether Tyler merely acted as President or became President. Akhil Reed Amar, *Presidents Without Mandates (With Special Emphasis on Ohio)*, 67 U. CIN. L. REV. 375, 377-78 (1999).

249. E.g., RICHARD H. HANSEN, *THE YEAR WE HAD NO PRESIDENT* 9-20 (1962).

250. Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution’s Succession Gap*, 48 ARK. L. REV. 215, 216 (1995).

251. U.S. CONST. amend. XX, § 3 (emphasis added).

252. Then-Vice Presidents Millard Fillmore, Andrew Johnson, Chester Arthur, Theodore Roosevelt and Calvin Coolidge boldly followed the Tyler precedent even prior to the ratification of the Twentieth Amendment. See RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 9.17, at n.6 (3d ed. 1999) (stating that Fillmore, Johnson, Arthur, Roosevelt and Coolidge all followed Tyler’s precedent).

253. U.S. CONST. art. II, § 1, cl. 6 (“In the case of the removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.”).

first two successors to the Presidency in the event of a vice presidential vacancy or inability to serve.²⁵⁴ The second, in 1886, replaced the President pro tempore of the Senate and the Speaker of the House with members of the presidential cabinet.²⁵⁵ Congress deemed this change necessary because of conflict of interest concerns and extended vacancies that had plagued the offices of Speaker and President pro tempore.²⁵⁶

Upon assuming the Presidency in 1945, President Truman wrote to Congress urging its members to revise the presidential succession law of 1886 in the interest of order and stability.²⁵⁷ Truman's discomfort with the existing rules of 1886 concerned the Secretary of State being named first successor to the Presidency. Since he as President could appoint whomever he wished to occupy the office of Secretary of State, Truman could effectively appoint his own successor in the event of a vice presidential vacancy. This was too vast a power for the President to hold, so thought Truman.²⁵⁸ Moreover, Truman was adamant that an elected official—not a presidential appointee—should occupy the Presidency. The Speaker or the President pro tempore fit the Truman rule more appropriately than an appointed cabinet secretary.²⁵⁹ Thus, in 1947, Congress revised the line of presidential succession to rank the Speaker first, followed by the President pro tempore, and then the various cabinet officers.²⁶⁰

Beyond giving rise to these intended modifications, the Twentieth Amendment has effected other changes in the American polity. First, it has moderated the practice of filibustering at the close of congressional sessions.²⁶¹ The Twentieth Amendment moreover changed the adjournment practices of Congress, which now adjourns more

254. Act of Mar. 1, 1792, ch. 8, 1 Stat. 240, *repealed by* Presidential Succession Act of 1886, ch. 4, 24 Stat. 1.

255. Act of Jan. 19, 1886, ch. 4, 24 Stat. 1, *repealed by* Presidential Succession Act of 1947, 3 U.S.C. § 19 (2000).

256. Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 KY. L.J. 345, 354 (2002) (“This change was brought about in part by concerns for the long stretches in which the offices of Speaker and President Pro Tem were vacant during the previous century, as well as concerns for the conflicts of interest that arose under the original statute.”).

257. See Joseph E. Kallenbach, *The New Presidential Succession Act*, 41 AM. POL. SCI. REV. 931, 932 (1947) (“Public interest was heightened when President Truman himself addressed a special message to Congress on June 19, 1945, urging revision of the 1886 law in the interest of ‘orderly, democratic government.’”) (citations omitted).

258. See William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: “The Emperor Has No Clones,”* 75 GEO. L.J. 1389, 1421-22 (1987) (“Influenced by his own succession experience and the prospective absence of a Vice President for almost a full four year term, Truman expressed concern that by appointing a Secretary of State, he had the power to appoint his successor.”).

259. See Americo R. Cinquegrana, *Presidential Succession Under 3 U.S.C. § 19 and the Separation of Powers: “If at First You Don’t Succeed, Try, Try, Again,”* 20 HASTINGS CONST. L.Q. 105, 110 (1992) (“[Truman] believed this [ability to appoint a successor] was inconsistent with democratic principles and that the Presidency should be occupied by elected officials insofar as possible.”).

260. Presidential Succession Act of 1947, 3 U.S.C. § 19 (2000).

261. Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 202 n.114 (1997) (stating that the Twentieth Amendment “will prevent filibusters and legislation by blackmail. It will put an end to that condition under which in a short session an individual senator may prevent the enactment of desirable legislation unless some measure in which he is interested is also allowed to pass.” (quoting 71 CONG. REC. 2390 (1929) (statement of Sen. Swanson))).

frequently for short periods of time when in session, and between sessions settles for a relatively brief adjournment.²⁶² One further consequence has been to abbreviate the presidential transition interval and thus deprive an incoming President of valuable time to prepare her administrative and budgetary program.²⁶³ Whereas a President could have previously allowed herself a leisurely pace from November to March, the Twentieth Amendment radically condensed the incoming President's time for preparatory work to ten weeks, "too short a period for a freshly minted president to change from his campaign garb to the raiments of power."²⁶⁴ Finally, the Twentieth Amendment emboldened Congress, which had previously ceded a nearly yearlong head start to an incoming President. Prior to the Twentieth Amendment, the new Congress elected in November 1848 would not assemble for its first session until December 1949.²⁶⁵ The ratification of the Twentieth Amendment authorized Congress to convene three weeks before Inauguration Day, thus giving Congress "time to gird for battle," according to presidential historian Richard Neustadt.²⁶⁶

Today, a new Congress is installed seventeen days ahead of Inauguration Day.²⁶⁷ Yet prior to the enactment of the Twentieth Amendment, a newly elected Congress was installed in March of the year after Election Day and did not convene until December.²⁶⁸ This delay was attributable to the conditions of the day, for instance travel by horseback or stagecoach and communication exclusively by mail.²⁶⁹ The mechanics were peculiar: in even-numbered years, the electorate would elect a new Congress in November and, in December, the old Congress would convene for an exceptionally brief session with the knowledge that its term would soon end. This peculiar congressional calendar produced untold machinations, with non-returning members insisting on legislative and other actions that new members might not.²⁷⁰ Such a short and well-timed session presented an occasion—a particularly appealing one to retiring and other members who had failed to win reelection—to pass self-serving legislation or perhaps even measures that would prove purposely disruptive to

262. Benson K. Whitney, Case Comment, *Barnes v. Kline: Picking the President's Pocket*, 70 MINN. L. REV. 1149, 1182 n.140 (1986) (discussing the Twentieth Amendment's effect on adjournment practices in the context of bill deliberations) (citations omitted).

263. Richard E. Neustadt, *The Twenty-Fifth Amendment and its Achilles Heel*, 30 WAKE FOREST L. REV. 427, 433 (1995) (noting the effect of the Twentieth Amendment in shortening the longstanding nine month grace period granted to the President to prepare her congressional agenda).

264. Walter Shapiro, *Bush Keeps His Balance in Whirlwind Transition*, USA TODAY, Feb. 9, 2001, at 9A.

265. Joseph C. Sweeney, *Limitation of Shipowner Liability: Its American Roots and Some Problems Particular to Collision*, 32 J. MAR. L. & COM. 241, 253 (2001).

266. John Maggs & James A. Barnes, *Why 100 Days?*, 33 NAT'L J. 118 (2001), available at LEXIS (search "News & Business"; then "Individual Publications"; select "National Journal").

267. Charles J. Zinn, *The Veto Power of the President*, 12 F.R.D. 207, 225 (1952).

268. U.S. CONST. art. I, § 4, cl. 2 ("The Congress shall assemble at least once in every Year, and such Meeting shall be on the Monday in December, unless they shall by Law appoint a different Day.").

269. Claiborne Pell, Editorial, *Lame and Dead Ducks*, N.Y. TIMES, Nov. 21, 1982, § 4, at 19 (discussing origins of two-month delay between the election of a member of Congress and her first official day in office).

270. See Anthony Lewis, *A Terrible Precedent*, DENVER POST, Jan. 6, 1999, at B9 (opining on last minute efforts of lame duck Congress during Clinton impeachment proceedings).

the incoming class.²⁷¹ As one scholar puts it, lame duck members of Congress “suffered from perverse incentives” because “on the one hand, once defeated, members were unaccountable to the electorate” and, on the other, they “were viewed as susceptible to pressure from the President and from special interests.”²⁷²

The call for an end to the actions of lame duck Congresses—which were viewed as contrary to representative democracy—intensified in the early 1920s during the Presidency of Warren Harding, who in 1922 openly lobbied departing members of Congress, in exchange for patronage appointments and other presidential dispensations, to look favorably upon his legislative program subsidizing the shipping industry.²⁷³ In the normal course of governance, managing the legislative agenda demands a certain degree of quid pro quo compromise. But here, the electorate had overwhelmingly defeated congressional candidates sympathetic to the Harding ship subsidy program, which had been a focal topic of the 1922 congressional cycle.²⁷⁴

Though the ship subsidy bill may not have been spectacularly offensive or exceedingly abusive of the power and influence of the Presidency,²⁷⁵ the Twentieth Amendment—conceived as a precautionary and defensive measure—sought to ensure that the ship subsidy bill would be the most objectionable of the dubious devices that outgoing members of Congress would have occasion to plot in a lame duck session. Admittedly, the amendment has not eliminated lame duck sessions entirely,²⁷⁶ but it has reduced, by roughly half, the length of time available to lame duck Senators and Representatives to “work political mischief.”²⁷⁷ Thus at its core, the Twentieth Amendment declares an outright repudiation of the constitutional authority of a lame duck Congress to act from Election Day to March of the following year, which had formerly marked the end of the congressional term.²⁷⁸ The result of the amendment—accelerating the close of the congressional term from March to January—has enhanced the popular legitimacy of congressional action taken from January to March.²⁷⁹

271. See Garrett Epps, *A Constitutional Fix that Needs Fixing*, WASH. POST, Dec. 27, 1998, at C4 (reflecting on the impact of the Twentieth Amendment on the Clinton impeachment).

272. John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 479 (1997).

273. *Id.* at 488-89.

274. See Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303, 332 (2001) (describing historical instances of tensions arising when a lame duck office-holder used her last days in office to enact policy initiatives unlikely to be supported by her successor).

275. See Eugene J. McCarthy, Editorial, *Give Bush Another 100 Days*, N.Y. TIMES, Mar. 3, 1989, at A39 (“[Prior to the Twentieth Amendment], [t]here was no record of obstructionism or irresponsibility on the part of Congress. Nor had a ‘lame duck’ President abused the powers of his office.”).

276. See Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, 50 DUKE L.J. 1395, 1413 (2001) (noting, however, that the amendment did shorten “the time in which a lame duck Congress could sit”).

277. Laurence H. Tribe, *This Lame Duck Still Flies*, N.Y. L.J., Jan. 4, 1999, at 2.

278. See BRUCE ACKERMAN, *THE CASE AGAINST LAMEDUCK IMPEACHMENT* 24-31 (1999) (noting intent of Framers of Twentieth Amendment to end lameduck sessions of Congress); see also Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2342 (1999) (describing the impact of the Twentieth Amendment on the Clinton impeachment).

279. See Malla Pollack, *What is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 778 (2001) (cataloguing constitutional amendments devolving more popular control over Congress).

According to its original sponsor, Senator George W. Norris, the Twentieth Amendment is a “great step toward placing the control of our government in the hands of the chosen representatives of the American people.”²⁸⁰

3. The Imperial Executive

Fears of an imperial Presidency gave rise to the Twenty-Second Amendment.²⁸¹ Proposed in 1947 and ultimately ratified in 1951,²⁸² the amendment was drafted to “repudiate the invincible” Democratic President Franklin D. Roosevelt, who had recorded an unprecedented third reelection in 1944.²⁸³ Republican legislators dissented from his actions to centralize governmental functions, expand and control the bureaucratic levers of the state, and consolidate popular authority in the Presidency.²⁸⁴ But more generally, the fundamental purpose of the amendment was to arrest the increasing concentration of power within the hands of the commander in chief by barring Presidents from following Roosevelt’s example of serving more than two elective terms of office.²⁸⁵

The two-term custom in the United States finds its origin in the nation’s first commander in chief, George Washington.²⁸⁶ In selflessly choosing to serve only two

280. See Thomas V. DiBacco, Editorial, *Short Timetable for Gore? Blame the 20th Amendment*, ORLANDO SENTINEL TRIB., Dec. 3, 2000, at G3 (discussing the effect of the Twentieth Amendment on the 2000 presidential election).

281. The Twenty-Second Amendment states:

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

U.S. CONST. amend. XXII.

282. See David C. Indiano, *The Constitution: It Ain’t Broke*, FED. LAW., May 2004, at 4, 5 (describing the enactment of the Twenty-Second Amendment).

283. See George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 825 (1992) (“The Twenty-Second Amendment reflects the determination by the Republican party to repudiate the invincible Franklin Roosevelt by establishing as the permanent law of the land the two-term limit that George Washington had established as custom.”).

284. See Lawrence Schlam, *Legislative Term Limitation Under a “Limited” Popular Initiative Provision?*, 14 N. ILL. U. L. REV. 1, 32 (1993) (discussing the roots of presidential term limitation).

285. See David E. Kyvig, *Refining or Resisting Modern Government?: The Balanced Budget Amendment to the U.S. Constitution*, 28 AKRON L. REV. 97, 103 (1995) (“The Twenty-Second Amendment, limiting a president to two terms and designed to block accretions of power in the executive office, won adoption through the combined support of Republicans and southern Democrats.”); see also Sanford Levinson, *Why it’s Smart to Think about Constitutional Stupidities*, 17 GA. ST. U. L. REV. 359, 365-66 (2000) (recalling a heated discussion on the Twenty-Second Amendment in the larger context of American constitutional history and culture).

286. See JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT*, 46 (1986)

terms, despite his likely reelection had he declared his candidacy for a third time, Washington is said to have adopted the model of Cincinnatus, the great Roman military commander who conquered pretenders to the throne and refused a coronation, turning away from political glory to return to his farm.²⁸⁷ After the revolution, Washington, having commanded his people to victory in war, answered the call to preside over the Constitutional Convention and subsequently become the first American President.²⁸⁸ The Founders wished to instill this noble ideal of disinterested public service—reflected in protagonists from the Roman era and mirrored by Washington—upon the citizens of the thirteen colonies that would ultimately strike common cause to form the United States.²⁸⁹ As one scholar puts it, the Washingtonian paradigm is “to subordinate personal ambition for the public good.”²⁹⁰ This Washingtonian standard carried great force until Roosevelt’s departure from the long-standing two-term convention,²⁹¹ so much so that only a few years removed from the divisiveness of the Civil War, a bipartisan congressional resolution voiced piercing disapproval of then-President Ulysses S. Grant’s intimations of interest in running for a third term in the election of 1876.²⁹² Washington’s voluntary retirement after two consecutive terms of presidential service was a shaping moment in American history because it triggered the land’s first contested presidential election in 1796 upon Washington’s retirement.²⁹³

As a textual matter, the Twenty-Second Amendment may be understood as constituting two proscriptions and two exceptions. First, the two-term clause is unmistakable: “No person shall be elected to the office of the President more than twice”²⁹⁴ Second, no one who has succeeded to the Presidency and has either become or acted as President for more than two years may be elected President on her own merits more than once.²⁹⁵ This means, for instance, that should a President

(discussing presidential tenure).

287. See Jack H. McCall, Jr. & Brannon P. Denning, *Mission Im-Posse-ble: The Posse Comitatus Act and the Use of the Military in Domestic Law Enforcement*, TENN. B.J., June 2003, at 26, 27 (discussing civilian control over the military as a fundamental aspect of American democracy); see also Ronald D. Rotunda, *Rethinking Term Limits for Federal Legislators in Light of the Structure of the Constitution*, 73 OR. L. REV. 561, 566 (1994) (discussing the origin of term limits in American democracy beginning with George Washington).

288. See J. Clarence Thomas, *Civility and Public Discourse*, 31 NEW ENG. L. REV. 515, 518 (1997) (discussing George Washington’s understanding of the importance of civility).

289. See Bruce P. Frohnen, *Law’s Culture: Conservatism and the American Constitutional Order*, 27 HARV. J.L. & PUB. POL’Y 459, 469 (2004) (describing the Founders’ search for historic models of human conduct to serve as examples for the new nation).

290. Colleen J. Shogan, *The Moralists and the Cavalier: The Political Rhetoric of Washington and Jefferson*, 28 N. KY. L. REV. 573, 581 (2001).

291. See JAMES T. FLEXNER, *GEORGE WASHINGTON: ANGUISH AND FAREWELL 1793-1799*, 304 (1972) (“Washington’s decision to retire at the end of his second term was so climatic an act that the precedent he thus established was not violated for more than a century and then restored by a Constitutional amendment.”).

292. Stephen W. Stathis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?*, 7 CONST. COMMENT. 61, 64 (1990).

293. Freeman, *supra* note 151, at 1968.

294. U.S. CONST. amend. XXII, § 1.

295. *Id.* (“[N]o person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.”).

succumb to death on Inauguration Day, the Vice President would succeed to the Presidency but would be barred from election to the Presidency more than once because she would have served more than two years of her successor's mandate. Conversely, should a second-term President die the day after the sixth anniversary of her inauguration, the succeeding Vice President could still freely serve as President for two additional elected terms. It appears, then, that under any imaginable circumstance, a successor Vice President may fulfill no more than ten years of presidential service. The amendment also includes two exceptions to these express proscriptions: its restrictions do not apply to either the President in office at the time the amendment was proposed or the President in office at ratification. Harry Truman was President in both cases—March 24, 1947, and February 27, 1951, respectively²⁹⁶—and therefore exempt from the two-term restriction.²⁹⁷

The Twenty-Second Amendment was passed just as effortlessly as it reads. Following a petition initiated by five states,²⁹⁸ Democrats and Republicans at the Capitol joined forces to win approval for the amendment, without which Republican majorities in both houses of Congress would have been insufficient to achieve the obligatory two-thirds prerequisite for transmission onto the states.²⁹⁹ Each of the several states—except Massachusetts and Oklahoma³⁰⁰—subsequently ratified the Twenty-Second Amendment with little opposition and debate.³⁰¹ Indeed, it “slipped through the Congress and the state legislatures almost without notice.”³⁰² But not everyone cheered its ratification.³⁰³ Most prominently, perhaps, then-President Truman condemned the amendment for enfeebling and rendering powerless a second-term President, who, at the hands of the Twenty-Second Amendment, lost “a lot of influence” and faced the daily rigor of his presidential duties “with one hand tied behind his back.”³⁰⁴

296. Brendon Troy Ishikawa, *The Stealth Amendment: The Impending Ratification and Repeal of a Federal Budget Amendment*, 35 TULSA L.J. 353, 363 n.53 (2000).

297. The second exception also extended to anyone who may have succeeded to the Presidency and either became or acted as President. See U.S. CONST. amend. XXII, § 1 (“But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person *who may be holding the office of President, or acting as President*, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.”) (emphasis added).

298. Elizabeth C. Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 SYRACUSE L. REV. 139, 198 (1998).

299. Boudreaux & Pritchard, *supra* note 184, at 151.

300. Julia C. Wommack, *Congressional Reform: Can Term Limitations Close the Door on Political Careerism?*, 24 ST. MARY'S L.J. 1361, 1379 n.60 (1993).

301. Stanley H. Friedelbaum, *Term Limits, the State Courts, and National Dominion: The Vicissitudes of American Federalism*, 60 ALB. L. REV. 1567, 1568 (1997).

302. Henry Steele Commager, *To Form a Much Less Perfect Union*, N.Y. TIMES, July 14, 1963, (Magazine), at 5.

303. See, e.g., JAMES W. DAVIS, *THE AMERICAN PRESIDENCY* 405-07 (2d ed. 1995) (discussing criticisms of amendment and concluding that amendment was “[p]assed more as a result of political spite”).

304. THOMAS E. CRONIN, *THE STATE OF THE PRESIDENCY* 305 (1975).

Scholarly opinion on the Twenty-Second Amendment is emphatically unsettled.³⁰⁵ Though some view the amendment as anti-democratic because it constrains citizen choice,³⁰⁶ the counterargument is equally powerful, perhaps more so in fact: the people have chosen, through an exceptional process of higher-ordered democratic engagement, to govern themselves by its terms.³⁰⁷ To some, the Twenty-Second Amendment has not gone quite far enough to prevent an imperial Presidency.³⁰⁸ Yet one scholar has suggested that the intensely partisan backdrop within which Congress proposed and the states ratified the Twenty-Second Amendment renders the amendment objectionable at best and illegitimate at worst.³⁰⁹ Others have argued that the amendment removes electoral accountability from a reelected President.³¹⁰ Still others contend that it compromises presidential authority³¹¹ or that it shifts the balance of power from the President to the legislature.³¹²

Though the targets of the Twenty-Second Amendment were undeniably the Presidency and Roosevelt, the amendment has forever changed the Vice Presidency in at least two ways. The first reverberates in the world of politics. Prior to the Twenty-Second Amendment, a Vice President who held presidential hopes found herself in an awkward holding pattern. On the one hand, she could not overtly chart her trajectory to the Presidency. She risked being viewed as too ambitious—or worse yet, disloyal—if she actively organized a future run for the White House or expressed any interest in the Presidency beyond an uncontroversial statement about her eagerness to serve in whatever capacity her fellow citizens wish. On the other hand, she could not truthfully disclaim any interest at all in the Presidency and, in the process cede organizational and further advantages to other aspirants to the office. The Twenty-Second Amendment pulled Vice Presidents from this political purgatory insofar as the amendment liberated a second-term Vice President to openly seek her party's nomination, free from cries of

305. See, e.g., John J. Gibbons, *Intentionalism, History, and Legitimacy*, 140 U. PA. L. REV. 613, 628 (1991) (stating that “the wisdom of the Twenty-Second [Amendment] . . . is also far from unanimously acknowledged”).

306. See, e.g., DAVIS, *supra* note 303, at 406 (arguing amendment is anti-democratic because it constrains choice of party and electorate).

307. See, e.g., Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 37 (2000) (“Most important, whatever limit the [Twenty-Second] Amendment imposes on the people is self-imposed, resulting from a broadly inclusive democratic process featuring a series of extraordinary votes.”).

308. See, e.g., Lawrence L. Schack, Note, *A Reconsideration of the Single, Six-Year Presidential Term in Light of Contemporary Electoral Trends*, 12 J.L. & POL. 749, 754-59 (1996) (discussing arguments in favor of six-year, single-term model for Presidency).

309. Carlos E. González, *Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution?*, 80 WASH. U. L.Q. 127, 207-09 (2002) (“Rather than an expression of a deliberated and discernible popular consensus, the Twenty-Second Amendment was the result of partisan politics.”).

310. See, e.g., Harry H. Wellington, *Term Limits: History, Democracy and Constitutional Interpretation*, 40 N.Y.L. SCH. L. REV. 833, 852 (1996) (arguing that “electoral accountability had been, and still is in the first term, an important check on that office.”).

311. See, e.g., Jeremy Paul, *Four More Years? Clinton Impeachment Makes the Case for Repeal of the 22nd Amendment—Really*, LEGAL TIMES, Feb. 22, 1999, at 27 (stating that second-term presidents struggle to govern effectively).

312. James Randolph Peck, Note, *Restoring the Balance of Power: Impeachment and the Twenty-Second Amendment*, 8 WM. & MARY BILL RTS. J. 759, 787-88 (2000).

betrayal, duplicity, and disloyalty to the incumbent President.³¹³ Second, the Twenty-Second Amendment has also palliated fears of an imperial Vice Presidency because an outgoing or former two-term President may not return to serve her country as Vice President.

This latter point is more than an academic diversion. Indeed, lawyers, scholars, and lay persons alike have debated whether the Constitution permits—and, if it does, whether it *should* permit—the Vice Presidency to serve as a vehicle through which a two-term President might ascend to the Presidency for a third term. These very issues were at the fore of political discourse as recently as the 2000 and 2004 presidential elections. Pundits first wondered whether Democratic presidential candidate Al Gore could name outgoing two-term President Bill Clinton as his nominee for Vice President.³¹⁴ The same question arose four years later, with John Kerry substituting for Al Gore at the top of the ticket.³¹⁵ One cannot know whether President Clinton would have even considered playing second fiddle to a President Gore or Kerry, but what is beyond question is that he was no fan of the Twenty-Second Amendment.³¹⁶

In any event, it appears that a two-term President may not, as a matter of constitutional law, accept the vice presidential nomination. Recall the language of Section 1 of the Twenty-Second Amendment, which states: “No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.”³¹⁷ By its plain and clear terms, there is no doubt that a two-term President may not run for the Presidency a third time, for were she to win, she would be “elected to the office of the President more than twice” in decided violation of the amendment.³¹⁸ But nowhere in its text does the Twenty-Second Amendment declare or even imply that a two-term President is constitutionally barred from joining the bottom half of a

313. See WITCOVER, *supra* note 1, at 404 (discussing an “unintended consequence” of the Twenty-Second Amendment).

314. For arguments that the Constitution does not forbid a Clinton Vice Presidency see Michael C. Dorf, *The Case for a Gore-Clinton Ticket*, FINDLAW, July 31, 2000, <http://www.writ.corporate.findlaw.com/dorf/20000731.html>, Tod Lindberg, *Bubba's Back: Bill Clinton has a Bright Political Future*, WASH. TIMES (D.C.), Jan. 2, 2001, at A15, available at 2001 WLNR 387005; Jack Shafer, *Vice President Bill Clinton? Take 3*, SLATE, Sept. 7, 2000, <http://slate.msn.com/toolbar.aspx?action=print&id=1006013>. For examples of counter-argument, see David Greenberg, *The Blair House Project: Choosing the Presidential Running Mates*, SLATE, Mar. 24, 2000, <http://slate.msn.com/toolbar.aspx?action=print&id=77739>; Tony Mauro, *Would the Constitution Prevent a Gore-Clinton Ticket?*, LEGAL INTELLIGENCER, July 21, 2000, at 7.

315. See *Could Clinton be VP?: Politics: Eligibility Under Constitution Weighed in Search for Kerry's No.2*, LONG BEACH PRESS-TELEGRAM (Cal.), Mar. 4, 2004, at A9, available at 2004 WLNR 1700105 (noting that Constitution is unclear about constitutionality of Clinton Vice Presidency); Stephen Gillers, *The Next Best Thing to Being President*, N.Y. TIMES, Mar. 3, 2004, at A23, available at 2004 WLNR 5392116 (arguing that Constitution does not forbid Clinton Vice Presidency); Joshua Spivak, *Bill Clinton for Vice President? Forget It.*, HIST. NEWS NETWORK, Mar. 22, 2004, <http://hnn.us/articles/4165.html> (noting that scholars disagree about constitutionality of Clinton Vice Presidency).

316. See, e.g., James C. Ho, *Employment for Ex-Presidents*, 7 GREEN BAG 2D 3, 3 (2003) (describing President Clinton's proposal to amend the Twenty-Second Amendment “to forbid only three *consecutive* terms as President”).

317. U.S. CONST. amend. XXII, § 1.

318. *Id.*

presidential ticket. To unearth this prohibition, we must return to the Twelfth Amendment.

The very last sentence of the Twelfth Amendment seals the fate of a two-term President with designs on the Vice Presidency.³¹⁹ Its drafters appear to have taken great care to state that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”³²⁰ The formative phrase is “constitutionally ineligible,” and it leads to the question whether a two-term President is constitutionally eligible for the Presidency. The answer is yes, according to a powerful article penned by Bruce Peabody and Scott Gant, who argue that the Twelfth Amendment’s reference to constitutional eligibility “likely pointed only to” the Constitution’s eligibility provision found in Article II.³²¹ This eligibility clause establishes that the Presidency is not open to anyone who is not an American citizen, has not reached thirty-five years of age, or has not resided in the United States for at least fourteen years.³²² This does not, however, tell the whole story and therefore cannot be the dispositive answer.

Granted, the Twelfth Amendment preceded the Twenty-Second Amendment. And, yes, it would be quite an exercise in originalism to argue that the Framers of the Twelfth Amendment intended to apply its eligibility clause precisely to such circumstances as those contemplated by the Twenty-Second Amendment.³²³ Yet, it would likewise be unsound to rely on a narrow clause-bound, textualist analysis of the Twenty-Second Amendment to argue that the drafters’ deliberate choice to prevent a candidate from being “elected to the office of the President more than twice” reflects their favorable regard upon a three-term Presidency via the Vice Presidency. It may be more appropriate—and constitutionally faithful—to abandon the practice of reading “the words of the Constitution in order, tracking the sequence of clauses as they appear in the document itself” and instead read “the words of the Constitution in a dramatically different order, placing textually nonadjoining clauses side by side for careful analysis.”³²⁴ Adopting this practice—Akhil Amar’s *intratextualism*—would advise reading the eligibility requirements in Article II alongside the Twelfth and Twenty-Second Amendments. Doing so may yield a different conclusion than the one generated by a myopic analysis of constitutional provisions on their own, each independent of other provisions whether they came before or after. It is a mistaken strategy to focus on what may admittedly be the distracting temporal element of chronologically-ratified amendments. Its only consequence is to erroneously reject a

319. *Id.* amend. XII (“But no person constitutionally ineligible to the office of the President shall be eligible to that of Vice-President of the United States.”).

320. *Id.*

321. Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 619 (1999).

322. U.S. CONST. art. II, § 1, cl. 5 (“No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”).

323. See Peabody & Gant, *supra* note 321, at 619 (finding Twelfth Amendment “could not have originally meant to preclude someone from being Vice President who had been elected President twice”).

324. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788 (1999).

proper, holistic reading of the full text of the Constitution which, inclusive of amendments, counsels that a two-term President may not again become President by serving as Vice President and succeeding an incapacitated or disabled President to the White House.

4. Vice Presidential Succession

More than any other amendment, the Twenty-Fifth Amendment makes plain the modern significance of the Vice Presidency. In addition to establishing procedures for substituting the Vice President or another official in the line of succession into the Presidency when the President is unable to discharge her office or is removed, the Twenty-Fifth Amendment sets forth a congressional confirmation process to fill a vice presidential vacancy.³²⁵ As one scholar has observed, though vice presidential vacancies once may have been nondescript events in American history—the Vice Presidency was unoccupied during sixteen of the thirty-six presidential administrations preceding the amendment—vice presidential vacancies are no longer tolerable.³²⁶

325. The Twenty-Fifth Amendment States:

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, with twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

U.S. CONST. amend. XXV.

326. Michael Nelson, Op-Ed, *America's Understudy*, PALM BEACH POST (Fla.), May 26, 1991, at E1, available at 1991 WLNR 1228793 ("Prior to 1967, seven vice presidential deaths, one vice presidential resignation and eight presidential deaths had left the nation without a vice president during 16 of 36 presidential administrations. Section 2 [of the Twenty-Fifth Amendment] stipulates that, in the modern era, such vacancies are intolerable: the president shall nominate a new vice president when a vacancy in the office occurs, subject to confirmation by both houses of Congress.").

Though the United States had long appreciated the precariousness of a situation in which any doubt surfaced as to who held the Presidency,³²⁷ filling a vice presidential vacancy never rose to the level of national urgency. It took a presidential assassination during a time of national uncertainty to befall an air of crisis upon the people and their elected representatives. Congress and the legislatures of the several states³²⁸ led the charge to finally enshrine this “housekeeping measure”³²⁹ within the Constitution and, at last, to quell longstanding apprehensions.³³⁰

At the height of the Cold War—only a few years removed from the Cuban Missile Crisis—the rise of nuclear weaponry, lingering uncertainty about the scope and meaning of Article II succession, and historical succession precedents all conspired to make plain the exigency of a constitutionalized system of presidential and vice presidential succession.³³¹ The Twenty-Fifth Amendment responded to the need for reliable presidential leadership in the nuclear age, in which the timetable for military action, whether offensive or defensive, was compressed into a matter of mere minutes.³³² The assassination of President John F. Kennedy in 1963 moved legislators to action and ultimately drove the new amendment.³³³

Fresh memories of the poor health of Dwight Eisenhower (Kennedy’s predecessor) highlighted the uncertain status of the nation’s leadership and confirmed the need for the amendment.³³⁴ Indeed, President Eisenhower himself had encouraged

327. David F. Hamilton, *Dedication of Birch Bayh United States Courthouse*, 37 IND. L. REV. 613, 614 (2004).

328. Mark I. Pinsky, *Disabled Pope Would Create a Dilemma for the Vatican*, ORLANDO SENTINEL, Jan. 25, 2004, at F1 (stating that “Congress and the state legislatures pushed for the [Twenty-Fifth] amendment to the U.S. Constitution”).

329. Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 987 (2002) (distinguishing constitutional amendments expressing national consensus on certain values from “housekeeping measures, such as the Twenty-Fifth Amendment, that do not speak in especially value-laden terms”).

330. Questions about dealing with the contingency of presidential incapacity arose as early as 1881, when President James Garfield was shot and lingered on for over two months. The same questions resurfaced in 1919 upon the collapse and paralyzing stroke of Woodrow Wilson, who remained in office as “a total invalid who barely left his bed and whose wife had to guide his hand when he signed formal documents” for 14 months. Harold Jackson, *Fierce Light that Beats Upon the Polyp: Focus on the Implications for the U.S. Should President Reagan Become Ill*, GUARDIAN (London), July 12, 1985, available at LEXIS (search “News & Business”; then “Individual Publications”; select “Guardian (London)”; see also Robert P. Hey, *U.S. 25th Amendment Works Well in Bush Medical Episode*, CHRISTIAN SCI. MONITOR, May 8, 1991, at 9, available at 1991 WLNR 964994 (stating that Garfield lay near death for over two months and that Wilson remained in office as “an invalid unable to lead the government” for more than one year).

331. Eric A. Richardson, Comment, *Of Presumed Presidential Quality: Who Should Succeed to the Presidency When the President and Vice President Are Gone?*, 30 WAKE FOREST L. REV. 617, 623 (1995).

332. Nicholas M. Horrock, *Ike Ailment Set Stage for Passing Reins*, CHI. TRIB., May 5, 1991, at C5.

333. Editorial, *Revisiting JFK’s Health*, TENNESSEAN, Nov. 21, 2002, at A18; Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309, 323 (1999); see also Akhil Reed Amar, *This is One Terrorist Threat We Can Thwart Now*, WASH. POST, Nov. 11, 2001, at B2 (noting the Twenty-Fifth Amendment “streamlined issues of vice presidential succession”).

334. See Richard L. Madden, *When Is Top Official’s Illness a Disability*, N.Y. TIMES, Nov. 26, 1980, at B2 (stating that approval of the Twenty-Fifth Amendment was prompted largely by illness of President Eisenhower); *The Presidency: Thinking About the Unthinkable*, ECONOMIST, Jan. 19, 1985, at 34 (“The illness of President Eisenhower and the assassination of President Kennedy led Congress to propose the [Twenty-Fifth] Amendment, adopted in 1967.”); Michael White, *Reagan’s Operation Gives Bush a Brief Taste of*

his contemporaries to adopt contingencies to respond to presidential incapacity,³³⁵ and went as far as devising his own agreement on presidential incapacity with his Vice President, Richard Nixon.³³⁶ New York Representative Emanuel Celler picked up on this issue as well and ordered a congressional study on presidential disability.³³⁷ Thus, what began as informal conversations between Eisenhower and his vice president³³⁸ grew into congressional hearings.³³⁹ In due course, this prompted an amendment bill in 1965,³⁴⁰ and culminated in the passage of the Twenty-Fifth Amendment in 1967.³⁴¹

Birch Bayh, a U.S. Senator from Indiana from 1963 to 1981, was a leading advocate of the amendment.³⁴² Even a cursory review of American presidential history reveals the wisdom of constitutionalizing a procedure for filling vice presidential vacancies and attending to presidential disability. In the twentieth century alone, fourteen of nineteen American Presidents lived with significant illnesses while in office. For example, Lyndon B. Johnson and Ronald Reagan had cancer; Woodrow Wilson had kidney disease; William McKinley, William Howard Taft, Warren Harding, Calvin Coolidge, Franklin D. Roosevelt, Harry Truman, and Dwight Eisenhower were diagnosed with coronary heart disease; Wilson, Harding, Franklin D. Roosevelt, and Eisenhower each suffered strokes; and Theodore Roosevelt, Franklin D. Roosevelt, Truman, Eisenhower, Johnson, and Reagan all endured surgery on at least one occasion during their presidency.³⁴³ The Wilson Presidency is perhaps the most

Elusive Power, GUARDIAN (London), July 15, 1985, available at LEXIS (search "News & Business"; then "Individual Publications"; select "Guardian (London)") (stating that the Twenty-Fifth Amendment was passed in part "by the wake of Ike's prolonged illnesses").

335. Stephanie Harvin, *Chief Executives Often Relied on Spin Doctors*, POST & COURIER (Charleston, SC), Feb. 18, 2002, at D1 ("Eisenhower began to push the [Twenty-Fifth] Amendment that spells out the specific order of succession in case of incapacity, a far greater problem than what to do if a president dies.").

336. Charles S. Clark, *A President's Health*, CHI. TRIB., May 22, 1992, at C7 ("Eisenhower's chief legacy on the health issue was a letter of agreement he and Nixon signed stipulating that Nixon would decide whether the president could no longer perform his duties, and the president would decide when he was capable of resuming them.").

337. John D. Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481, 489 (1995).

338. Alvin S. Felzenberg, *The Modern Veep*, NAT'L REV. ONLINE, May 21, 2001 (Guest Comment), available at LEXIS (search "News & Business"; then "Individual Publications"; select "National Review") (stating that the amendment "began from conversations between Nixon and a recovering Eisenhower over what to do when the president becomes too ill to perform his duties").

339. William Reville, *Presidential Illness: Is it Ever Right to Tell a Lie?*, IRISH TIMES, Nov. 15, 1999, at 13 ("The US Congress was spurred by Eisenhower's illness to initiate hearings that led to the passage of the [Twenty-Fifth] Amendment to the Constitution, finally ratified in 1967.").

340. 79 Stat. 1327 (1965).

341. See Feerick, *supra* note 337, at 487-98 (recounting the full history of Twenty-Fifth Amendment).

342. Mary C. Daly, *Teaching Integrity in the Professional Responsibility Curriculum: A Modest Proposal for Change*, 72 FORDHAM L. REV. 261, 264 (2003).

343. Herbert L. Abrams, *The Vulnerable President and the Twenty-Fifth Amendment, with Observations on Guidelines, a Health Commission, and the Role of the President's Physician*, 30 WAKE FOREST L. REV. 453, 461 (1995). Thus far, the only twenty-first century President addition to the list of Presidents who have undergone an invasive medical procedure while in office is George W. Bush. See Elisabeth Bumiller & Lawrence K. Altman, *Bush Returns to Activities After 20-Minute Procedure Finds No Polyps on His Colon*, N.Y. TIMES, June 30, 2002, at 16, available at 2002 WLNR 4046710 ("President Bush transferred the powers of the presidency to Vice President Dick Cheney for two hours and 15 minutes this morning while under heavy

disconcerting example of all. During his illness of several months, which spanned one of the most critical periods in American history,³⁴⁴ Wilson remained isolated in his private quarters while, according to Birch Bayh, First Lady Edith Wilson and a presidential aide essentially steered the ship of state.³⁴⁵

The original constitutional clause on presidential succession accounted for the President's removal, death, resignation, or inability to discharge the office.³⁴⁶ But it had been designed chiefly to respond to presidential death—especially an instantaneous or near instantaneous death³⁴⁷—not presidential disability. As a general matter, the Twenty-Fifth Amendment is the marriage of law and politics in the service of a necessary constitutional safeguard. Without it, presidential political advisors—and Presidents themselves—may, under certain circumstances, otherwise be reluctant to sanction any temporary transfer of power because of the perceived or actual political damage such a transfer might engender.³⁴⁸ The amendment codifies the liberal democratic principle that a transfer of executive authority should proceed in a predetermined orderly fashion.³⁴⁹ It also promotes stability in the affairs of the state insofar as it defuses the possibility that the Presidency will swing from one political party to another as a successor moves into the office. This had been possible prior to the Twenty-Fifth Amendment. When the Vice Presidency was vacant, a presidential death or incapacity would thrust the Speaker of the House into the Presidency, and there was of course no assurance that the Speaker and the President shared the same party allegiance.³⁵⁰

sedation during a colonoscopy at Camp David . . ."). During the President's temporary incapacity, the Vice President served as "acting president." Elisabeth Bumiller, *Bush to Undergo Colon Procedure*, N.Y. TIMES, June 29, 2002, at A1, available at 2002 WLNR 4079729; Tamara Lipper, *President Cheney?*, NEWSWEEK, July 8, 2002, at 8, available at 2002 WLNR 8855222; David Shribman, *He is the Very Model of a Modern 2d Fiddle*, BOSTON GLOBE, July 2, 2002, at A3, available at 2002 WLNR 2569483.

344. See Arthur S. Link, *Woodrow Wilson: A Cautionary Tale*, 30 WAKE FOREST L. REV. 585, 586-89 (1995) (discussing political climate during Wilson's illness).

345. See Birch Bayh, *The Twenty-Fifth Amendment: Dealing with Presidential Disability*, 30 WAKE FOREST L. REV. 437, 450 (1995) (stating that the First Lady and the President's chief aide controlled access to the President).

346. U.S. CONST. art. II, § 1, cl. 6 ("In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.").

347. Calvin Bellamy, *Presidential Disability: The Twenty-Fifth Amendment Still an Untried Tool*, 9 B.U. PUB. INT. L.J. 373, 374 (2000).

348. See Nancy Kassop, *When Law and Politics Collide: Presidents and the Use of the Twenty-Fifth Amendment*, 35 PRESIDENTIAL STUD. Q. 147 (2005), available at 2005 WLNR 3727398 (concluding that White House counsel typically advise Presidents to adhere closely to the spirit and letter of the Twenty-Fifth Amendment, while Presidents hesitate to sanction a temporary transfer of power for at least three reasons: (1) the President appears weak; (2) the Vice President becomes more visible and, perhaps, more powerful; and (3) the possibility arises that the President may be unable to reclaim her office).

349. Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 93 (1997).

350. Amanda G. Altman, Note, *Party Poopers: The Supreme Court Overlooks the Party in Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 46 ST. LOUIS U. L.J. 1001, 1026-27 (2002).

Section one of the Twenty-Fifth Amendment,³⁵¹ which affirms that the Vice President does not *act* as President but in fact *becomes* President when she succeeds to the Presidency, repeats the fundamental substance of Section three of the Twentieth Amendment,³⁵² which constitutionalizes the Tyler precedent.³⁵³ This first section of the amendment forecloses a special election to fill a presidential vacancy, a possibility that had once seemed mandated by Article II.³⁵⁴ Section two of the Twenty-Fifth Amendment outlines the procedure for filling a vice presidential vacancy: the Senate and the House of Representatives must, by majority vote, confirm the President's vice presidential nominee.³⁵⁵ In the first use of this constitutional provision, the Senate and the House approved President Nixon's nomination of Gerald Ford to the Vice Presidency by margins of 92 to 3 and 387 to 35, respectively.³⁵⁶ When Ford later became President and nominated Nelson Rockefeller to the Vice Presidency, the Senate and House approved the choice by respective votes of 90 to 7 and 287 to 128.³⁵⁷ Taking no fewer than 121 days,³⁵⁸ the Rockefeller confirmation may be said to have undermined the very purpose of the amendment, which was to establish a speedy procedure ensuring that the Presidency will have an identifiable successor.³⁵⁹

Sections three and four of the Twenty-Fifth Amendment relate to presidential disability.³⁶⁰ Section three stipulates that the President may authorize the Vice President to act as President when the President determines that she is temporarily unable to fulfill her duties.³⁶¹ The fourth section empowers the Vice President, along with the support of a majority of the cabinet, to temporarily relieve the President of her office.³⁶² In such a case, the Vice President assumes the Presidency as acting President until the President declares that she is fit to resume her presidential duties, subject to a congressional procedure for resolving disagreements about presidential disability.³⁶³

351. U.S. CONST. amend. XXV, § 1. See *supra* note 325 for the text of the Twenty-Fifth Amendment.

352. *Id.* amend. XX, § 3 ("If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President.").

353. See *supra* Subsection III.B.2 for a discussion of the Tyler precedent.

354. See Adam M. Dodek, *When Death Strikes the Nation: The Assassination of Prime Minister Rabin and the Problem of Succession*, 19 LOY. L.A. INT'L & COMP. L. REV. 57, 75 n.113 (1996) (citing ALLAN P. SINDLER, UNCHOSEN PRESIDENTS 17 (1976)).

355. U.S. CONST. amend. XXV, § 2. See *supra* note 325 for the text of the Twenty-Fifth Amendment.

356. Benton Becker, *The History of the Nixon Pardon*, 30 CUMB. L. REV. 31, 32 (2000).

357. GOLDSTEIN, *supra* note 7, at 246.

358. Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 128 (1995).

359. Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791, 849 (1999).

360. U.S. CONST. amend. XXV, §§ 3-4. In the first real test of the Twenty-Fifth Amendment's provision for presidential incapacity, aides to President Ronald Reagan refused to invoke the procedures for elevating the Vice President to the rank of acting President despite the apparent incapacitation of the President. Richard A. Knox, *Medical Specialists Debate Electorate's Need to Know*, BOSTON GLOBE, Oct. 15, 1996, at A13 ("Yet the first serious test of the amendment failed when Reagan's aides refused to invoke it, despite the fact that the president had lost half his blood volume and was subsequently incapacitated by the effects of anesthesia, trauma, psychoactive painkillers and profound fatigue.").

361. U.S. CONST. amend. XXV, § 3. See *supra* note 325 for the text of the Twenty-Fifth Amendment.

362. U.S. CONST. amend. XXV, § 4. See *supra* note 325 for the text of the Twenty-Fifth Amendment.

363. U.S. CONST. amend. XXV, § 4. See *supra* note 325 for the text of the Twenty-Fifth Amendment.

This section exhibits a certain measure of fused powers—as opposed to the traditional American model of separated powers—insofar as it authorizes Congress to determine, in certain instances, whether the President is fit to serve.³⁶⁴

Joel Goldstein argues that Section two of the Twenty-Fifth Amendment exhibits several shortcomings: (1) there is no accepted standard for congressional ratification of the President's nomination; (2) Representatives and Senators may be tempted to put partisanship ahead of national interest and therefore delay or otherwise disrupt the vice presidential appointment process; (3) the confirmation process delves into the nominee's personal life; and (4) the procedure allows a vice presidential nominee to be confirmed and perhaps subsequently ascend to the Presidency via succession without validation from the electorate.³⁶⁵

Another observer argues that, despite its extraordinary specificity and careful attention to detail,³⁶⁶ the Twenty-Fifth Amendment fails to address a large universe of eventualities.³⁶⁷ For instance, the amendment is silent on non-presidential disability, specifically about what follows when a Vice President³⁶⁸ or other public official in the line of succession³⁶⁹ is unable to discharge her duties. Equally controversial is whether, in the event of both presidential and vice presidential vacancies, an acting President could nominate herself to the Vice Presidency via the Twenty-Fifth Amendment's congressional procedures in order to ultimately become—and no longer merely to act as—President.³⁷⁰

Finally, with respect to presidential disability, the Twenty-Fifth Amendment does not identify who should conduct the medical evaluation that will uncover the requisite facts permitting the Vice President and the cabinet to make an informed decision about whether the President is in fact fit to serve.³⁷¹ Furthermore, it is unclear whether a President could invoke the Twenty-Fifth Amendment in order to serve a short sentence

364. See Elbert P. Tuttle & Dean W. Russell, *Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the "Blending" of Powers*, 37 EMORY L.J. 587, 589 n.10 (1988) (stating that the Twenty-Fifth Amendment "evidences the blending of powers by providing for a congressional determination of the fitness for duty of the President in certain situations").

365. GOLDSTEIN, *supra* note 7, at 247.

366. *But see* Peter Jeremy Smith, *Commas, Constitutional Grammar, and the Straight-Face Test: What if Conan the Grammarian Were a Strict Textualist?*, 16 CONST. COMMENT. 7, 18 n.32 (1999) (arguing that the Twenty-Fifth Amendment contains superfluous commas).

367. See Thomas V. Dibacco, *Constitutional Tinkering: A Last Resort*, ORLANDO SENTINEL TRIB., Apr. 14, 1991, at G3 ("What is more, the inordinate detail of the amendment, making it one of the longest, still may not cover eventualities that are best left to statutes and judicial interpretation.").

368. See Richard E. Cohen, *The Rules of Vice Presidential Succession*, 33 NAT'L J. 727 (2001), available at LEXIS (search "News & Business"; then "Individual Publications"; select "National Journal" (stating that the Twenty-Fifth Amendment is silent about what transpires when a Vice President becomes incapacitated in office)).

369. See Paul Taylor, *Proposals to Prevent Discontinuity in Government and Preserve the Right to Elected Representation*, 54 SYRACUSE L. REV. 435, 471-72 (2004) ("Although Section 4 of the Twenty-Fifth Amendment sets out the rules by which the President may be determined to be incapacitated, there are no rules governing how the incapacitation of those below the level of President is to be determined.").

370. Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 162 n.40 (1995).

371. Bert E. Park, *Protecting the National Interest: A Strategy for Assessing Presidential Impairment Within the Context of the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 593, 594 (1995).

for a misdemeanor,³⁷² to contest a trial in a criminal proceeding,³⁷³ or because a momentary lapse of judgment had so severely compromised her immediate authority that she was temporarily unable to govern.³⁷⁴ Nevertheless, in the face of these and other arguable weaknesses,³⁷⁵ it may be sufficient, as one author has noted, that Article II authorizes Congress to pass legislation on presidential succession.³⁷⁶ Similarly, a recent working group has conceded that although guidelines for the application of the amendment may need to be strengthened, the Twenty-Fifth Amendment does not require revision.³⁷⁷

C. Political Status

As the evolving constitutional structure of the Vice Presidency has ripened the office into a mighty station of policy development and political advocacy, it has also propelled its occupant into certain contention for her party's presidential nomination, if not the Presidency. According to Joel Goldstein, the foremost authority on the Vice Presidency, three features of the Vice Presidency help explain this correlation: (1) occupying the Vice Presidency guarantees a substantial lead in a presidential primary because its occupant commands instant name recognition, unlike other public officers who, at great expense of time and resource, must divide their time between introducing themselves to the public and national media while pleading their case to the electorate;³⁷⁸ (2) discharging official vice presidential duties attracts favorable media coverage insofar as it locates the Vice President "within a presidential context," thus outfitting the aspiring presidential candidate in a measure of stately legitimacy,³⁷⁹ and (3) exploiting the Vice Presidency as a pulpit from which to address the nation on a variety of policy and other issues allows the Vice President to double as a leading party spokesperson.³⁸⁰ Nothing appears to pierce the armor enveloping Goldstein's perceptive thesis.

372. Eric M. Freedman, *On Protecting Accountability*, 27 HOFSTRA L. REV. 677, 709-10 (1999).

373. Keith King, *Indicting the President: Can a Sitting President Be Criminally Indicted?*, 30 SW. U. L. REV. 417, 426 (2001).

374. See Scott E. Gant, *Presidential Inability and the Twenty-Fifth Amendment's Unexplored Removal Provisions*, 1999 L. REV. MICH. ST. U. DETROIT C.L. 791, 797 (1999) ("What if one or a series of political judgments so undermined the President's immediate authority that he considered himself temporarily unable to govern (but not permanently unfit)?").

375. See, e.g., Philip Bobbitt, *Parlor Game*, 12 CONST. COMMENT. 151, 153 (1995) (characterizing the Twenty-Fifth Amendment as one of the Constitution's "artlessly drafted provisions" because it "enabled a discredited President Nixon to name his successor").

376. James C. Ho, *Ensuring the Continuity of Government in Times of Crisis: An Analysis of the Ongoing Debate in Congress*, 53 CATH. U. L. REV. 1049, 1070-71 (2004) ("Though some have noted weaknesses and defects in the Twenty-fifth Amendment, the authorization of congressional legislation to deal with Presidential succession in Article II should be sufficient.").

377. See generally Robert E. Gilbert, *The Contemporary Presidency: The Twenty-Fifth Amendment: Recommendations and Deliberations of the Working Group on Presidential Disability*, 33 PRESIDENTIAL STUD. Q. 877 (2003), available at 2003 WLNR 10055004 (outlining recommendations of Working Group on Presidential Disability).

378. GOLDSTEIN, *supra* note 7, at 255-58.

379. *Id.* at 259-62.

380. *Id.* at 262-64.

Consider that fourteen of the forty-three Presidents in American history had formerly held the Vice Presidency. The first Vice President to ascend to the Presidency was John Adams,³⁸¹ followed sequentially, though not consecutively, by Thomas Jefferson,³⁸² Martin Van Buren,³⁸³ John Tyler,³⁸⁴ Millard Fillmore,³⁸⁵ Andrew Johnson,³⁸⁶ Chester Arthur,³⁸⁷ Theodore Roosevelt,³⁸⁸ Calvin Coolidge,³⁸⁹ Harry

381. Adams was Vice President under George Washington from April 21, 1789 to March 4, 1797 and President from March 4, 1797 to March 4, 1801. For more on Adams, see JOSEPH J. ELLIS, *PASSIONATE SAGE: THE CHARACTER AND LEGACY OF JOHN ADAMS* (2d ed. 2001); JOHN ADAMS AND THE FOUNDING OF THE REPUBLIC (Richard Alan Ryerson ed., 2001); DAVID MCCULLOUGH, *JOHN ADAMS* (2001).

382. Jefferson was Vice President under John Adams from March 4, 1797 to March 4, 1801 and President from March 4, 1801 to March 4, 1809. For more on Jefferson, see JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* (2d ed. 1998); DUMAS MALONE, *JEFFERSON AND THE ORDEAL OF LIBERTY* (1962). Aaron Burr and George Clinton served successively as Vice Presidents under Jefferson from March 4, 1801 to March 4, 1805 and from March 4, 1805 to March 4, 1809, respectively. For more on Burr, see BUCKNER F. MELTON, JR., *AARON BURR: CONSPIRACY TO TREASON* (2002); HERBERT S. PARMET & MARIE B. HECHT, *AARON BURR: PORTRAIT OF AN AMBITIOUS MAN* (1967). For more on Clinton, see JOHN P. KAMINSKI, *GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC* (1993).

383. Van Buren was Vice President under Andrew Jackson from March 4, 1833 to March 4, 1837 and President from March 4, 1837 to March 4, 1841. For more on Van Buren, see DONALD B. COLE, *MARTIN VAN BUREN AND THE AMERICAN POLITICAL SYSTEM* (1984); ROBERT V. REMINI, *MARTIN VAN BUREN AND THE MAKING OF THE DEMOCRATIC PARTY* (1959); JOEL H. SILBEY, *MARTIN VAN BUREN AND THE EMERGENCE OF AMERICAN POPULAR POLITICS* (2002). Richard Johnson served as Vice President under Van Buren from March 4, 1837 to March 4, 1841. For more on Johnson, see LELAND WINFIELD MEYER, *THE LIFE AND TIMES OF COLONEL RICHARD M. JOHNSON OF KENTUCKY* (1967).

384. Tyler was Vice President under William H. Harrison from March 4, 1841 to April 4, 1841 and President from April 4, 1841 to March 4, 1845. The Vice Presidency was vacant during the Tyler Presidency. For more on Tyler, see DAN MONROE, *THE REPUBLICAN VISION OF JOHN TYLER* (2003).

385. Fillmore was Vice President under Zachary Taylor from March 4, 1849 to July 9, 1850 and President from July 9, 1850 to March 24, 1853. The Vice Presidency was vacant during the Fillmore Presidency. For more on Fillmore, see ROBERT J. RAYBACK, *MILLARD FILLMORE: BIOGRAPHY OF A PRESIDENT* (1992).

386. Andrew Johnson was Vice President under Abraham Lincoln from March 4, 1865 to April 15, 1865 and President from April 15, 1865 to March 4, 1869. The Vice Presidency was vacant during the Johnson Presidency. For more on Johnson, see HANS L. TREFOUSSE, *ANDREW JOHNSON: A BIOGRAPHY* (2d ed. 1997).

387. Arthur was Vice President under James A. Garfield from March 4, 1881 to September 19, 1881 and President from September 19, 1881 to March 4, 1885. The Vice Presidency was vacant during the Arthur Presidency. For more on Arthur, see THOMAS C. REEVES, *GENTLEMAN BOSS: THE LIFE OF CHESTER ALAN ARTHUR* (2d ed. 1991).

388. Theodore Roosevelt was Vice President under William McKinley from March 4, 1901 to September 14, 1901 and President from September 14, 1901 to March 4, 1909. For more on Roosevelt, see JOHN MORTON BLUM, *THE REPUBLICAN ROOSEVELT* (2d ed. 1977); EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* (1789); EDMUND MORRIS, *THEODORE REX* (2001). The Vice Presidency was vacant during Roosevelt's first term as President. Charles W. Fairbanks served as Vice President under Roosevelt from March 4, 1905 to March 4, 1909. For more on Fairbanks, see James H. Madison, *Charles Warren Fairbanks and Indiana Republicanism*, in *GENTLEMEN FROM INDIANA: NATIONAL PARTY CANDIDATES, 1836-1940*, at 171-88 (Ralph D. Gray ed., 1977).

389. Coolidge was Vice President under Warren G. Harding from March 4, 1921 to August 2, 1923 and President from August 2, 1923 to March 4, 1929. For more on Coolidge, see DONALD R. MCCOY, *CALVIN COOLIDGE: THE QUIET PRESIDENT* (1967); WILLIAM ALLEN WHITE, *A PURITAN IN BABYLON: THE STORY OF CALVIN COOLIDGE* (2001). The Vice Presidency was vacant from August 2, 1923 to March 4, 1925. Charles G. Dawes served as Vice President under Coolidge from March 4, 1925 to March 4, 1929. For more on Dawes, see JOHN PIXTON, *AMERICAN PILGRIM: A BIOGRAPHY OF CHARLES GATES DAWES* (1971); BASCOM N.

Truman,³⁹⁰ Richard Nixon,³⁹¹ Lyndon B. Johnson,³⁹² Gerald Ford,³⁹³ and, most recently, George H.W. Bush.³⁹⁴ In the eighteen presidential elections featuring an incumbent or former Vice President as a presidential nominee, the Vice President has won nine times.³⁹⁵ This trend has only accelerated in recent years—particularly since the Second World War³⁹⁶—as sitting or former Vice Presidents have, with increasing

NOLLY TIMMONS, *POTRAIT OF AN AMERICAN*: CHARLES G. DAWES (1953).

390. Truman was Vice President under Franklin Delano Roosevelt from January 20, 1945 to April 12, 1945 and President from April 12, 1945 to January 20, 1953. For more on Truman, see ALONZO L. HAMBY, *MAN OF THE PEOPLE: A LIFE OF HARRY S. TRUMAN* (1995); DAVID McCULLOUGH, *TRUMAN* (2d ed. 1993); MERLE MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN* (1974). The Vice Presidency was vacant from April 12, 1945 to January 20, 1949. Alben W. Barkley served as Vice President from January 20, 1949 to January 20, 1953. For more on Barkley, see POLLY ANN DAVIS, *ALBEN W. BARKLEY: SENATE MAJORITY LEADER AND VICE PRESIDENT* (1979); JAMES K. LIBBEY, *DEAR ALBEN: MR. BARKLEY OF KENTUCKY* (1979). For a detailed autobiographical account of Barkley's life and political career, see ALBEN W. BARKLEY, *THAT REMINDS ME* (1954) (detailing autobiographical account of life and political career).

391. Nixon was Vice President under Dwight Eisenhower from January 20, 1953 to January 20, 1961 and President from January 20, 1969 to August 9, 1974. For more on Nixon, see STANLEY I. KUTLER, *ABUSE OF POWER: THE NEW NIXON TAPES* (1997); RICHARD REEVES, *PRESIDENT NIXON: ALONE IN THE WHITE HOUSE* (2001); ANTHONY SUMMERS, *THE ARROGANCE OF POWER: THE SECRET WORLD OF RICHARD NIXON* (2d ed. 2001). Spiro T. Agnew served as Vice President under Nixon from January 20, 1969 to October 10, 1973. For more on Agnew, see JULES WITCOVER, *WHITE KNIGHT: THE RISE OF SPIRO AGNEW* (1972). The Vice Presidency was vacant from October 10, 1973 until December 6, 1973 when Gerald R. Ford, Jr. was named to the office. Ford served as Vice President under Nixon until August 9, 1974.

392. Lyndon B. Johnson was Vice President under John F. Kennedy from January 20, 1961 to November 22, 1963 and President from November 22, 1963 to January 20, 1969. For more on Johnson, see ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE MASTER OF THE SENATE* (2002); ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* (1982); ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961-1973* (1998); DORIS KEARNS GOODWIN, *LYNDON JOHNSON AND THE AMERICAN DREAM* (1991). The Vice Presidency was vacant from November 22, 1963 until January 20, 1965 when Hubert H. Humphrey was named to the office. Humphrey served from January 20, 1965 to January 20, 1969. For more on Humphrey, see DAN COHEN, *UNDEFEATED: THE LIFE OF HUBERT H. HUMPHREY* (1978); CARL SOLBERG, *HUBERT HUMPHREY: A BIOGRAPHY* (1984).

393. Ford was Vice President under Richard M. Nixon from December 6, 1973 to August 9, 1974 and President from August 9, 1974 to January 20, 1977. For more on Ford, see JAMES CANNON, *TIME AND CHANCE: GERALD FORD'S APPOINTMENT WITH HISTORY* (2d ed. 1998); JOHN ROBERT GREENE, *THE PRESIDENCY OF GERALD R. FORD* (1995); JERALD F. TERHORST, *GERALD FORD AND THE FUTURE OF THE PRESIDENCY* (1974). The Vice Presidency was vacant from August 9, 1974 until December 19, 1974 when Nelson A. Rockefeller was named to the office. Rockefeller served as Vice President under Ford from December 19, 1974 to January 20, 1977. For more on Rockefeller, see JOSEPH E. PERSICO, *THE IMPERIAL ROCKEFELLER: A BIOGRAPHY OF NELSON A. ROCKEFELLER* (1982).

394. George H.W. Bush was Vice President under Ronald W. Reagan from January 20, 1981 to January 20, 1989 and President from January 20, 1989 to January 20, 1993. For more on Bush, see RYAN J. BARILLEAUX & MARK J. ROZELL, *POWER AND PRUDENCE: THE PRESIDENCY OF GEORGE H.W. BUSH* (2004); NICHOLAS KING, *GEORGE BUSH: A BIOGRAPHY* (1980); A NOBLE CALLING: CHARACTER AND THE GEORGE H.W. BUSH PRESIDENCY (William Levantrosser & Rosanna Perotti eds. 2004). James D. Quayle served as Vice President under Bush from January 20, 1989 to January 20, 1993. For more on Quayle, see DAVID S. BRODER & BOB WOODWARD, *THE MAN WHO WOULD BE PRESIDENT: DAN QUAYLE* (1992). For a detailed autobiographical account of Quayle's life and political career, see DAN QUAYLE, *STANDING FIRM: A VICE-PRESIDENTIAL MEMOIR* (1994).

395. Andrew Cohen & Nick de Souza, *Millard Who?*, *WORLD LINK*, Sept. 2000, at 22.

396. G. Terry Madonna, *For Tom Ridge or Any Candidate, Becoming VP is a Haphazard Process*, *LANCASTER NEW ERA* (Pa.), Apr. 20, 2000, at 14, available at 2000 WLNR 4303964 ("In short, party

frequency, captured their party's presidential nomination.³⁹⁷ Moreover the perks, privileges, and advantages of incumbency (for instance air travel in Air Force Two, ground travel by motorcade, advice from presidential aides, assistance from White House staffers, and the power to dispense federal funding) cloak a sitting Vice President in a presidential aura and only serve to solidify her claim to the top of her party's presidential ticket.³⁹⁸ It is therefore commonplace, at least in recent decades, to witness aspiring presidential candidates from both major political parties engaging in heated quadrennial jockeying for the vice presidential nomination, though none appear to seek the Vice Presidency for its own sake but instead for the opportunity for advancement that only the second office can offer.³⁹⁹ As one vice presidential scholar has written, "If ambitious political leaders who are offered the second slot on the ticket fail to recognize the unrivaled steppingstone status of the modern vice presidency, they will reduce their chances of becoming president."⁴⁰⁰

However once elected to the Vice Presidency, aspiring presidential candidates find themselves maneuvering along the blurred boundary between remaining indefatigably loyal to the President—an understood condition of occupying the office—and disclaiming involvement in policy and other decisions that fall out of favor with the electorate—a natural inclination of any candidate for public office.⁴⁰¹ "Ambitious Vice Presidents," writes one commentator, "get reminded, often and unceremoniously, of who is No. 1," citing the infamous exchange between President Dwight D. Eisenhower and an inquisitive reporter, in which Eisenhower playfully requested a couple of weeks to research his answer to a question about what decisions

nominees since World War II have come overwhelmingly from the ranks of sitting vice presidents and former vice presidents. The list is formidable: Truman in 1948; Nixon in 1960; Johnson in 1964; Nixon and Humphrey in 1968; Ford in 1976; Mondale in 1984; and Bush in 1988. Few who seriously entertain the thought of becoming president will turn such an offer down. Even losing vice presidential candidates, can in losing, establish and enhance their national reputations and emerge as their likely party nominee in the future.").

397. See Jules Witcover, Editorial, *Past Can Guide Kerry in Search for Running Mate*, BALTIMORE SUN, Mar. 8, 2004, at A15, available at 2004 WLNR 1459980 ("In eight of the last 10 national elections, one or both major party presidential nominees had first served as the No. 2 man."); Timothy Walch, *There's Never Been a Veep Like Cheney*, HIST. NEWS NETWORK, Feb. 11, 2004, available at 2004 WLNR 6911001 ("Four of the nine men who have served in [the Vice Presidency] over the past 50 years have gone on to the White House.").

398. See Sandra Sobieraj, *Gore's Incumbency Provides Advantages on Campaign Trail*, SEATTLE POST-INTELLIGENCER, Aug. 25, 1999, available at <http://seattlepi.com/national/gore251.shtml> ("From motorcades that make traffic tie-ups melt away to tax-policy help from the White House's economic adviser, the perks of the vice presidency give Gore advantages over the former New Jersey senator and pro basketball star in the chase for the Democratic presidential nomination.").

399. George Sirgiovanni, *The "Van Buren Jinx": Vice Presidents Need Not Beware*, 18 PRESIDENTIAL STUD. Q. 61, 75 (1988) ("Indeed, would-be Presidents of the United States now want to be Vice President, because they know the Vice Presidency is not the dead-end job it used to be, but a free pass onto the fast track toward the White House.").

400. Michael Nelson, *Choosing the Vice President*, 21 POL. SCI. & POL. 858, 866 (1988).

401. See generally Michael Nelson, *The Curse of the Vice Presidency*, AM. PROSPECT, July 31, 2000, at 20, available at 2000 WLNR 4341941 (describing loyalty dilemma facing sitting Vice Presidents planning a run for the White House); see also Akhil Reed Amar, *Why Veeps Must Hold their Tongues*, NEW REPUBLIC, Dec. 6, 1999, at 16 ("So the first reason for a sitting vice president to hold his tongue is clear enough: he has a unique obligation to do nothing that might destabilize the country or compromise a transition of power.").

his Vice President, Richard Nixon, had helped make in the White House.⁴⁰² A sitting Vice President vying for the Presidency must also contend with the potentially problematic campaign involvement of an outgoing President, whose political rhetoric in support of the Vice President may actually *undermine* the likelihood of elevating the Vice President to the Presidency.⁴⁰³ Still, vice presidential success in modern presidential sweepstakes has been impressive enough to supplant the once conventional wisdom that United States Senators—who have for good reason fared poorly as presidential candidates in the contemporary nominating era⁴⁰⁴—are best situated among presidential hopefuls to seek the Presidency.⁴⁰⁵

IV. REBIRTH

No one has articulated the perilous effect of the existing method of vice presidential selection more compellingly than Akhil Amar. Describing what he calls the “legitimacy gap,”⁴⁰⁶ Amar posits that “the biggest structural problem of the Vice Presidency is that its occupant lacks a personal mandate from the people.”⁴⁰⁷ Compounded by the American electorate’s disposition to staff the Oval Office solely on the basis of the identity of the dueling presidential candidates—without regard to vice presidential candidates, who have no proven effect on the presidential vote—the deleterious consequence to the American polity is that the “vice president simply piggybacks into office.”⁴⁰⁸ These traditional modalities of choice fly in the face of participatory democracy, and are “only slightly more democratic than the British monarchy,”⁴⁰⁹ writes another commentator. Surely the United States can do better for its citizenry.

402. Joel Connelly, *In the Northwest: Kerry Must Avoid Shoals in Picking a Running Mate*, *Seattle Post-Intelligencer*, Mar. 5, 2004, available at http://seattlepi.com/connelly/163302_joel05.html (“Dwight Eisenhower seemed to delight in hanging an insecure Richard Nixon out to dry. ‘I was with President Eisenhower when he made those lonely decisions,’ Nixon told a 1960 campaign crowd. Asked at a press conference what decisions Nixon actually helped make, Eisenhower replied that if given a week or two he might be able to think of one.”). *Id.*

403. *See generally* John M. Murphy & Mary E. Stuckey, *Never Cared to Say Goodbye: Presidential Legacies and Vice Presidential Campaigns*, 32 *PRESIDENTIAL STUD. Q.* 46 (2002) (analyzing impact of discourse of outgoing President on presidential campaigns of 1960, 1968, 1988 and 2000).

404. *See* Barry C. Burden, *United States Senators as Presidential Candidates*, 117 *POL. SCI. Q.* 81, 87-101 (2002) (applying notion of investment in ambition theory to illuminate travails of Senators vying for Presidency).

405. *See* Robert L. Peabody et al., *The United States Senate as a Presidential Incubator: Many are Called But Few are Chosen*, 91 *POL. SCI. Q.* 237, 238 (1976) (“Fueling the ambition of contemporary senators—nothing succeeds like success—has been an impressive performance by senatorial contenders in the presidential and vice-presidential sweepstakes of recent years.”).

406. Akhil Reed Amar, *Why Clinton Should Consider a Sabbatical*, *NEW REPUBLIC*, Feb. 8, 1999, at 15, available at 1999 *WLNR* 5212213 (“However, when something happens to the president, and the vice president must take over temporarily or permanently, our weird electoral system creates a legitimacy gap because we end up with a chief executive no one squarely voted for.”).

407. *Id.*

408. *Id.*

409. Steve Chapman, *Kerry’s Best Vice Presidential Choice: Let Public Have a Say*, *BALT. SUN*, Apr. 27, 2004, at 11A, available at 2004 *WLNR* 1496577.

A. *Triggering Crisis*

Five elements have worked in concert to engulf the Vice Presidency at the core of the perfect storm. Together with the evolution of the Vice Presidency along substantive, structural, and political dimensions, two factors—modern executive selection and contemporary modalities of vice presidential choice—raise vice presidential selection to the level of near urgency. Unlike the concrete crises that have spurred constitutional amendments in the past—an electoral crisis, a congressional crisis, an executive crisis, and a continuity crisis—the crisis that now threatens the Vice Presidency and the American polity is an amorphous and much less tangible one: the Vice Presidency is popularly illegitimate.

The Vice President is more involved than ever before in American history in the discharge of executive responsibilities. Substantively, Vice Presidents are now party leaders whose voice on policy issues actually matters—something that could scarcely be uttered of the Vice Presidency in years past without sarcasm.⁴¹⁰ Structurally, constitutional amendments have changed the face of the office and catapulted the Vice Presidency into the pantheon of American domestic and foreign influence.⁴¹¹ Politically, the Vice Presidency has become a springboard to the Presidency.⁴¹² Yet naming its occupant remains a presidential prerogative, a procedure that is devoid of public input. The failure of vice presidential selection to reflect the substantive, structural and political evolution of the Vice Presidency alone states a strong claim for modernizing vice presidential selection. Modern executive selection and the strategic considerations involved in vice presidential ticket balancing only strengthen the case.

1. Executive Selection

The prevailing political theory holds that the electorate in a presidential election expressly approves the Vice President as presidential successor and consents to her as the nation's second-in-command.⁴¹³ This presupposes that vice presidential nominees exact a meaningful influence on presidential elections. But they do not. The evidence points convincingly in the other direction, suggesting that the Vice Presidency does not figure prominently—or even perceptibly—in the calculations that voters make when casting their ballot for the Presidency.⁴¹⁴ It is thus erroneous to invoke the theory of imputed popular endorsement to clothe the Vice Presidency in popular legitimacy.

410. See *supra* Subsection III.A for a discussion of the evolution of the Vice Presidency.

411. See *supra* Subsection III.B for a review of the constitutional changes to the Vice Presidency.

412. See *supra* Subsection III.C for a survey of the evolution of the Vice Presidency into a stepping stone toward the Presidency.

413. See, e.g., John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 661 (1999) (“Since the enactment of the Twelfth Amendment, the President and Vice President have run as a team and therefore voters generally will have approved a specific successor if a President were constitutionally unable to continue.”).

414. See John Jacobs, *Dole's Possibilities for Running Mate Fuels Speculation*, FRESNO BEE, Mar. 19, 1996, at B7, available at 1996 WLNR 1655029 (quoting Nelson Polsby, director of UC Berkeley's Institute of Governmental Studies, noting that vice presidential candidates have marginal impact on, and have even been known to hurt, presidential tickets).

There is a telling dearth of evidence, argues political scientist David Rohde, that running mates have any effect on presidential elections.⁴¹⁵ Presidential election expert Nelson Polsby concurs, stating that “[t]he vast bulk of the research in political science has shown that vice presidential candidates don’t have much impact.”⁴¹⁶ A recent study by political scientist David Romero has established that vice presidential candidates exert no impact on the electorate’s presidential vote—whether measured for their direct effect on presidential choice or their indirect influence through presidential candidate evaluations.⁴¹⁷ As Democratic strategist Vic Kamber puts it, “[t]he reality is when people go to vote they may think of a package, but they still vote for whose hand is on the button.”⁴¹⁸

Even former Vice President Dan Quayle agrees that vice presidential candidates do not decide presidential elections.⁴¹⁹ Moreover, public opinion surveys and exit polls routinely confirm that vice presidential candidates exact little or no effect on the electorate.⁴²⁰ If it is quantifiable—a questionable proposition at best—the statistical effect of the Vice Presidency on the outcome of a presidential election is roughly one percent.⁴²¹ While voters and the various news media may pay dutiful attention to vice presidential candidates and take great care to weigh their respective virtues and shortcomings, the race is really only about the presidential candidates. The vice presidential nominees do not change the “big picture desires”⁴²² of the electorate. The same holds for vice presidential debates, which typically have little or no impact in a

415. Dirk VanderHart, *Students Dismiss VP Candidates’ Influence on Voting*, CNN.com, Oct. 22, 2004, <http://edition.cnn.com/2004/allpolitics/10/14/mich.state/index.html> (“‘There’s little evidence from previous presidential elections of a vice presidential candidate having much impact,’ Rohde said.”).

416. Jacobs, *supra* note 414, at B7 (quoting Nelson Polsby, director of UC Berkeley’s Institute of Governmental Studies).

417. David W. Romero, *Requiem for a Lightweight: Vice Presidential Candidate Evaluations and the Presidential Vote*, 31 PRESIDENTIAL STUD. Q. 454, 462 (2001) (concluding vice presidential nominees do not color voters’ choice in their presidential vote).

418. Lisa Leiter, *Republicans Catch Veep Fever*, INSIGHT, Aug. 28, 1995, at 10 (quoting Vic Kamber) (“Because the vice-presidential nominee rarely serves as a significant vote-getter for a presidential candidate, he or she basically complements and balances the ticket. There’s no evidence that Americans vote for vice presidents, but Dole being a septuagenarian could cause the electorate to look more carefully at who would occupy the Oval Office if something should happen to him. ‘The reality is when people go to vote they may think of a package, but they still vote for whose hand is on the button,’ Kamber says. The bottom line is: They have to be credible as a workable team.”).

419. Daily News Wire Services, *Quayle Declares Loyalty to Presidential Campaign*, DAILY NEWS (L.A.), July 23, 1992, at N13, available at 1992 WLNR 1239720 (“However, [Quayle] insisted that vice presidents are never the deciding factors in presidential elections, and that he was helping the re-election campaign by raising issues such as family values.”).

420. Nelson Polsby, *A Safe Choice, But Edwards is on the Sidelines*, FIN. TIMES (U.K.), July 8, 2004 (Comment), available at 2004 WLNR 9768032 (“US public opinion surveys and exit polls have pretty much established that the identity of a vice-presidential candidate has little or no effect on the outcome of a US presidential election.”).

421. Martha Quillin, *She’s So Real*, THE NEWS & OBSERVER (Raleigh, N.C.), Oct. 3, 2004, at D1, available at 2004 WLNR 17510857 (“In any presidential election, the candidate for vice president has an effect of maybe 1 percent on who will occupy the White House . . .”).

422. Burt Constable, *Maybe Edwards Will Learn Veep is Worth a Bucket of Warm Spit*, DAILY HERALD (Arlington Heights, Ill.), July 8, 2004, at 15, available at 2004 WLNR 5827146.

presidential election⁴²³ because voters do not look beyond the top of the presidential ticket on Election Day.⁴²⁴ The bottom line is that vice presidential candidates simply are not significant considerations in presidential elections.⁴²⁵

As with all rules, however, there are exceptions. Two twentieth century examples demonstrate that a vice presidential candidate may in fact help or hurt her party's presidential prospects. In 1960, vice presidential candidate Lyndon B. Johnson helped his running mate John F. Kennedy carry Texas, Johnson's home state.⁴²⁶ More recently, polls indicated that vice presidential candidate Dan Quayle actually pushed Californians *away* from his running mate, then-Vice President George H.W. Bush.⁴²⁷ One writer points to at least four other examples of a vice presidential candidate impacting the presidential election, listing arguable instances of the vice presidential candidate's impact in helping the presidential nominee sweep the Electoral College votes from the vice presidential nominee's home state.⁴²⁸ But each of these four other

423. See, e.g., Bill Adair, *As Candidates Clash, War, Credibility at Issue*, ST. PETERSBURG TIMES, Oct. 6, 2004, at A1, available at 2004 WLNR 3727881 (stating that "vice presidential debates typically have little impact in a presidential election"); Richard Clough, *Vice Presidential Debate Will Have Little Impact, Experts Say*, DAILY BRUIN, Oct. 6, 2004, <http://www.dailybruin.ucla.edu/news/articles.asp?ID=30189> ("It's rare that they [vice presidential debates] have any impact," said Sheldon Kamieniecki, a professor of political science at the University of Southern California. 'Maybe a difference of a quarter or half of a percent,' he said."); Robert Novak, *Kemp Can Take Heart From Lincoln Debate*, BUFFALO NEWS, Oct. 15, 1996, at B3, available at 1996 WLNR 1101248 ("Nobody ever believed that the vice-presidential debate would seriously impact the presidential election."); Susan Page, *Contenders May Have Been Making Pitch to Year-2000 Audience*, USA TODAY, Oct. 10, 1996, at 13A, available at 1996 WLNR 2813768 ("So while vice presidential debates historically have had no measurable impact on the presidential election, political activists were watching this one as a nationally televised test for each man."); Godfrey Sperling, *Debates Can Flip-Flop Polls, Even After a Second Round*, CHRISTIAN SCI. MONITOR, Oct. 5, 2004, at 9, available at 2004 WLNR 1635594 ("Vice presidential debates have never been known to have a lasting effect on a presidential election.").

424. Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281, 314 (2003) ("Voters cannot cast a separate vote for vice president, and it is unlikely that the vice presidential candidate's presence will affect the decision to vote for the presidential candidate at the head of the ticket." (citations omitted)).

425. Bruce Garvey, *The Ups and Downs of the Dream Ticket*, OTTAWA CITIZEN, July 7, 2004, at A8 ("And then there's the fact that historically, the choice of a vice-presidential running mate has rarely had much impact on the result of a presidential election.").

426. *Novak Zone: A Look at John Kerry and John Edwards Ticket; A Big Spat in Texas Over Condom Use Being Taught in Schools—Part 2* (CNN News television broadcast July 10, 2004), available at 2004 WLNR 7338726 (transcript) ("No, and as a matter of fact, Drew, the people vote for presidents. They don't vote for vice presidents. The great exception to the rule of a vice president causing any impact was Lyndon Johnson in 1960, the first presidential election I covered, when he was able to carry Southern states without which John Kennedy from Massachusetts, like John Kerry, would not have been elected."); see also James J. Kilpatrick, *The Fine Art of Choosing a Running Mate*, N.J. REC., May 27, 1992, at B7, available at 1992 WLNR 1509778 ("Only once in this century has a vice presidential candidate apparently helped his partner. That was in 1960, of course, when Lyndon Johnson helped Jack Kennedy carry Texas. If Kennedy had lost to Richard Nixon in Texas, Nixon could have won the White House by a successful challenge to the crooked count in Illinois.").

427. Jerry Roberts, *Quayle Hurting Bush in California, Poll Says*, S.F. CHRON., Sept. 17, 1988, at A1, available at 1988 WLNR 916329 ("State voters have a highly negative opinion of vice presidential candidate Dan Quayle, and many say they are less likely to vote Republican because of him, a new California Poll shows.").

428. Ronald A. Faucheux, *The State of the Prez-Veep Union*, FORT WORTH STAR-TELEGRAM, May 30, 2004, at E1, available at 2004 WLNR 1959690 (citing—in addition to Kennedy-Johnson ticket—Roosevelt-

purported examples of vice presidential influence on the presidential vote misses the mark. Political science literature has proven that the vice presidential home state advantage is statistically insignificant.⁴²⁹ It is perplexing, then, that presidential nominees continue weighing prospective vice presidential teammates largely through the lens of geographical ticket balancing, estimating the electoral advantages she will derive from a running mate hailing from a particular state.

2. Modalities of Choice

Though the last half century has witnessed the Vice Presidency evolve in its constitutional structure, substantive function, and political status, the modalities of vice presidential selection have failed to keep pace. Ever since Franklin Delano Roosevelt's third reelection to the Presidency in 1940, vice presidential selection has been what it remains today: the exclusive province of the presidential nominee.⁴³⁰ This has distorted the incentives informing vice presidential choices. Rather than selecting a vice presidential nominee for her preparedness to assume the Presidency and her tested ability to wield the escalating power of the Vice Presidency, a presidential nominee is more likely to pick her running mate for strategic purposes of ticket balancing, which generally means selecting a vice presidential candidate whose background generally complements or supplements her own resume.⁴³¹ The current practice of vice presidential selection threatens to leave the nation with a novice on deck, one who may be unqualified to competently discharge the increasing duties of the Vice Presidency.⁴³² Worse still, she may be ill-equipped to lead the nation in the event of presidential disability or vacancy.⁴³³

Truman, Dewey-Bricker, Humphrey-Muskie and Clinton-Gore as tickets benefiting from a vice presidential boost).

429. Robert L. Dudley & Ronald B. Rapoport, *Vice-Presidential Candidates and the Home State Advantage: Playing Second Banana and Home and on the Road*, 33 AM. J. POL. SCI. 537, 540 (1989) ("In spite of the remarkably consistent tendency of political parties to choose vice-presidents who balance the ticket geographically, we find the 'friends and neighbors' effects in the vice-presidential candidate's home state to be statistically insignificant.").

430. *But see* DeWayne Wickham, *A Longing for the Days When National Political Conventions Were Relevant*, USA TODAY, Sept. 7, 2004, at 15A, available at 2004 WLNR 6675607 (noting one exception at 1956 Democratic convention where presidential candidate Adlai Stevenson let convention delegates choose his running mate).

431. Jeff Guinn, *Vice Guys Quick! Can You Name to Vice Presidents?*, FORT WORTH STAR-TELEGRAM, May 25, 1996 (Life & Arts), at 1, available at 1996 WLNR 1198517 ("Ticket-balancing often means selecting a vice president whose political background is different from the presidential candidate's").

432. Ralph Z. Hallow, *Edwards' Goal Now a More Potent Post*, WASH. TIMES, Oct. 5, 2004, at A8, available at 2004 WLNR 804529 (stating Vice Presidents "were chosen principally for geographical or ideological ticket balancing but not for anything of substance they might contribute").

433. *But see* GOLDSTEIN, *supra* note 42, at 789 (concluding that despite selection process, vice presidential candidates are often prepared to serve as President).

By tradition, the party leadership controlled vice presidential nominations.⁴³⁴ This practice persisted until the presidential election of 1940 when, facing the American electorate for the third consecutive time, President Roosevelt insisted on picking Henry Wallace as his running mate.⁴³⁵ Delegates to the Democratic convention disagreed with his pick and were poised to deny Roosevelt his vice presidential preference until Roosevelt threatened to withdraw his own candidacy as President.⁴³⁶ Roosevelt's bold rigidity in making his own vice presidential selection in 1940 established a precedent under which subsequent presidential nominees have reserved for themselves the license to make the vice presidential nomination in the name of their party.

Since then, vice presidential picks have centered around three areas: "geography, generation and ideology," explains former Vice President Dan Quayle, adding that the selection process is a curious one "because it is done by one person."⁴³⁷ A presidential nominee typically seeks to neutralize certain perceived weaknesses or shortcomings that threaten to make her candidacy vulnerable in the presidential election.⁴³⁸ A recent study of presidential elections from 1940 to 1992 has verified this very point, concluding that presidential nominees pick their vice presidential nominees primarily according to three factors: (1) the size of the candidate's home state; (2) whether the

434. Christopher Matthews, *What's Missing From This Year's Convention*, S.F. EXAMINER, July 12, 1992, at A8, available at 1992 WLNR 48699 ("Not so long ago, political conventions were seedy affairs run by bosses and marked by intrigue."); see also David Greenberg, *The Nation: Mirror, Mirror; The Myths and Mysteries of Picking a No. 2*, N.Y. TIMES, Apr. 11, 2004, at 43, available at 2004 WLNR 5501198 ("But through the 20th century, power migrated from party bosses to the candidates. . . . The idea of balancing a ticket started in the 19th century, when candidates owed their livelihoods to the party bosses who ran state and city machines—and whose ability to turn out voters decided elections.").

435. Edgar Poe, *Confident Clinton is Shopping for a Running Mate*, NEW ORLEANS TIMES-PICAYUNE, Mar. 14, 1992, at B7, available at 1992 WLNR 817796 ("It was in 1940 that presidential nominees began hand-picking their running mates. That was the year President Franklin Roosevelt forced a belligerent Democratic convention at Chicago to name Henry Wallace to the No. 2 spot on the ticket.").

436. E.g., Thomas V. DiBacco, *Bush Not First to Struggle with Pick*, WASH. TIMES, July 23, 2000, at C4, available at 2000 WLNR 351250 ("In 1940, Roosevelt, nominated for an unprecedented third term, handpicked Henry A. Wallace of Iowa for his running mate. Wallace, a liberal, alienated conservative Southerners who put up their own candidate. Wallace won by a narrow margin, but only after Roosevelt threatened to refuse the nomination unless his choice was selected."); Jules Witcover, *In VP Hunt, Kerry has Time on his Side*, BALT. SUN, Mar. 7, 2004, at C1, available at 2004 WLNR 1460263 ("In 1940, Franklin Roosevelt chose Wallace after a falling-out with Vice President John 'Cactus Jack' Garner of Texas over Roosevelt's decision to seek a third term.").

437. Stephen Goode, *Quayle Predicts Dole Will Pick a Governor*, INSIGHT, Aug. 28, 1995, at 12 (quoting Dan Quayle) ("It is a very interesting selection process because it is done by one person. It is a personal decision," he says, adding that important considerations such as 'geography, generation and ideology' are factors that balance and enrich the ticket.").

438. But the 1992 Clinton-Gore Democratic ticket is widely seen as defying conventional ticket balancing strategies. Bill Clinton and Al Gore were both roughly the same age, hailed from the same region, and practiced the same religion. E.g., Phil Gailey, *A Mate to Run With Rather Than From*, ST. PETERSBURG TIMES, Aug. 4, 1996, at 3D, available at 1996 WLNR 2382702 ("Bill Clinton ignored the traditional ticket-balancing rules and went with Al Gore Jr. as his vice president in 1992—same generation (baby boomers), same region (the South), same religion (Baptist)."); see also Jeff Mayers, *Clinton's Choice Draws Mixed Reaction in Poll*, WIS. ST. J., July 10, 1992, at 4C, available at 1992 WLNR 3464128 (stating "[b]oth are white, middle-aged, moderate Southerners from small states" and "[t]he pick defied the usual ticket-balancing strategy of most past vice presidential choices.").

candidate had been the presidential nominee's rival for the presidential nomination; and (3) the candidate's age.⁴³⁹

Thus, a younger or nationally inexperienced nominee may choose a Washington veteran, as was the case in the presidential election of 2000 when George W. Bush picked a perennial capitol insider, Dick Cheney.⁴⁴⁰ In much the same way, an older nominee may wish to signal, with the choice of a younger running mate, that her campaign lacks neither energy nor vigor, as in the Bush-Quayle Republican ticket of 1988.⁴⁴¹ Additionally, a presidential nominee hailing from a small state may enlist the help of a candidate from a larger state in hopes of securing the state's electoral votes. The most recent manifestation of this example of ticket balancing occurred in the presidential election of 1996, when Kansas Senator Bob Dole recruited Californian Jack Kemp to join him in squaring off against the Gore-Clinton ticket.⁴⁴² A further consideration may be the extent to which the presidential nominee emerged from her party's presidential primary having defeated a particularly compelling candidate. In such a case—as in 2004 when John Kerry selected Democratic rival John Edwards as

439. See Lee Sigelman & Paul. J. Wahlbeck, *The "Veepstakes": Strategic Choice in Presidential Running Mate Selection*, 91 AM. POL. SCI. REV. 855, 855 (1997) (examining presidential nominee's choice of running mate in each election since 1940 and analyzing factors used in selection).

440. See, e.g., Editorial, *Cheney Equals Experience*, ROCKY MOUNTAIN NEWS (Denver, Colo.), July 26, 2000, at 46A, available at 2000 WLNR 804552 ("What immediately strikes just about every observer is that Cheney's Washington experience serves to compensate for Bush's inexperience, and what occurs next is that Bush deserves credit for selecting someone of substance instead of someone more noted for flash, dash and big-state heft."); Ann McFeatters, *Seasoned Veteran a Comfort to Bush*, PITTSBURGH POST-GAZETTE, July 26, 2000, at A10, available at 2000 WLNR 3444454 ("The choice of Cheney also signals that Bush expects to be president, and he wants Cheney's seasoning and experience to help him govern."); David M. Shribman, *Cheney a Perfect Match for Bush*, LONG BEACH PRESS TELEGRAM (Cal.), July 26, 2000, at A11, available at 2000 WLNR 1341335 ("Where Bush is an outsider, Cheney is an insider. Where Bush is a blank page, Cheney is reams of tiny type on pages of the Congressional Record. Where Bush came of age politically in the 1990s, Cheney came of age in the 1970s.").

441. See, e.g., Editorial, *Bush's Veep Choice: A Man of the Future*, ST. REC. (Columbia, S.C.), Aug. 18, 1988, at 18A, available at 1988 WLNR 412583 ("Mr. Quayle, who bears a startling resemblance to movie heartthrob Robert Redford, brings charisma and youthful vitality to the Republican ticket—the first post-World War II baby boomer to make it on any major political party's ticket. Mr. Bush seemed to sense that specialness when he introduced Mr. Quayle as 'freedom's friend . . . a man of the future. A young man born in the middle of this century and from the middle of America.'"); Sandy Grady, *Quayle Suits the Nominee's Needs—Will "Danny Boy" Suit the Voters?*, MIAMI HERALD, Aug. 18, 1988, at 29A, available at 1988 WLNR 779419 ("So Bush has picked himself a young, loyal, aggressive cheerleader—Bush's Bush, so to speak."); Carl P. Leubsdorf & Mark Nelson, *Bush Picks Quayle*, ALBANY TIMES UNION, Aug. 17, 1988, at A1, available at 1988 WLNR 62463 (adding "[Quayle's] a dynamic young leader for the future of our party." (quoting George H.W. Bush)).

442. See, e.g., Press Services, *Dole Picks Kemp to Fill No. 2 Spot, Aides Report 'Quarterbacks are Always Ready'*, MEMPHIS COM. APPEAL, Aug. 10, 1996, at A1, available at 1996 WLNR 3554959 ("Among other things, senior aides to Dole say, Kemp, is expected to help the Republican ticket in California, where he grew up, and in large cities and urban areas because of the activist role he sought to play on behalf of inner city redevelopment as secretary of Housing and Urban Development in the Bush administration."); Richard Lacayo et al., *Punching up the Ticket: By Running With Jack Kemp, Will Bob Dole be Getting More Excitement Than He Bargained For?*, TIME, Aug. 19, 1996, at 20, available at 1996 WLNR 4989012 ("Originally from California, [Kemp] polls well in that crucial state, where Dole is trailing Clinton by 25 points.");

his running mate—the presidential nominee may hope to capitalize on the losing candidate's popular appeal.⁴⁴³

Likewise, a moderate Democratic nominee may venture to unite divergent party factions by settling on a proud liberal as the vice presidential nominee, as in 1976 when Jimmy Carter tapped Walter Mondale.⁴⁴⁴ The reverse, too, is possible. In 1988, liberal Democratic nominee Michael Dukakis selected moderate Democrat Lloyd Bentsen to join his campaign against the Bush-Quayle ticket.⁴⁴⁵ Republicans are not above such ideological compromises. Consider the election of 1980, when conservative Ronald Reagan tipped his hat to moderate Republicans by opting for centrist George H.W. Bush,⁴⁴⁶ or moderate Gerald Ford's selection of conservative Bob Dole in 1976.⁴⁴⁷ Similarly, a northeastern nominee, astutely conscious of the American south and heartland's perception of northeastern sensibilities and proclivities—whether accurate or not—may look favorably upon a southerner or midwesterner, just as a southern nominee may tap a northerner to fill the bottom half of the ticket. This helps explain, respectively, Massachusetts Senator John F. Kennedy's 1960 selection of Texan

443. See, e.g., Dan Balz & Lois Romano, *Edwards: 'Hope is on the Way' As Kerry Formally Locks up the Nomination in Boston, Running Mate Vows They'll Reward Work, Not Just Wealth*, ST. PAUL PIONEER PRESS, July 29, 2004, at A1, available at 2004 WLNR 3539872 (“[Kerry] then yielded the spotlight to Edwards, who was his last major rival in the Democratic primary battle and the popular choice to team with Kerry in the campaign ahead against President Bush and Vice President Dick Cheney.”); Julie Hirschfeld Davis, *Edwards Gets Kerry's Vote; Populist Southern Senator, Ex-trial Lawyer 'Ready for Job,'* BALTIMORE SUN, July 7, 2004, at A1, available at 2004 WLNR 1475016 (“Kerry selected Edwards—whose broad grin, populist themes and positive campaigning style made him a popular rival to the more reserved Kerry during the primary season—after a vetting process conducted in painstaking secrecy.”); Ken Herman, *Kerry Taps Edwards, Democrats' Favorite Popular Appeal Trumps Experience as "Thrilled" Ex-Rival Completes Ticket*, ATLANTA J. AND CONST., July 7, 2004, at A1, available at 2004 WLNR 6326809 (“Siding with sizzle over experience, John Kerry announced to a cheering crowd Tuesday that fellow senator and former rival John Edwards will be his running mate. . . . He [Edwards] was the last major Democratic presidential candidate to drop out of the race.”).

444. E.g., R.W. Apple, Jr., *A Move to the Center*, ALBANY TIMES UNION, July 10, 1992, at A1, available at 1992 WLNR 166584 (“In 1976 Jimmy Carter felt that, as a Southern moderate in a party with a still-vibrant liberal tradition, he needed to reach out to Northern liberals, so he chose Walter F. Mondale of Minnesota.”).

445. E.g., Marie Cocco, *Dukakis' Choice: Bentsen; Senator Adds Geographic, Political Balance to Ticket*, NEWSDAY, July 13, 1988, at 3, available at 1988 WLNR 150711 (describing the “moderate to conservative political record” of Bentsen and referring to Dukakis as “a liberal Massachusetts politician”); Joel K. Goldstein, *The Importance of Being Vice President*, ST. LOUIS POST-DISPATCH, Aug. 9, 1996, at 7C, available at 1996 WLNR 752067 (arguing the Dukakis-Bentsen pairing exhibits ideological ticket balancing because “a liberal, like Michael Dukakis, finds a more moderate running mate in Lloyd Bentsen”).

446. United Press International, *Bush Stays Close to the Presidency as He Fends Off Attacks from Right*, MIAMI HERALD, Aug. 24, 1984, at 13A, available at 1984 WLNR 206119 (“Conservatives cried foul when Ronald Reagan picked a seemingly moderate Republican as his running mate, but there has been no more loyal team player in the administration than Vice President George Bush.”); Mark Johnson, *Quiet Campaigns on for Republican No. 2 Spot: It's Not Cool to Openly Go After Post*, RICHMOND TIMES-DISPATCH, Apr. 7, 1996, at A7, available at 1996 WLNR 1060474 (“In the past, vice presidential nominees were selected to help geographically, such as Lyndon Johnson for the Democrats in 1960, or to unite the party, such as conservative Ronald Reagan tapping then-moderate George Bush in 1980.”).

447. See, e.g., Craig Shirley, *We Elect Presidents, Not Their Wives*, WASH. TIMES, Jan. 17, 1996, at A15, available at 1996 WLNR 312792 (“The moderate Gerald Ford picked Ronald Reagan's choice, Bob Dole, in 1976, and Reagan himself picked the moderate George Bush in 1980.”).

Lyndon B. Johnson⁴⁴⁸ and Johnson's subsequent invitation to Minnesotan Hubert H. Humphrey to join the symbiotic Democratic ticket of 1964.⁴⁴⁹

As recently as the 1964 presidential election, hope emerged among advocates of popularizing the Vice Presidency that the vice presidential nomination would shift away from the grasp of the presidential nominee to a more democratic and participatory form of selection. Hubert H. Humphrey secured the 1964 Democratic vice presidential nomination through an active strategy that meticulously canvassed party leaders, prominent elected officials, influential interest groups, convention delegates, and opinion shapers in the news media.⁴⁵⁰ This was a well-designed campaign to rally the disparate elements of the Democratic coalition behind Humphrey so as to leave the presidential nominee, Lyndon B. Johnson, no choice but to pick Humphrey—despite retaining the authority under the Roosevelt precedent to ultimately select his own running mate. The Humphrey nomination was thought to signal a new democratic and consent-driven way to name the vice presidential nominee.⁴⁵¹ In light of its success, the Humphrey case spurred predictions that the vice presidential nomination would no longer be motivated by strategic ticket balancing and would instead become a real choice of the people.⁴⁵² This, of course, has not materialized. Ticket balancing continues to govern the vice presidential nomination. Yet the myriad poll numbers that a presidential nominee will scrutinize in the run-up to her vice presidential selection does not—indeed cannot—constitute meaningful electoral participation.⁴⁵³

The legacy of Roosevelt's 1944 vice presidential selection precedent is unmistakable. Even today, sixty years later, the Roosevelt precedent continues to

448. See, e.g., Bob Adams, *Balancing the Ticket: Bentsen is Many Things Dukakis is Not*, ST. LOUIS POST-DISPATCH, July 13, 1988, at C1, available at 1988 WLNR 345547 (“Dukakis is making much of the comparison with 1960, when another liberal from Massachusetts, John F. Kennedy, won by picking a conservative from Texas, Lyndon B. Johnson, who helped carry the South.”); Mel Ayton, *The Ghost of JFK Hangs over This Election*, HIST. NEWS NETWORK, Nov. 1, 2004, available at 2004 WLNR 15823411 (“It reminded voters of the 1960 Austin-Boston axis, when the liberal Massachusetts Senator John F. Kennedy chose a conservative Southerner, Lyndon Johnson, to balance the ticket.”).

449. E.g., Joshua Zeitz, *Democratic Debacle*, AM. HERITAGE, June 1, 2004, at 59, available at 2004 WLNR 9601928 (“But the Texas senator harbored presidential ambitions and knew that as a Southerner he could never aspire to the Democratic nomination without forging ties to the Northern wing of the party—particularly to its liberal minority, the spiritual heirs of Franklin Roosevelt's New Deal.”); see also Scott Lehigh, *Kerry's Uphill Battle*, BOSTON GLOBE, Mar. 27, 2002, at A23, available at 2002 WLNR 2597974 (“As he worked to become the Democrats' leader in the Senate, Johnson, a Texan, needed a bridge to Northern liberals. Humphrey, a Minnesotan, wanted access to Southern senators, who treated him as a pariah because of his speech for civil rights at the party's 1948 convention.”)

450. Gerald Pomper, *The Nomination of Hubert Humphrey for Vice-President*, 28 J. POL. 639, 640-56 (1966) (outlining Humphrey's methodical pursuit of the Vice Presidency).

451. *Id.* at 659 (“Consent, not dictation, is the basic process of free government”).

452. *Id.* at 657 (“If the Humphrey case is indicative, the second spot will no longer be simply a trading device. There will be efforts to build a consensus behind this choice separately or, more likely, the same coalition will be evident in the selections of both candidates. We are less likely to see ‘balanced’ tickets, in which the two running-mates represent distinctively different positions.”).

453. Walter Shapiro, *What if Voters Picked Running Mates?*, USA TODAY, Apr. 12, 2000, at 24A, available at 2000 WLNR 3529171 (“It is odd that in a democracy, we routinely allow presidential nominees to designate their successors without any real opportunity for voter participation. (The evanescent poll numbers that both Gore and Bush will endlessly study before making their choices do not constitute meaningful consultation.”)).

shape the American polity—and not necessarily for the better. Consider the most recent available example: the 2004 Democratic vice presidential nomination. Although Democratic presidential nominee John Kerry believed that former House minority leader Richard A. Gephardt was the most qualified politician to assume the Presidency in the event of Kerry's death or incapacity, Kerry predictably ceded to the enormous pressures of ticket balancing and settled on the more popular one-term Senator John Edwards—whom Kerry is said to have personally held in low regard.⁴⁵⁴

In the words of former Democratic vice presidential nominee Geraldine Ferraro, modern vice presidential selection “focus[es] simply on the political” and casts aside otherwise critical qualities of presidential character and disposition.⁴⁵⁵ One can surely understand—though not necessarily accept—why a presidential nominee would seek to shore up her electoral weaknesses by filling the bottom of the ticket with a complementary or compensatory vice presidential candidate.⁴⁵⁶ But in the face of the contemporary Vice Presidency's extraordinary stature in the American polity—which calls for a seasoned public official to fill the office—and the prevailing national insecurity as America wages the war against terror—which requires reliable executive leadership—good politics should not supersede good government.

B. *Popular Legitimacy*

Nothing prevents good government and good politics from working well together in harmonizing fashion. This is the legacy of the late Endicott Peabody, a longtime Democratic leader who served the Commonwealth of Massachusetts as its Governor.⁴⁵⁷ Peabody passed away in 1997 as one of the most outspoken advocates for democratizing the Vice Presidency,⁴⁵⁸ believing that the party—not the presidential nominee—should select the vice presidential nominee.⁴⁵⁹ In 1972, Peabody became the first person ever to actually mount an active campaign for the Democratic nomination for Vice President,⁴⁶⁰ balking at the Roosevelt tradition of letting the

454. Nina J. Easton et al., *On the Trail of Kerry's Failed Dream*, BOSTON GLOBE, Nov. 14, 2004, at 24, available at 2004 WLNR 9576944.

455. Geraldine Ferraro, *The Sooner the Better*, BOSTON GLOBE, May 2, 2004, at D12, available at 2004 WLNR 3601685 (asserting that “[t]oday's vice-presidential discussions take qualifications for granted . . .”).

456. See Joel K. Goldstein, Editorial, *Don't Fault the System for Dan Quayle: Responsibility for Choosing Running Mates Lies with the People Who Pick Them*, ST. LOUIS POST-DISPATCH, Nov. 4, 1988, at 3B, available at 1988 WLNR 351149 (arguing that ticket balancing “helps resolve factional differences, keeps the major parties united and prevents significant third-party movements”).

457. Herald Wire Services, *Endicott Peabody: Former Governor of Massachusetts*, MIAMI HERALD, Dec. 5, 1997, at 4B, available at 1997 WLNR 3076254 (noting death of Endicott ‘Chub’ Peabody, governor of Massachusetts from 1962 to 1964).

458. Edgar Poe, *Sizing Up the Vice Presidential Nominating Process*, NEW ORLEANS TIMES-PICAYUNE, Feb. 29, 1992, at B7, available at 1992 WLNR 765421 (“Former Massachusetts Gov. Endicott Peabody currently is one of this country's leading and best known advocates of an amendment to the Constitution to create a change to the present method of selecting vice presidents. He contends that ‘Americans resent they have nothing to say about the selection of the vice president.’”).

459. Irvin Molotsky, *Endicott Peabody: One-Term Massachusetts Governor, Lifelong Liberal*, PITTSBURG POST-GAZETTE, Dec. 5, 1997, at D6, available at 1997 WLNR 2880749 (“Mr. Peabody's contention was that the party, not the presidential nominee, should choose the vice-presidential candidate.”).

460. Wayne King & Warren Weaver, Jr., *Peabody Heard From*, N.Y. TIMES, Aug. 13, 1986, at B6,

presidential nominee pick her own running mate.⁴⁶¹ Peabody's vice presidential campaign took him to forty states.⁴⁶² His labors were not for naught, as he had accumulated 107 delegate votes by the opening of the Democratic National Convention.⁴⁶³ This landmark run formed the centerpiece of his larger idealistic drive to draw attention to the democratic deficiency that shackles the Vice Presidency.⁴⁶⁴ Though onlookers had widely viewed his 1972 effort as an exercise in futility,⁴⁶⁵ Peabody renewed his campaign for the Democratic vice presidential nomination again in 1992,⁴⁶⁶ this time nominating himself for the office at the Democratic National Convention.⁴⁶⁷ Peabody would ultimately withdraw his nomination but not before securing a coveted opportunity to address the delegates.⁴⁶⁸

In his remarks, Peabody proposed that voters cast separate ballots for Vice President, thereby permitting them to veto improvident vice presidential nominations.⁴⁶⁹ "Only a heartbeat separates the offices of president and vice president, yet we continue to give each presidential candidate authority to select his running mate," declared vice presidential candidate Peabody, adding that "[c]oupled on the ballot during the elective process, the voters have absolutely no opportunity to exercise their vote directly for the second-highest so called elected official in the

available at 1986 WLNR 785038 ("In 1972 [Peabody] entered the state's primary as a candidate for the Democratic nomination for Vice President, the first and last politician to attempt that maneuver."); see also Editorial, *Chub Peabody Remembered*, BOSTON HERALD, Dec. 4, 1997, at 46, available at 1997 WLNR 265828 (stating that Peabody "caused jaws to drop in 1972 with history's only declared candidacy for a vice-presidential nomination").

461. Mark Schlinkmann, "Candidate" With a Cause, ST. LOUIS POST-DISPATCH, Dec. 28, 1991, at 1B, available at 1991 WLNR 521570 ("Peabody tried to 'run' for the Democratic nomination for vice president—ignoring the tradition of letting presidential nominees make their own choice.").

462. Charles Green, *Running for Vice-President: Subliminal Campaign Effort*, DETROIT FREE PRESS, May 15, 1988, at 1B, available at 1988 WLNR 1061002 ("Former Massachusetts Gov. Endicott Peabody campaigned in 40 states for the vice-presidential nomination in 1972.").

463. Ben Bradlee, Jr., *Peabody on Trail for Votes Again*, BOSTON GLOBE, Aug. 10, 1986, at 2, available at 1986 WLNR 283649.

464. *Endicott Peabody, Ex-Mass. Governor*, PALM BEACH POST (Fla.), Dec. 4, 1997, at 6B, available at 1997 WLNR 1739838 (stating that Peabody "led a quixotic campaign to elevate the importance of the vice presidency").

465. Edgar J. Driscoll, Jr. & Brian Mooney, *Endicott Peabody, Former Governor, Dead at 77*, BOSTON GLOBE, Dec. 3, 1997, at A1, available at 1997 WLNR 2348358.

466. Bob Hohler, *Kerrey, Harkin File for N.H. Primary*, BOSTON GLOBE, Dec. 21, 1991, at 8, available at 1991 WLNR 1754329 ("Four candidates, including Endicott Peabody, a Democrat and former Massachusetts governor, filed for vice presidential candidacies.").

467. Adam Pertman, *Gore Considers Race a Fight for America's Soul*, DAILY NEWS (L.A.), July 17, 1992, at N15, available at 1992 WLNR 1231302 ("Before Gore officially was placed on the ticket, not by a roll-call vote but by acclamation, former Massachusetts Gov. Endicott Peabody promoted his perennial pursuit of the Vice Presidency by putting his own name into nomination.").

468. David E. Rosenbaum, *Under the Big Top—On the Floor: All Over Town, Delegates Hear About Perot*, N.Y. TIMES, July 17, 1992, at A12, available at 1992 WLNR 3299515 ("Endicott Peabody, the Governor of Massachusetts in the mid-1960's, nominated himself for Vice President last night, gave a speech and then withdrew the nomination.").

469. Reed Karaim, *Gore Steps Beyond Old Image*, PHILA. INQUIRER, July 17, 1992, at A15, available at 1992 WLNR 2005054.

nation.”⁴⁷⁰ Peabody never really expected to win.⁴⁷¹ He had only hoped to mobilize support for electing the Vice President independently of the President⁴⁷²—a proposal that would require a constitutional amendment.⁴⁷³

1. Recasting the Vice Presidency

Any suggestion to legitimize the evolving Vice Presidency should bear at least four features. To begin with, it should be consistent with the three American democratic values that gave shape to the office more than two hundred years ago. These values include popular consent, stability, and competence, each of which has been fluently elaborated by vice presidential scholar Joel Goldstein.⁴⁷⁴ These embody the first three of the four requirements for recasting the Vice Presidency. In addition—and this is the fourth feature—any proposal should comport with the existing substance and structure of the Constitution. That is, what unites the overwhelming majority of modern constitutional amendments is a shared language of thought whose animating syntax is broadly anchored in the democratization of the American polity and American public institutions, and the popular legitimatization of political leadership. At least fourteen of the seventeen amendments ratified since the Bill of Rights share this distinguishing feature.

Consider the Constitution’s vision for the popular legitimacy of public officials, as evidenced by the authorization of separate ballots for electing the President and Vice President,⁴⁷⁵ the solicitation of public input to fill vice presidential vacancies,⁴⁷⁶ and the direct election of United States Senators.⁴⁷⁷ Or the Reconstruction Amendments, which abolish slavery,⁴⁷⁸ extend the equal protection of the laws to all individuals,⁴⁷⁹ and authorize citizens of all ethnicities to exercise their franchise.⁴⁸⁰ Post-Bill of Rights amendments also grant each citizen a financial stake in the operations of

470. *Convention Report*, S.F. CHRON., July 17, 1992, at A9, available at 1992 WLNR 2504382 (quoting Endicott Peabody).

471. See Marianne Means, Editorial, *Questions About Quayle Not Answered By Direct-Elect Ideas*, SEATTLE POST-INTELLIGENCER, Feb. 7, 1992, at A13, available at 1992 WLNR 1485821 (“Peabody’s goal is not really to win the No. 2 spot but to generate support for an amendment that would transform the way we pick our vice presidents.”).

472. See Editorial, *Endicott Peabody*, BOSTON GLOBE, Dec. 4, 1997, at A20, available at 1997 WLNR 2359765 (describing Peabody’s efforts as “a Quixotic campaign for vice president in an attempt to change the law”).

473. See *A Quayle Failure in N.H.*, BOSTON GLOBE, Feb. 21, 1992, at 10, available at 1992 WLNR 1871651 (“Peabody supports changing the Constitution so the vice president is elected by the people rather than named by the president . . .”).

474. GOLDSTEIN, *supra* note 7, at 209-22.

475. U.S. CONST. amend. XII (eliminating practice of casting two votes for President and requiring electorate to discriminate in ballots between President and Vice President).

476. *Id.* amend. XXV, § 2 (providing congressional procedure for confirming presidential nominee for vacant Vice Presidency).

477. *Id.* amend. XVII (authorizing direct election of U.S. Senators).

478. *Id.* amend. XIII (abolishing slavery and involuntary servitude).

479. *Id.* amend. XIV, § 1 (extending equal protection of laws to all citizens).

480. U.S. CONST. amend. XV, § 1 (extending franchise to all citizens irrespective of ethnicity).

government,⁴⁸¹ frustrate the ability of Congress to increase its own compensation without electoral authorization,⁴⁸² limit the capacity of an unrepresentative lame duck Congress to take meaningful action,⁴⁸³ and stem the increasing concentration of executive power in an imperial executive.⁴⁸⁴ Moreover, constitutional amendments have steadily expanded popular participation in the affairs of state: giving residents of the District of Columbia a voice in choosing the President and Vice President,⁴⁸⁵ eliminating the bar on women's right to vote,⁴⁸⁶ expanding the universe of eligible voters to include citizens having attained at least eighteen years of age,⁴⁸⁷ and prohibiting poll taxes as a condition of casting an electoral ballot.⁴⁸⁸ Thus, any reform must fit squarely within this distinctive and distinguishing motif of democratic and popular legitimacy. Call it the constitutional consistency test. This is the fourth requirement.

One of the most intriguing vice presidential reform proposals has taken life under the pen of Akhil and Vik Amar, authors of a novel piece on executive ticket splitting.⁴⁸⁹ Ticket splitting allows a voter literally to split her ticket—to cast her electoral ballot for the Republican nominee for President and the Democratic nominee for Vice President, or vice versa.⁴⁹⁰ The Amars rebut several arguments against ticket splitting—deriving from such sources as constitutional text and history, federal and state law, law and economics, political theory and public policy—and conclude that nothing compels a unified ticket in federal elections.⁴⁹¹ Moreover, they argue, ticket splitting yields an important collateral benefit for the Vice Presidency: “If parties know that the vice-presidential candidate must compete directly against the opposing party’s vice-presidential candidate, they will be less likely to put forth weak candidates for that office.”⁴⁹²

Under the Amarian vision of executive selection, the electorate should have the option of voting for their preferred presidential and vice presidential nominees, regardless of their respective party affiliations. In the 2004 presidential election, for example, this would have meant permitting voters to choose between incumbent Republican President George W. Bush and Democratic challenger John Kerry for

481. *Id.* amend. XVI (authorizing federal income tax).

482. *Id.* amend. XXVII (requiring electoral authorization for congressional pay increases).

483. *Id.* amend. XX, § 1 (shortening tenure of lame duck Congress).

484. *Id.* amend. XXII, § 1 (limiting Presidents to two elective terms and succeeding Vice Presidents to no more than ten years of presidential service).

485. U.S. CONST. amend. XXIII, § 1 (authorizing District of Columbia to cast electoral ballots for President and Vice President).

486. *Id.* amend. XIX, § 1 (extending franchise to all citizens irrespective of gender).

487. *Id.* amend. XXVI, § 1 (extending franchise to all citizens at least eighteen years of age).

488. *Id.* amend. XXIV, § 1 (prohibiting poll or other tax as condition of exercising franchise).

489. Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913 (1992).

490. Another scholar proposed a similar idea in 1988, suggesting that the Vice President should be elected separately from the President because “binding [the Vice Presidency] to [the Presidency] is an artificial restriction fundamentally anti-democratic in nature.” Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1726 (1988).

491. Amar & Amar, *supra* note 489, at 946 (“In the end, we have been unable to find any obviously compelling reason for the prohibition on executive ticket splitting in federal elections.”).

492. *Id.* at 945.

President and, for Vice President, between incumbent Republican Vice President Dick Cheney and Democratic challenger John Edwards. Since ticket splitting does not bind voters to cast their ballots for their preferred presidential nominee's choice for Vice President, the result in 2004 could have produced a Republican President serving alongside a Democratic Vice President or, alternatively, a Democratic President with a Republican Vice President as her deputy. Voters would of course have retained the right to reelect both incumbent Republicans or to replace them with both halves of the Democratic ticket.

The Amarian proposal comes close to fulfilling the four conditions outlined above for democratizing the Vice Presidency. First, ticket splitting is consistent with the democratic value of popular consent that underpins the office insofar as it seeks to confer upon the second office a mandate issued directly from the people. Second, the proposal fosters a competent executive because presidential nominees—knowing that vice presidential candidates will be in direct competition with one another—will be constrained to devalue ticket-balancing considerations and instead select running mates of presidential quality. Third, ticket splitting comports with the existing substance and structure of the Constitution because it democratizes executive selection by authorizing voters to express their disparate preferences on candidates, whether the outcome is a split or unified ticket. But ticket splitting may not meet the fourth test: stability.

Though the Amars take great care to defuse the argument—persuasively, in my view—that an elected split ticket could lead to divided government and internal inconsistency,⁴⁹³ they do not address how their proposal would mesh with the Twenty-Fifth Amendment. Recall that the amendment authorizes the Vice President to temporarily stand in as acting President until the President regains the ability to discharge her presidential duties.⁴⁹⁴ In an America governed by ticket splitting, the President would be even more reluctant than usual to cede her power to a Vice President, particularly to one of a different political stripe.

Moreover, imagine the potential for divisiveness and uncertainty when—assuming the intervening advent of a temporary change of control—the President seeks to regain her office from the acting President who represents the opposing political party. Joel Goldstein has also argued that ticket splitting would foster too much volatility in the American polity, given that the “[d]eath or resignation of the President could lead to a radical shift of government policy and personnel.”⁴⁹⁵ Another commentator has suggested that the Twenty-Fifth Amendment—as applied without ticket splitting—*already* could lead to a situation in which the nation does not know who is really the President⁴⁹⁶ because the amendment contemplates that Americans may have two Presidents simultaneously for three weeks pending congressional resolution of this imbroglio.⁴⁹⁷ It is, therefore, not difficult to imagine the situation

493. *Id.* at 938-41.

494. U.S. CONST. amend. XV.

495. GOLDSTEIN, *supra* note 7, at 285.

496. Edwin M. Yoder, Jr., Op-Ed., *The “Acting President” Problem*, WASH. POST, Sept. 23, 1988, at A21 (“One can, for instance, imagine a situation in which the nation is unsure who is really president.”).

497. Richard E. Neustadt, Speech, *The Twenty-Fifth Amendment and its Achilles Heel*, 30 WAKE FOREST L. REV. 427, 431 (1995) (“Whatever the Twenty-fifth Amendment accomplishes, the amendment causes some

described by Edwin Yoder in which the President has temporarily ceded her powers to the Vice President, who then refuses to return the office to the President when the period of temporary disability has elapsed.⁴⁹⁸ If this is possible in a unified Republican or Democratic administration, the prospects are just as unsavory, if not worse, in a split administration.

Yet the Amarian proposal embodies precisely the kind of inventive thinking that the Vice Presidency will require in order to unstitch itself of its democratic illegitimacy. As with any creature of human design, the Vice Presidency is an imperfect institution that lawmakers must never shield from the forces of change solely for the sake of fidelity to history. Quite the contrary, fidelity to the history of the evolving Vice Presidency as traced above⁴⁹⁹ demands that the office remain malleable to accommodate the exigencies of the day. It is in this spirit that I raise several reform proposals designed to address the democratic deficit that continues to afflict the Vice Presidency in the modern American polity.

2. The Popular Vice Presidency

With popular legitimacy and democratic integrity as the two signposts, several designs emerge for modifying vice presidential selection. Some—admittedly more politically feasible and viscerally attractive than others—may require formal constitutional amendments and others may call for difficult adjustments to rigid political customs. The aim of the exercise is to canvass the multiplicity of options available to democratize the Vice Presidency, an office that has evolved from insignificance to prominence. The value of the exercise is to demonstrate the viability of popularizing the Vice Presidency and make plain the several possible approaches—from narrow to wholesale—to satisfy a pressing need in the American project of democracy.

a. *New Hampshire Vice Presidential Primary*

One source of inspiration for vice presidential reform is the state of New Hampshire, which is unique in currently administering both a presidential and vice presidential primary every presidential election cycle, something the state has done since 1952.⁵⁰⁰ Though the tally is not binding,⁵⁰¹ the New Hampshire Secretary of

potentially bad things as well. One is particularly bad: it sanctions two Presidents at once for at least three weeks after Congress assembles to decide between them.”).

498. Edwin M. Yoder, Jr., *Determining Presidential Health under the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 607, 608 (1995) (“That is, a situation might arise in which the elected President had temporarily handed over his duties to the Vice President, who then for some reason declined to hand them back when the period of temporary ‘disability’ had passed, or when the disability seemed to the Vice President and his supporters to linger. Might two or more presidential factions, each claiming constitutional legitimacy, be unable to agree on who was, or should be, President? Although Section 4 of the amendment outlines a process for resolving any such dilemma, no such process can be foolproof.”).

499. See *supra* Part III for a discussion of the evolution of the Vice Presidency as a matter of substantive function, constitutional structure, and political status.

500. William Bryk, *McCain and Me*, N.Y. PRESS, Feb. 18, 2000, http://www.nypress.com/print.cfm?content_id=1294 (“In 1952, the state added a beauty contest for president and, inexplicably, vice president.”).

501. *Request Made to Delete Quayle from N.H. Ballot*, ST. PETERSBURG TIMES, Dec. 22, 1991, at 10A,

State sees no need to discontinue the state's distinguishing practice of holding a vice presidential primary: "It's just sort of stayed as a tradition in New Hampshire. Usually it doesn't have much significance, but it's still there and some people think that maybe someday it might come in handy."⁵⁰² Some well-known political veterans have cast their lot in the state's vice presidential primary, including former North Carolinian Republican Senator Jesse Helms in the 1980 election cycle.⁵⁰³

Other equally prominent vice presidential aspirants have shunned the primary—and for their political sacrilege have faced unpleasant, though fleeting, consequences. In the 1992 presidential election, incumbent Vice President Dan Quayle refused to run in the vice presidential primary.⁵⁰⁴ In a complaint to the state attorney general, a rival primary participant accused Quayle of misleading the New Hampshire electorate by posing as a vice presidential candidate yet not running in the vice presidential primary.⁵⁰⁵ Through a spokesperson, Quayle defended his choice to sit out the primary as merely following recent tradition: "You don't run for vice president. You serve at the request of the president."⁵⁰⁶ Quayle's response actually had merit. New Hampshire's vice presidential primary does not officially elect delegates to the national convention—in fact, New Hampshire law allocates convention delegates according only to the percentage of the vote garnered by presidential candidates in the state's presidential primary.⁵⁰⁷

Merely implementing New Hampshire's practice of holding an advisory and nonbinding vice presidential primary to all states would not be a satisfactory modification to Vice Presidency selection. But the New Hampshire model does offer the seedlings of a workable proposal for holding vice presidential primaries in addition

available at 1991 WLNR 1930603 ("The tally isn't binding.").

502. William Bryk, *Shades of Nixon: Will the Next Vice President Please Sign Up?*, N.Y. PRESS, Feb. 24, 2004, http://www.nypress.com/print.cfm?content_id=9685 (quoting N.H. Secretary of State Bill Gardner).

503. *Campaign '80: Mass. Delegation Repeats Support for Kennedy*, BOSTON GLOBE, Dec. 28, 1979, available at 1979 WLNR 1693 ("Conservative Republican Senator Jesse Helms of North Carolina filed signatures to become the only candidate in New Hampshire's vice presidential primary.").

504. *Move Afoot to Strike Quayle from '92 Primary Committee*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Dec. 22, 1991, at 111, available at 1991 WLNR 443246 (stating that a participant in the vice presidential primary "wants Dan Quayle's name removed from the Bush-Quayle '92 Primary Committee because the vice president isn't running in New Hampshire's primary").

505. *Ex-Gov. Peabody Wants Quayle Off N.H. Primary Committee*, LEXINGTON HERALD-LEADER (Ky.), Dec. 22, 1991, at A6, available at 1991 WLNR 1345286 ("You might ascertain that Dan Quayle has determined not to present himself as a candidate for vice president this year since he did not file in the New Hampshire primary, the only primary available to him in the 50 states of the union," Peabody wrote. "If this is so, you might recommend that this committee delete Mr. Quayle's name from the Bush-Quayle '92 Primary Committee so that supporters will not be misled in the future.") (quoting Endicott Peabody)).

506. *Call to Eliminate Quayle's Name*, BOSTON GLOBE, Dec. 22, 1991, at 23, available at 1991 WLNR 1764989.

507. Federal Election Commission, Advisory Opinion Number 1979-43 (Oct. 5, 1979), available at <http://ao.nictusa.com/ao/no/790043.html> ("While New Hampshire law permits the separate designation of presidential and vice presidential candidates, the allocation of delegates among candidates is based upon the percentage of vote received by presidential candidates only, and only presidential candidates may designate delegates to be certified. The candidate of the Democratic Party for the office of Vice President is nominated at the Democratic National Convention, and not 'as a direct result' of the New Hampshire Vice Presidential Primary.").

to the parties' respective presidential primaries. Currently, states hold their Democratic and Republican presidential primaries beginning in January of an election year and continuing through the early fall. Typically, at least in recent years, the victor is crowned for all intents and purposes well in advance of her party's summer nominating convention, either because she has accumulated the requisite number of delegates or because rival candidates have exited the race.⁵⁰⁸

b. Vice Presidential Primary

It would be imprudent to hold a vice presidential primary concurrently with a presidential primary for two principal reasons. First, it would dilute the quality of the vice presidential field because first-tier politicians would instead contest the Presidency, thus precluding their participation in a vice presidential primary administered at the same time. Given the motivation for reforming the Vice Presidency—to infuse the office with democratic legitimacy and to attract candidates of presidential quality—a concurrent vice presidential primary would be counterproductive. Second, it would divert attention away from the presidential primary, which would be harmful from the perspective of citizen engagement because presidential primaries serve at least two important social functions: (1) the invaluable public function of introducing prospective presidential nominees to the nation, often for the first time; and (2) the political function of rallying the party apparatus and party adherents in advance of the general election.

But holding a vice presidential primary *after* the presidential primary would assuage these two drawbacks. Once a party's presidential nominee is known—but not yet officially nominated at the nominating convention—the party may hold its vice presidential primary without fear of excluding candidates of presidential timbre because all unsuccessful presidential candidates will be free to run for the vice presidential nomination. This arrangement would also avoid detracting from the attention properly given to the presidential nominee during the presidential primary season. Moreover, a vice presidential primary would confer upon the vice presidential nominee a degree of popular legitimacy comparable to that acquired by the successful candidate in the presidential primary.

Assuming the party wishes to retain its existing nominating calendar alongside the new addition of a vice presidential primary, the nominating convention could remain scheduled for the summer months immediately preceding Election Day in November. Working backwards, the vice presidential primary could be held before the nominating convention during the late spring and early summer on an abbreviated calendar much shorter than the timetable for the presidential primary, which would precede the vice presidential primary. Whereas presidential primaries currently run from January to the late spring of an election year, they would likely have to begin in the early winter of the year preceding the election, nearly a full year before Election Day.

508. See Darlisa Crawford, *National Party Conventions Focus Attention on Candidates, Issues*, WASH. FILE, July 14, 2004, available at <http://usinfo.state.gov/dhr/Archive/2004/Jul/14-184669.html> (noting that delegates no longer select candidates at political conventions but rather “confirm their support” for a candidate; prior to the 2004 Democratic National Convention, Senator John Kerry’s nomination was “likely to be unanimous” because the other candidates had dropped out of the race and endorsed Kerry).

Consider the resulting calendar, where *X* is the election year: (1) November in year *X*-1: presidential primary begins, perhaps still, as today, with the Iowa Caucuses and the New Hampshire Primary; (2) April in year *X*: presidential primary ends (at the latest); (3) early May – late June in year *X*: vice presidential primary begins and ends on a condensed schedule; (4) late July – late August in year *X*: parties hold their respective nominating conventions; and (5) November in year *X*: presidential election. A few clarifications are in order. First, states would have to revise their primary laws to advance the dates of their respective presidential primaries to accommodate this new calendar. Second, parties would in all likelihood wish to give themselves some time between the end of the presidential primary and the beginning of the vice presidential primary. In addition to allowing party organizers sufficient time to transition from one to the other, the interval would permit unsuccessful presidential candidates to weigh the prospects of running in the vice presidential primary. Third, the vice presidential primary calendar would have to proceed at an accelerated pace over two or three months in order to allow sufficient time between the conclusion of the vice presidential primary and the nominating convention, typically held in July or August preceding Election Day in November.

This first proposal to democratize the Vice Presidency may elicit several strong objections. Two in particular merit attention, though neither is dispositive.⁵⁰⁹ First, a vice presidential primary is susceptible to the charge that it would prevent political parties from relying on ticket balancing to unify divergent factions of the party, appeal to certain geographical elements of the electorate, or compensate for perceived shortcomings in the candidacy of the presidential nominee. The rebuttal to this point is that a presidential nominee could summon her persuasive powers and newly inherited status as party spokesperson to signal her liking for a particular running mate in the field of the vice presidential primary candidates. This strategy would of course pose the potentially devastating risk that primary voters would ignore or overtly reject the recommendation of the presidential nominee—not an especially constructive way to begin a run for the White House. But if a presidential nominee was nevertheless keen on a given candidate—whether due to strategic considerations or because she genuinely thought the two of them would make a compatible pair—nothing would prevent her from either obliquely suggesting or forthrightly stating her liking during or preceding the vice presidential primary.

A second objection begins with the proposition that presidential candidates raise and spend enormous sums of money in a presidential primary. It may be unreasonable to hold a vice presidential primary on the heels of the presidential primary because donors—in all probability the same ones in the presidential and vice presidential primaries—are unlikely to be as responsive to candidates for the second office as they were to presidential candidates. Fundraisers, for their part, may be less willing to latch onto vice presidential candidates—whose candidacy is no sure thing in the context of a primary—instead of plying their trade for the presidential nominee, who by then would

509. A third objection is that a vice presidential primary would unduly extend the presidential campaign. Advancing the date of the presidential primary to November of the year preceding election year would require presidential candidates to declare their candidacies much earlier and may transform the presidential election campaign—from beginning (declaration of candidacy) to end (Election Day)—to a full two-year proposition.

already be known and eager to build new symbiotic relationships with those in a position to help her win the general election. The response to this argument is simple and perhaps unsatisfactory: the cost of business in a vice presidential primary will include spending a considerable amount of time cultivating donors—not at all unlike the usual practice in any race for elective office. A corollary to this objection is an analogous fear that a deep-pocketed vice presidential candidate will run away with the nomination thanks to her large personal fortune. But this concern may be addressed by imposing spending limits on candidates in the party's vice presidential primary.⁵¹⁰ As a practical matter though, a wealthy candidate may not in fact enjoy any particular advantage or head start over her less wealthy rivals in a primary.⁵¹¹ Just ask Steve Forbes.⁵¹²

When measured against the four conditions listed above for democratizing the Vice Presidency,⁵¹³ the proposal to hold a vice presidential primary performs commendably. First, a vice presidential primary confers upon its winner a resounding popular mandate, not unlike the claim of popular legitimacy that the presidential nominee takes with her into the general election. Second, the result of a vice presidential primary is to generate a competent candidate, one who has weathered the test of opposition from qualified candidates and has earned the confidence of the primary electorate. Third, a vice presidential primary will yield a stable executive insofar as, compared to the Amarian ticket splitting proposal, a unified ticket poses no substantial risk of intraexecutive dissent and neutralizes the hazard of changing ideological course upon vice presidential succession to the Presidency. Finally, a vice presidential primary democratizes vice presidential selection and thus comports with

510. But note that the Supreme Court has invalidated provisions limiting expenditures by candidates on their own behalf. *Buckley v. Valeo*, 424 U.S. 1, 54 (1976). Whether this rule would survive a challenge under the Court's most recent pronouncements on campaign finance regulation remains uncertain. See *McCormell v. Fed. Election Comm'n*, 540 U.S. 93, 224 (2003) (upholding as constitutional the two main features of the Bipartisan Campaign Reform Act of 2002: the control of soft money and the regulation of electioneering communications); *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) (holding that "a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits."); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 382 (2000) (affirming *Buckley* as authority for comparable state regulation of campaign contributions).

511. Ron Faucheux, *Rich Candidates Don't Always Win—or Lose*, CAMPAIGNS & ELECTIONS, July 1998, at 8, available at 1998 WLNR 5198686 ("Big spending during election campaigns does not always ensure victory for wealthy candidates.").

512. Despite spending sixty-six million dollars from his personal fortune in two presidential bids, publisher Steve Forbes was unable to mount a successful campaign in either the 1996 or 2000 Republican presidential primary. Michael Crowley, *Publisher is Closing the Book on Campaign 2000*, BOSTON GLOBE, Feb. 10, 2000, at A16, available at 2000 WLNR 2284913; see also Kenneth T. Walsh, *The Gilded Age of American Politics*, U.S. NEWS & WORLD REP., May 20, 1996, at 26, available at 1996 WLNR 4174551 (stating that a presidential candidate "can spend unlimited amounts of his own money if he does not accept federal funds."). But wealthy candidates have fared better in Senate, gubernatorial, and mayoral races. See Joshua Green, *A Gambling Man*, ATLANTIC MONTHLY, Jan. 1, 2004, at 34, available at 2004 WLNR 9612034 (discussing recent success of wealthy Senate candidate Jon Corzine, gubernatorial candidate Mark Warner, and mayoral candidate Michael Bloomberg).

513. See *supra* Subsection IV.B.I for a discussion of the four features that are indispensable to a popularly legitimate Vice Presidency.

the existing substance and structure of the post-Bill of Rights constitutional amendments.

c. Nominating Convention

A second proposal for democratizing the vice presidential selection process builds upon the quadrennial party nomination conventions. Unlike those of the past, today's nomination conventions are broadly viewed as well-crafted infomercials produced by Hollywood executives whose sole purpose—disingenuous, according to several commentators⁵¹⁴—is to present the focus-group tested and poll-driven face of a political party to the electorate.⁵¹⁵ Some, like Eugene McCarthy, have argued that conventions no longer matter in the American polity particularly because they are no longer battlefields where important battles are waged over such issues as platform policy and the selection of the vice presidential nominee.⁵¹⁶

But conventions are not irrevocably doomed to inconsequence. Selecting the vice presidential nominee at the convention could produce at least two propitious results. First, conventions could reclaim their lost importance in the American political consciousness. Second, it could permit convention delegates to participate in choosing the vice presidential nominee, thus imbuing the candidate with some measure of popular legitimacy.

There are several ways to involve convention delegates in vice presidential selection. Three suggestions deserve consideration. First, convention delegates could themselves vote to select the vice presidential nominee—a choice that would be binding on the presidential nominee. Second, the party could canvass convention

514. See, e.g., Jennifer Harper, *Democrats Ready Stage in Los Angeles*, WASH. TIMES, Aug. 4, 2000, at A16, available at 2000 WLNR 346692 (“In a well-publicized spitting match this week, heavyweights at CBS, NBC and ABC have spurned and criticized the GOP convention, calling it an ‘infomercial’ and scripted ‘love fest,’ among other things.”); Bill Lambrecht, *Gore’s Mission is to Combat His Stiff Image*, ST. LOUIS POST-DISPATCH (Mo.), Aug. 13, 2000, at A1, available at 2000 WLNR 927887 (“With little intrigue or risk-taking, conventions are widely disparaged by analysts as infomercials.”); Pamela McClintock & Susan Crabtree, *Beantown Bash a Media Mosh Pit*, DAILY VARIETY, July 26, 2004, at 1, available at 2004 WLNR 12536341 (“In 1996, [Nightline host Ted] Koppel walked off the floor of the Republican National Convention in protest, saying it was ridiculous to cover an event that had become little more than an infomercial for the political parties.”); Frank Rich, *G.O.P. Nixes Nets*, N.Y. TIMES, Aug. 14, 1996, at 21, available at 1996 WLNR 4371460 (describing convention as “a masterpiece of disingenuousness”); Noel Rubinton, *As Networks Abandon Convention, Doors Open for Cable, Internet*, MILWAUKEE J. & SENTINEL, Aug. 7, 2000, at A13, available at 2000 WLNR 3246920 (“Network television economics also intersect with a changed political landscape where conventions now most closely resemble lavish infomercials produced by the major political parties.”); Don Surber, *Summer Was Made for Song*, CHARLESTON DAILY MAIL (W. Va.), Sept. 1, 2000, at 1C, available at 2000 WLNR 744592 (“CBS dismissed the political conventions as infomercials.”).

515. Leonard Steinhorn, *Lights, Cameras, Cue the Politicos Conventions*, BALT. SUN, July 23, 2000, at 1C, available at 2000 WLNR 1075110 (“Like much of politics today, [political conventions] will be little more than focus-group-tested Hollywood productions designed for consumer consumption, slick and sophisticated sales pitches aimed at the unwitting voter.”).

516. Eugene J. McCarthy, Op-Ed., *When Conventions Mattered*, N.Y. TIMES, Aug. 14, 2000, at A23, available at 2000 WLNR 3231664 (“Once conventions were battlefields where real fights were waged over platforms, personalities and power. Vice-presidential choices were not made beforehand; the selection of the presidential nominee was seldom sure until the convention had run its course. Conventions had lives and logic all their own. And they mattered.”).

delegates for their vice presidential preferences and the presidential nominee would choose her running mate from a limited list of the delegates' top candidates. Third, the reverse scenario also seems intriguing: the presidential nominee could put forth a limited list of vice presidential candidates she deems both presidential and with whom she could work effectively, and then allow the convention to choose her running mate from those candidates. Below, I weigh the merits and demerits of each of these options.

Curiously, the first suggestion—allowing convention delegates to select the vice presidential nominee—is arguably the most democratic of the three, but it may not be the most appealing. Were the objective exclusively to give the vice presidential nominee a popular mandate heading into the general election, this option would be the most attractive insofar as it leaves the selection of the vice presidential nominee entirely in the hands of the convention. But recall that a new vice presidential selection process must answer to more than one requirement. It must fulfill four requirements.⁵¹⁷ It must be consistent with three American democratic values: popular consent, stability, and competence. It must also comport with the existing substance and structure of the Constitution. Authorizing convention delegates to pick the vice presidential nominee would meet three of these (popular consent, competence, consistency with Constitution) but would fail to foster executive stability because one cannot be certain that the choice of convention delegates would be compatible with the presidential nominee. If there is any merit to the current vice presidential selection process, it is that it forces the presidential nominee to consider her compatibility with her prospective running mate and whether she will be able to work harmoniously with her Vice President over the next four to eight years. This first of three options, to let the convention pair the nation's prospective leaders, casts aside this important consideration.

The second option—surveying convention delegates as to their vice presidential preferences and requiring the presidential nominee to choose her running mate from a limited list of the delegates' top candidates—suffers from the same infirmity as the first. Convention delegates might not select candidates who would work well with the presidential nominee. If a President cannot rely on her Vice President for counsel and assistance in administering the affairs of state—or worse, if she is unable to trust her Vice President and leads the nation in fear of her deputy's subversive or insubordinate intentions—she may as well not have a Vice President at all. The importance of executive stability cannot be overstated.

Conversely, the third option has merit precisely because it marries popular legitimacy with executive stability. Under the third suggestion, the presidential nominee compiles a limited list of candidates and asks convention delegates to select the vice presidential nominee from those individuals. Here, the presidential nominee would likely pick candidates with whom she could work comfortably and competently. Moreover, it is likely that the presidential nominee would conduct a vetting inspection of prospective candidates that would include face-to-face interviews with them prior to presenting her final list to the convention. Having meticulously assessed the

517. See *supra* Subsection IV.B.1 for a discussion of the four features that are indispensable to a popularly legitimate Vice Presidency.

advantages and disadvantages of potential running mates (perhaps on the basis of strategic ticket balancing), the presidential nominee would be assured that the convention's choice would bring with it no surprises. Most importantly, the vice presidential nominee would take with her into the presidential election a measure of popular legitimacy that would serve her well in the event her ticket won election and she later succeeded to the Presidency.

Thus the third option appears to be the most appealing of the three proposals to legitimize the Vice Presidency through the engine of the nominating convention. First, it confers upon the vice presidential nominee a popular mandate. Second, it generates a competent candidate who has secured the approval of convention delegates. Third, it spawns a stable partnership that pairs collaborative presidential and vice presidential nominees. Lastly, the third option is wholly consistent with the democracy-promoting substance and structure of the Constitution in that it invites the people to figure notably in vice presidential selection.

d. Post-Election Vice Presidential Selection

Under existing customs of vice presidential selection, presidential nominees typically select their running mates in the spring or summer months preceding the quadrennial November presidential election. The proposals outlined above have sought to respect this customary practice and have thus shared at least one common element: each has approached the task of legitimizing the Vice Presidency with suggestions aimed at selecting vice presidential nominees *before* the presidential election. However, the period *after* the presidential election presents equally attractive alternatives for democratizing vice presidential selection. In no particular order, three post-election proposals include: (1) presidential nomination and congressional confirmation; (2) national ratification by referendum; and (3) vice presidential election.

i. Congressional Confirmation

The Twenty-Fifth Amendment's congressional procedure for filling vice presidential vacancies offers an enticing model for vice presidential selection. Recall that, in the event of a vice presidential vacancy, the amendment stipulates that the President is to nominate an individual to serve as Vice President subject to confirmation by both chambers of Congress.⁵¹⁸ Why not use this confirmation process to select the Vice President? Applying this model to vice presidential selection would change presidential elections in several regards. First, no longer would a presidential candidate face the electorate with a vice presidential nominee by her side. Presidential candidates would run without running mates. Second, pre-convention posturing and strategy would no longer feature the presidential nominees' long-anticipated vice presidential choices. Third, depending on the timing of the president-elect's nomination—and House and Senate confirmation—of a Vice President, Inauguration Day might *not* mark the Vice President's installation into office, as it does today.

518. See *supra* Subsection III.B.4 for a discussion of the Twenty-Fifth Amendment's congressional procedure for filling a vice presidential vacancy.

Under this model, the President-elect would have three time frames within which to nominate a Vice President: (1) between Election Day and the installation of the new Congress, which is January 3 of the year following Election Day;⁵¹⁹ (2) between the installation of the new Congress and Inauguration Day, which falls on January 20 of the year following Election Day;⁵²⁰ and (3) after Inauguration Day. Each presents a common difficulty for an incoming President: partisan sabotage. For instance, should the President-elect seek to have Congress confirm her vice presidential nominee between Election Day and the installation of the new Congress, the President-elect would face a lame duck Congress perhaps all too enthusiastic to disrupt the tenure of the incoming President. Similarly, obtaining congressional confirmation between January 3 and Inauguration Day or after Inauguration Day would present too tempting an opportunity to dissident politicians eager to get the new President off to a bad start.

Yet this model possesses at least two redeeming qualities whose allure may sufficiently outweigh the risks of congressional derailment. Liberated from strategic ticket-balancing considerations, the newly-elected President would be free to select whomever she wishes to serve as Vice President. She would therefore be able to fill the office with the person she deems most prepared to assume the powers and duties of the Presidency in the event of the President-elect's inability to serve. Moreover, knowing that her choice is subject to congressional confirmation and wishing to avoid the disappointment of congressional rejection of her nomination, the President-elect would be constrained to nominate a Vice President who is likely to meet with the approval of the congressional leadership. This would require consultations between the incoming President's transition team and congressional leaders, perhaps even leading to an agreement under which the incoming President informally secures congressional pre-approval of a limited number of prospective candidates. The process could in fact produce a candidate with wide bipartisan appeal—and one whom the President-elect believes would make a competent partner.

This option—applying the Twenty-Fifth Amendment model—would require a constitutional amendment but would meet the four conditions for democratizing the Vice Presidency. First, congressional confirmation is a more than adequate proxy for popular consent. Indeed, it is the very process by which the President selects cabinet secretaries, judges, ambassadors, and other executive officers.⁵²¹ Second, vice presidential congressional confirmation would yield a competent candidate who has been tested and vetted by the President, and examined and approved by elected politicians. Third, this option would foster executive stability because the individual nominated by the President will have first been thoughtfully measured by the President. Finally, congressional confirmation democratizes vice presidential selection and therefore meets the constitutional consistency test.

519. U.S. CONST. amend. XX, § 1.

520. *Id.*

521. *Id.* art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .”).

ii. National Ratification

An alternative post-election mechanism for vice presidential selection is national ratification by referendum. Under this proposal, the President-elect selects an individual to fill the office of the Vice Presidency. But instead of sending her nominee to face a lame duck Congress for confirmation, the President-elect puts her nominee before the nation in a national referendum. The nominee would run unopposed in an election in which the ballot question—only one—would ask each voter whether she approves of the President-elect's vice presidential nominee. Here, the American electorate substitutes for the Congress as the confirmatory body for the President-elect's nomination. This option exhibits largely the same virtues as congressional confirmation. First, it would free the President-elect from strategic ticket-balancing considerations, thus permitting her to pick the most qualified person for the office. And, second, unless the President-elect nominates a competent candidate with wide appeal to the electorate, she would suffer a humiliating and disruptive rebuke at the start of her presidential term.

Certain parameters would need elaboration—for instance, the timing of the referendum (whether it would occur between Election Day and January 3, between January 3 and January 20, or after Inauguration Day), whether a simple majority is sufficient for ratification, not to mention the not-insignificant matter of a constitutional amendment to accommodate this new process. Nonetheless, national ratification would meet the four conditions for democratizing the Vice Presidency. First, national ratification clears the bar of popular consent. Second, it encourages the President-elect to nominate a competent candidate who will meet with the approval of the electorate. Third, it fosters executive stability because the President-elect is unlikely to nominate a candidate with whom she will not work and interact productively. Finally, national ratification democratizes vice presidential selection and therefore meets the constitutional consistency test.

iii. Vice Presidential Election

A third post-election means of filling the Vice Presidency—while ensuring that the office is occupied by a qualified candidate capable of assuming the Presidency—is to hold a separate vice presidential election after the President-elect is herself elected. After Election Day, candidates from the President-elect's political party could declare their respective candidacies and, in an abbreviated election campaign calendar, make their case to the nation for the job. All voters—not just adherents to the President-elect's party—would be eligible to cast a ballot for Vice President.

In addition to requiring a constitutional amendment to take effect, a separate vice presidential election raises numerous questions. Would prospective vice presidential candidates be asked to refrain from publicly expressing an interest in running for the office during the presidential campaign? If not, would their public comments *not* detract from the electorate's focus on the presidential election? How long would the vice presidential campaign last? Ideally, the campaign would be a short one permitting the Vice President to be installed on Inauguration Day, as is currently the case. But

would a short campaign give the electorate sufficient time to get to know the several vice presidential candidates and make an informed decision on a matter of such critical importance?

Even assuming these and other questions are adequately settled, a vice presidential election as a means of filling the Vice Presidency does not appear to satisfy the four conditions for democratizing the Vice Presidency. Although a vice presidential election would fulfill the first, second, and fourth conditions—popular consent, competence, and constitutional consistency—it would fall short on the third condition: executive stability. In an open vice presidential election—even if limited to candidates from the President-elect’s party—there is no certainty that the victor will mesh well with the President-elect. Indeed, it is not out of the realm of possibility that one of the President-elect’s former presidential primary rivals would win the vice presidential election, perhaps resulting in an uneasy pairing. Although it is not uncommon under the current practice of vice presidential selection for a presidential nominee to tap a rival from the presidential primary as her running mate, being compelled to work with a former adversary is quite different from freely choosing to do so. For this reason, a vice presidential election may not represent the most flavorsome option for democratizing the Vice Presidency.⁵²² Even so, it remains one of several alternatives for popularizing the second office.

V. CONCLUSION

Having averted constitutional catastrophe and triumphed in the great battles of the twentieth century, the United States faces new twenty-first century challenges that will surely test the fabric of the nation. There is no greater present threat to the American constitutional order than the borderless conflict into which the United States has been drawn, one that military scholars and historians aptly characterize as the Fourth World War.⁵²³ Like the Cold War before it, the modern war against terrorism is likely to

522. However, eighteen states have successfully adopted the practice of ticket splitting, authorizing voters to cast their ballot for a Governor and Lieutenant Governor of different political parties. See Brian Kladko, *Many Questioning the Lack of a Lieutenant*, BERGEN COUNTY REC. (N.J.), Aug. 19, 2004, available at 2004 WLNR 15133579 (“But 18 [lieutenant governors] run separately, allowing voters to split the ticket.”). But see Editorial, *Second-Place Finishers*, BUFFALO NEWS (N.Y.), Sept. 9, 2002, at B10, available at 2002 WLNR 1502955 (“In New York, unlike other states, the governor and lieutenant governor races are separate in the party primaries, but combined into a ‘ticket’ for the general elections.”). Candidates for Governor and Lieutenant Governor from the same political party run on a unified ticket in twenty-four states. Robert Schwaneberg & Dunstan McNichol, *The Tricky Idea of a Lieutenant Governor*, STAR-LEDGER (N.J.), Sept. 19, 2004, at 21, available at 2004 WLNR 18025236.

523. See generally Eliot A. Cohen, Op-Ed., *What’s in a Name: World War IV: Let’s Call This Conflict What It Is*, WALL ST. J., Nov. 20, 2001, available at <http://www.opinionjournal.com/forms/printThis.html?id=95001493> (defending formulation of war on terror as World War IV and analogizing new war to Cold War, described as World War III); Norman Podhoretz, *World War IV: How It Started, What It Means, and Why We Have to Win*, COMMENTARY, Sept. 2004, at 17 (arguing that the “great struggle” triggered by the tragedy of September 11, 2001, may only be understood as World War IV); R. James Woolsey, *World War IV*, 9 J. COUNTERTERRORISM & HOMELAND SECURITY INT’L 23 (2003) (framing war on terrorism as World War IV); see also John Bersia, Editorial, *In Fourth World War, Who Is the Enemy?*, ORLANDO SENTINEL, Oct. 14, 2002, at A15 (“In short, the community of civilized peoples is engaged essentially in a fourth world war, following in the footsteps of World War I, World War II and the Cold War.”); Arnaud de Borchgrave, Commentary, *Vision*

stretch years into the future. This burgeoning clash of cultures has descended a palpable air of insecurity upon the nation and its people. Nonetheless, the forces of good shall assuredly prevail—just as they did in the Cold War. Yet successfully waging this fateful battle for freedom will demand more than military might, diplomacy, and the untold efforts of the nameless women and men who toil selflessly in the obscurity of back channels and underground cells. The prospect of victory will hinge upon cultivating, nurturing, and multiplying foreign democratic institutions, whose legitimacy may be demonstrated only by freely manifested popular will.

But tending to democracy abroad should not blind the United States to the urgency to remain ever vigilant of the popular legitimacy of its own democratic institutions. Though the cautionary code that must guide the executive, judicial, and legislative spheres of government may admittedly echo a familiar refrain, it remains as pertinent today as ever before. The executive must resist the lure to expand its domestic and foreign authority in the guise of waging the war on terror. Courts must remain independent and unabashed in the face of an emboldened executive. And legislators, as keepers of the score, must faithfully articulate the conscience of their respective communities and hold the executive accountable on behalf of the people.

Though perhaps useful as a vision of grand strategy, these broad strokes risk obscuring the details of the inner workings of American democratic institutions, some of which may benefit from either tinkering, repair, comprehensive redesign, or, at the very least, informed public deliberation. One such American institution is the Vice Presidency. This mighty office must contend with a crisis of popular illegitimacy. As I have argued above,⁵²⁴ constitutional amendments and changing American political practices have collaborated with the evolving substantive function of the Vice Presidency to transform its occupant from pauper to potentate, and the office into an undeniably commanding hub of power and influence in Washington and across the globe.

Yet the voice of the American electorate is conspicuously silent on who should manage the power of the Vice Presidency and exercise its institutional muscle. Inexplicably, it is instead the victorious presidential nominee—and she alone—who decides who will represent Americans as the nation's understudy to replace the sitting President in the event of a presidential vacancy or inability to serve. In a liberal

of World War IV, WASH. TIMES, Sept. 30, 2002, at A21, available at 2002 WLNR 399030 (“Wake up America, you are already in World War IV.”); Robert A. George, *Conscientious Objector*, THE NEW REPUBLIC, Oct. 25, 2004, at 20, 22 (“In the current struggle, which some call World War IV, Americans are being asked to sacrifice liberties in the face of an enemy that has less ability to damage us than the Soviets did.”); Phil McCombs, *The Fire This Time*, WASH. POST, Apr. 13, 2003, at F1 (“This is World War IV.”); Brian Murphy, *A New World War? Some Scholars and Military Experts Say It's Already Here*, MILWAUKEE J. SENTINEL, Oct. 5, 2003, at 1, available at 2003 WLNR 5159821 (“Former CIA Director James Woolsey even has bestowed a name: World War IV—III being the Cold War.”); Mike Rosen, Editorial, *Playing Politics with Fear*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Dec. 5, 2003, at 53A, available at 2003 WLNR 1696381 (“We may now be engaged in World War IV (the Cold War was World War III), once again necessitating compromises of our civil liberties.”); Alison Rowat, *Is Victory on Terror a Battle Too Far for Bush?*, HERALD (Glasgow), Sept. 11, 2003, at 6, available at 2003 WLNR 6104013 (“The war against terror, or world war IV as it has been dubbed, is meant to be a conflict like no other.”); Jay Tolson, *The Coming Storms*, U.S. NEWS & WORLD REP., Mar. 14, 2005, at 27, available at 2005 WLNR 3897977 (“So how is World War IV going?”).

524. See *supra* Subsection III for a discussion of the evolution of the Vice Presidency.

democracy, it is odd—unspeakable even—that a choice of such colossal import turns on the caprice of one individual. This arrangement is even more objectionable in the context of the new war against terror, in which the nation finds itself on unsteady ground knowing neither when nor how nor against whom the enemy will unleash its next strike, but accepting with courageous resolve that it will someday come. On this point, the admonition of Walter Cronkite bears repeating—and heeding:

America is a very different country from that led by presidents prior to World War II – in a vastly different world. We can no longer afford to elect mere running mates to the second-highest office. In this increasingly dangerous post-9/11 world we live in, we had better be comfortable with the idea of him or her at the helm. These considerations are of such importance that a candidate’s wish to “balance the ticket” must take a back seat.⁵²⁵

Admittedly, it understates the case to declare that it will be difficult to renew the outmoded contemporary custom of vice presidential selection. Institutional inertia and entrenched preferences are perhaps the two greatest impediments to achieving any meaningful modification to the Vice Presidency. Why would political parties and presidential nominees, of their own accord, ever relinquish the privilege to fill the bottom of the ticket with their candidate of choice? They would not, at least not when the battleground issue is constructed as voluntary disarmament or as surrendering the power to dole out political dispensations. But were the question framed differently,⁵²⁶ for instance, as why political parties and presidential nominees would *ever* sanction an undemocratic practice that threatens to exact real and tangible consequences upon the American polity, it is more likely that parties and nominees would embrace their social obligation to democratize a patently undemocratic American institution. The public trust commands no less.

In this Article, I seek only to launch—not end—a conversation about reforming the Vice Presidency. Having reviewed the foundations and evolution of the Vice Presidency, I have argued that the office should be democratized and legitimized in light of its modern status. I have offered several suggestions for popularizing the Vice Presidency, detailing electoral and appointive mechanisms that promise—some more than others—to transform the Vice Presidency from a presidential prerogative to a popular selection. There may exist alternatives, some of which may be more practicable, politically feasible, and appealing than the ones I have raised as possibilities. The broad objective of this Article is to serve as a trigger to encourage reflection on renewing the modalities of American vice presidential selection.

525. Walter Cronkite, *Importance of the VP*, ALBANY TIMES UNION, Mar. 29, 2004, at A6, available at 2004 WLNR 716631.

526. Berkeley linguist George Lakoff has done much of the current thinking on framing theory. See generally GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE (2004) (arguing that “framing” shapes the arguments of the individual and institutional players involved in policy debates and public discourse); GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK (2d ed. 2002) (arguing that conservatives and liberals trace their respective policy preferences to different moral systems that shape their outlook on the world); George Lakoff, *Framing the Dems*, AM. PROSPECT, Sept. 1, 2003, at 32, available at <http://www.prospect.org/print/V14/8/lakoff-g.html> (arguing that Republicans have mastered the art of “framing”); George Lakoff, *Metaphor, Morality and Politics*, 62 SOC. RES. 177 (1995) (arguing that appreciation of social and political thought requires understanding of metaphorical concepts).

Former Senator Birch Bayh, a critical cog in the conception and design of the Twenty-Fifth Amendment, once advised that the best course of action in constitutional revision is to “do it now before there is a crisis, when you can do it dispassionately and non-controversially”⁵²⁷ The time may be ripe to respond to his compelling call to action. Currently mired in democratic deficiency, the Vice Presidency should be modernized to conform to its contemporary status. Just as the United States has, in the past, recast the Vice Presidency to repair a broken electoral system, defend against congressional intrigue, arrest the rise of an imperial executive, and palliate the uncertainty of presidential vacancy, the Vice Presidency must again evolve—this time to cleanse itself of its popular illegitimacy.

527. Jack Germond & Jules Witcover, *Electoral 'Time Bomb' May Just Keep Ticking*, BALT. SUN, Feb. 7, 1994, at 2A (quoting Birch Bayh), available at 1994 WLNR 865732.