

The Vice Presidency in Five (Sometimes) Easy Pieces

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Abstract

The public perception of the Vice President is that of an individual with little actual authority, but one who has the potential to be thrust into the most powerful office in the world. But the modern Vice President has additional responsibilities that many often forget. Contrary to public perception, the Vice President's role as President of the Senate carries important Constitutional responsibilities, such as the ability to weigh-in with tie-breaking Senate votes or preside over many impeachment trials. Though overlooked, these are important and powerful responsibilities. Additionally, the Vice President has assumed the role of "running mate" for presidential candidates, with the ability to influence a voter's choice. In a system that allows voters to split their ballots for every other position, forcing people to vote for the President and Vice President together is an anomaly. Furthermore, the modern Vice President has often assumed the role of copilot with the President, taking responsibility for broad policy areas. Although this responsibility is conferred at the President's discretion, it is a reflection of the evolving recognition that the Vice President is an important member of the executive team and potentially a future President. Lastly, the Vice President has the potential to cement the sitting President's legacy. For a President limited by two terms, a hand-picked successor can secure and extend policies beyond a single administration. Taken together, these responsibilities reveal that being Vice President is worth more than many would think.

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As a number of participants in this Symposium have observed, the first Vice President, John Adams, is reputed to have said: “I am Vice President. In this I am nothing, but I may be everything.”¹ These are the two capacities in which many Americans have tended to think about vice presidents—as do-nothing, ceremonial understudies, and (for some, at least) persons thrust suddenly into the most powerful office on the planet when the president above them dies, resigns, is removed, or is otherwise disabled from holding the office. In this Essay, I propose to separate out and muse a bit about three additional roles (making a total of five) for modern vice presidents: running mate, active copilot during the President’s terms, and successor to the presidency down the line.²

Before I turn to these three additional perspectives on the vice presidency, let me briefly comment on the two that Adams highlighted.³

I. WHILE BECOMING PRESIDENT MAY NOT BE “EVERYTHING,” IT
CERTAINLY IS A BIG DEAL

In 1841, William Henry Harrison became the first chief executive to die in office, and Vice President John Tyler assumed the presidential role pursuant to Article II, Section 1 of the Constitution, which provides: “In

1. DAVID MCCULLOUGH, JOHN ADAMS 389 (Simon & Schuster 2001).

2. *See infra* Parts III–V.

3. *See infra* Parts I–II.

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”⁴ On that occasion, there was some dispute whether “the Same” referred to the Office itself, or merely the powers and duties of the Office⁵—a matter that would affect not only titles (about which people care) but also higher and more guaranteed salaries (which in turn might afford more independence in the exercise of presidential powers, including the veto power, the appointment power, the pardon power, and the like).⁶ Human nature being what it is, Tyler, like other nineteenth century vice presidents who found themselves in similar circumstances, asserted that he had become the President and not just an Acting President.⁷ But even had he not prevailed in this aggressive stance, no one doubted that he was suddenly responsible for all presidential powers and duties,⁸ an awesome set of job functions indeed. Within a generation, two other vice presidents had quickly become “everything,” with Millard Fillmore replacing Zachary Taylor in 1850 and Andrew Johnson succeeding Abraham Lincoln in 1865.⁹

As clear as it was that the presidency was “everything” as early as the late eighteenth century when John Adams offered his characterization (to say nothing of fifty years later when vice presidents actually began replacing fallen presidents), subsequent developments over the last 150 years have served to magnify the importance of the President vis-à-vis the other “co-equal” branches.¹⁰ Changes in communication, transportation, and military technology have made the world a much smaller place and have correspondingly enlarged the importance of certain kinds of decisions involving foreign affairs (in the commercial, diplomatic, and national security realms);¹¹ decisions that the President is, as a matter of constitutional text and history and functional practicality, much better

4. John D. Feerick, *Adequacy of Current Succession Law in Light of the Constitution and Policy Consideration: Presidential Succession and Inability: Before and After the Twenty-fifth Amendment*, 79 *FORDHAM L. REV.* 907, 918–19 (2010); U.S. CONST. art. II, § 1, cl. 6.

5. See Feerick, *supra* note 4, at 918–19.

6. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 448 (2005).

7. See *id.*; Feerick, *supra* note 4, at 918–19.

8. See *supra* note 5 and accompanying text.

9. See Feerick, *supra* note 4 and accompanying text.

10. See *infra* Part III.

11. See JOSEPH A. PIKA & JOHN ANTHONY MALTESE, *THE POLITICS OF THE PRESIDENCY* 362 (CQ Press Rev. 6th ed. 2005).

situated than Congress or the federal judiciary to make.¹²

Alongside that, changes in the way federal elections operate, going back to the mid-1800s when states began holding general (if nonbinding) statewide elections to pick presidential electors who were presumed to be committed to supporting a particular presidential candidate,¹³ gave the President a unique personal national mandate (someone who modernly commands the support of nearly seventy million voters), compared to the much smaller number (several hundred thousand to a handful of millions) of voters that any leader of the House and Senate could ever claim as having picked them on a ballot.¹⁴

Because of these economic, technological, and electoral changes, the “People’s President” we have today is both the most important and the most dangerous branch.¹⁵ If “everything” was a bit of an overstatement in the 1790s, it is not a huge stretch today.

II. IS PRESIDING OVER THE SENATE REALLY SO LITTLE?

Adams’s disparaging assessment of the (ir)relevance of vice presidents who do not suddenly become chief executives seems deeply felt and widely shared. Adams elaborated that “[m]y Country has in its Wisdom contrived for me, the most insignificant Office that ever the Invention of Man contrived or his Imagination conceived.”¹⁶ And his fellow Founding Father, the influential Roger Sherman of Connecticut, voiced a similarly sarcastic sentiment about the roles the Constitution necessarily assigns to the vice president: “If the vice-President were not to be President of the Senate, he would be without employment”¹⁷ Former Vice President Walter Mondale summed it up this way: “Over most of America’s history, the vice

12. *See id.* at 370–71.

13. *See* Vikram David Amar, *Some Questions and Answers Concerning Justice Blackmun in Federalism and Separation of Powers Cases*, 26 HASTINGS CONST. L.Q. 153, 156–57 (1998).

14. *Election 2012: Results*, CNN POLITICS (Dec. 10, 2012, 11:22 AM), <http://www.cnn.com/election/2012/results/main>. President Obama received the support of over sixty-five million voters in 2012, and the Senator who received the most votes in the nation, Diane Feinstein of California, received about one-tenth of that, or around six and a half million votes. *Id.*

15. *See infra* Parts III, IV, V.

16. *Letter from John Adams to Abigail Adams, 19 December 1793*, MASS. HIST. SOC., <http://www.masshist.org/digitaladams/archive/doc?id=L17931219ja> (last visited Jan. 17, 2017).

17. DAVID BRIAN ROBERTSON, *THE ORIGINAL COMPROMISE: WHAT THE CONSTITUTION’S FRAMERS WERE REALLY THINKING* 139 (Oxford Press 2013).

president has been standby equipment.”¹⁸

On closer view, however, it is hard to understand—or at least defend—this pessimistic assessment.¹⁹ Roger Sherman locates the Vice President’s role as President of the Senate right next to unemployment, but this Senate-presider role is truly important in a number of constitutional processes, including all those in which the Senate takes formal votes.²⁰ Consider legislation, nominee confirmation, treaty ratification, federal constitutional amendment proposal, and the like. The Constitution says that “[t]he Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”²¹ Given the way this provision is worded—“shall have no vote unless”—one might be tempted to think that the ability to vote only when there is a tie is much less important than the ability to vote on all measures (which is enjoyed by all the elected Senators from the states).²² But game theory would suggest that the only time the vote of *any* voter in the Senate (whether a senator or the Vice President) matters is when there is a tie or very nearly a tie. Let us take the situation of a deadlocked vote. If the Senate vote breaks perfectly evenly, and the vice president does in fact vote such that the matter is resolved 51–50 (or 50–49, etc., if there were vacancies, nonvotes, or abstentions), then every member of the 51-member bloc—including each senator and the vice president—mattered, in the sense that if the voter alone had switched sides, a tie would ensue, and the result would have been different.

If the Senate votes 51–49 (or any two-vote margin) in favor of something, then everyone in the majority could reasonably believe that each vote might matter, again in the sense that if a single senator alone had switched sides, a tie would have ensued and the result might have changed. (In these circumstances, then, senators have the power to create a tie—which

18. Joel Achenbach, *Second-Guessing the No. 2 Spot*, WASH. POST (Sept. 8, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/07/AR2008090702714.html>.

19. See *infra* notes 20–40 and accompanying text.

20. See generally Roy E. Brownell II, *A Constitutional Chameleon: The Vice President’s Place within the American System of Separation of Powers*, 24 KAN. J.L. & PUB. POL’Y 1, 43–46 (2014). On February 7, 2017, Mike Pence became the first Vice President to cast the tie-breaking vote to confirm a cabinet member. Ron Elving, *Pence Becomes First VP to Break Tie over Cabinet Nomination*, NPR (Feb. 7, 2017, 12:36 PM), <http://www.npr.org/2017/02/07/513836576/pence-becomes-first-vp-to-break-senate-tie-over-cabinet-nomination> (“[I]t is rather rare and certainly notable to see Pence pressed into service in this manner in just his third week in office.”).

21. U.S. CONST. art. II, § 3, cl. 4.

22. See *id.*

might be important—a power that the Vice President lacks.) But note that I say “might” in the preceding sentences—the result would not change if a member of the 51-vote bloc were to change sides and the vice president were to vote in the direction of the original 51-member bloc. (Similarly, if the Senate votes 51–49 against a measure, everyone in the majority might matter, in that if any of them were to have voted the other way, creating a tie, the vice president might have voted in favor of the measure, changing the result.)

If a majority voting bloc exceeds the minority bloc on any up–down measure by more than two votes (as is true in almost all instances), then no one’s vote in the majority (or minority) can be said to have truly driven the outcome because if any one person had switched sides, the outcome still would have been the same. (Imagine a 55–45 vote; none of the members of the 55-vote bloc is necessary to the outcome.) This is not to say that senators and their votes are meaningless in these settings; it is only to say that their votes are no more meaningful than the vice president’s (dormant) power to vote in ties. This analysis applies not just to legislation but also to other matters in which the Vice President has the power to break ties.²³

So, it turns out the Vice President has nearly the same voting power as each senator, and we certainly do not usually characterize each senator’s legislative power as “nothing.”²⁴

It is true that the filibuster (an internal Senate rule that makes the threshold required for passage of some measures higher than a mere majority),²⁵ disproportionate clout by chairs and members of certain key

23. *Vice President of the United States (President of the Senate)*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Vice_President.htm (last visited Jan. 17, 2017) (“While vice presidents have used their votes chiefly on legislative issues, they have also broken ties on the election of Senate officers, as well as on the appointment of committees in 1881 when the parties were evenly represented in the Senate.”). Mike Pence was the first Vice President to cast the tie-breaking vote in the Senate to confirm a member of the Cabinet. See Emmarie Huetteman & Yamiche Alcindor, *Betsy DeVos Confirmed as Education Secretary; Pence Breaks Tie*, N.Y. TIMES (Feb. 7, 2017), https://www.nytimes.com/2017/02/07/us/politics/betsy-devos-education-secretary-confirmed.html?_r=1.

24. See, e.g., *Origins and Development*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Origins_Development.htm (last visited Jan. 17, 2017) (“The framers of the Constitution created the United States Senate to protect the rights of individual states and safeguard minority opinion in a system of government designed to give greater power to the national government. . . . The framers intended the Senate to be an independent body of responsible citizens who would share power with the president and the House of Representatives.”).

25. See generally MARTIN B. GOLD, *SENATE PROCEDURE AND PRACTICE* 216 (Rowman & Littlefield 2004) (“A time-honored Senate tradition, the filibuster is a way of balancing minority

committees, blue-slip practices in judicial confirmations,²⁶ and other Senate procedures may complicate this stylized analysis. These innovations were not all around when Adams voiced his pejorative views²⁷ and (more importantly) are not constitutionally mandated and could be undone by a simple majority (which might include the vice president) of Senate voters.²⁸

It is also true that senators usually get to express themselves by voting, whether or not their votes “matter” in the sense described.²⁹ But there is nothing that prevents the vice president from making public—in a way that allows self-expression and also gives information to other senate voters—how he would vote should a tie on a particular measure arise.³⁰ Indeed, just as the President need not exercise a veto in order for the veto power to meaningfully influence legislation,³¹ so, too, even unexercised vice presidential voting power can influence what happens in non-tie situations; letting others know clearly how he would resolve a tie may affect the very likelihood of a tie and also may shape the contours of the legislation that ultimately may be enacted.³²

Mention of the President’s veto power raises another point: it might be argued that vice presidents do not really vote on their own, but instead cast their votes based on whether the president would veto the measure were it presented to him.³³ A vice president who breaks a tie in a negative direction

rights with the principle of rule by the majority. By threatening a talkathon filibuster, a senator or group of senators can force the majority of senators to amend or even abandon a particular piece of legislation. A filibuster can last for many days and is a tactic of last resort for a determined minority.”).

26. *Id.* at 242 n.2 (“The practice by which the House refuses to receive a Senate bill because of what the House deems is in violation of the revenue clause is known as “blue slipping.” In the Senate, someone could address the revenue clause issue by raising a constitutional point of order. The point of order would be referred to the Senate for decision, would be debatable, and would be resolved by a simple majority vote.”).

27. *See supra* note 1 and accompanying text.

28. *See supra* notes 17–18 and accompanying text.

29. *See supra* note 22 and accompanying text.

30. *See, e.g.,* Sam Stein, *Joe Biden Tells ‘Meet the Press’ He’s ‘Comfortable’ with Marriage Equality*, HUFFINGTON POST (May 6, 2012, 10:11 AM), http://www.huffingtonpost.com/2012/05/06/vice-president-biden-gay-marriage_n_1489235.html.

31. Charles Black, *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 91–95 (1976).

32. *Id.* Congress can accept a president’s “recommendations” or anticipate “the general direction of his views” to pass legislation likely to avoid a presidential veto. *Id.* at 95. In the event of a tie, the Senate may take a similar anticipatory approach in voting. *See supra* notes 30–31 and accompanying text.

33. *See* Roy E. Brownell III, *The Independence of the Vice Presidency*, 17 N.Y.U.J. LEGIS. &

is merely sparing the president a veto (and perhaps some bad press), but the negative result would have been the same no matter what the vice president did. (A vice president who breaks a tie in a positive direction gives the president an opportunity to sign a law that otherwise would never have made it to the president's desk, but again, if the positive vote is made simply by following a presidential directive, then the vice president's power is less meaningful.)

But John Adams, of all people, should have known (or would soon learn) that vice presidents are not legally bound to follow the wishes of their presidents.³⁴ Adams, during the time he was President, had Thomas Jefferson—his chief presidential opponent and leader of the opposition party—in the vice presidency, and Jefferson certainly would not have taken his cues about how to break ties from President Adams.³⁵

A few words about at least one other important role of the President of the Senate are in order. The Vice President presides over impeachment trials unless the President (or presumably the vice president himself) is the one on trial.³⁶ Thus, when Justice Samuel Chase was impeached and tried in the Senate, Vice President Aaron Burr presided, and in doing so, had the power to make important rulings (just as all trial judges make important rulings).³⁷ By most accounts, he made his rulings in an evenhanded and expert way, providing a helpful precedent for the young nation.³⁸

At the end of the day, the “nothing” characterization was not fair in the late 1790s (and is much less accurate today, as explained below),³⁹ and the real meaning of “nothing” can be seen only in comparative terms: when contrasted with exercising the vast powers of the presidency itself, being vice president (or a member of the Senate) may not seem like much, but in

PUB. POL'Y 297, 299 n.1 (stating that “whatever the president decides, the vice president has to support”).

34. Charles O. Paullin, *The Vice-President and the Cabinet*, 29 AM. HIST. REV. 496, 496–97 (1924). President John Adams did not invite Vice President Thomas Jefferson to attend Cabinet meetings because of their “opposing politics,” although he spoke fondly about leading the government alongside Jefferson. *Id.* at 497.

35. *See id.*

36. U.S. CONST. art. I, § 3. The Constitution nowhere says that a vice president cannot preside over his or her own impeachment trial, but the general anti-conflict-of-interest norm that runs through the fabric of the document would seem to dictate this result.

37. *See* Alexander Pope Humphrey, *The Impeachment of Samuel Chase*, 8 AM. LAW. 57, 57 (1900).

38. *See generally id.*

39. *See infra* Parts III–V.

the larger picture, it is still a very big deal.⁴⁰

III. MOVING BEYOND ADAMS'S BINARY OPPOSITION: THE ROLE OF MODERN RUNNING MATE

In quadrennial election years like this one, the selection of the major party vice presidential candidates attracts a great deal of attention because of the possible effect that would-be vice presidents might have on the results of the presidential election.⁴¹ Many major party presidential candidates wait until their parties' nominating conventions to unveil their vice presidential choices, but this year, the Republican nominee Donald Trump made and announced his pick prior to the beginning of the Republican Convention, let alone his actual selection as the party's candidate.⁴²

The fact that we talk about the presidential nominee announcing his or her "pick" as a vice presidential "running mate" should—when we pause to think on it—cause us to linger on a very unusual aspect of vice presidential elections in American democracy: voters are prevented from registering their preference for a president of one party and a vice president of another.⁴³ Notice that the hands of American voters are almost never tied in this sense that they must vote for a candidate of one office in order to get a preferred candidate for another.⁴⁴ Voters are allowed to "split" their tickets across party lines with regard to candidates for the U.S. Senate and House, with regard to candidates for federal executive and legislative offices, with regard to federal and state candidates, and so forth.⁴⁵ (For the last quarter of the

40. See *infra* Part III.

41. See Mara Liasson, *Who Will Be Trump's, Clinton's Vice President?*, NPR (May 14, 2016, 6:00 AM), <http://www.npr.org/2016/05/14/477954654/who-will-be-trumps-clintons-vice-president>. The decision is the "most important" for a candidate because "[p]icking a vice president is the first 'presidential level' decision any candidate makes. Although vice presidential candidates have rarely, perhaps never, determined the outcome of an election, the choice tells voters a lot about the candidate." *Id.*

42. See Kelly O'Donnell, *It's Official: Trump Announces Mike Pence as VP Pick*, NBC NEWS (July 15, 2016, 11:02 AM), <http://www.nbcnews.com/storyline/2016-conventions/its-official-trump-announces-mike-pence-vp-pick-n610111>.

43. See Vikram David Amar, *Vice President: A Split-Ticket Vote?*, L.A. TIMES (Oct. 22, 2008), <http://www.latimes.com/opinion/la-oe-amar22-2008oct22-story.html>; Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913 (1992) [hereinafter Amar & Amar].

44. See *infra* notes 45–46 and accompanying text.

45. Indeed, even with many state-level executive branches, voters are allowed to vote for a Governor of one party and a Lieutenant Governor of another. See, e.g., Brooks Firestone, *End California's Split Ticket*, L.A. TIMES (June 14, 1998), <http://articles.latimes.com/1998/>

twentieth century, large groups of voters appeared to split their federal votes between the parties, and although that trend has abated, it is still more pronounced than it was before World War II when ticket splitting really picked up.)⁴⁶ The idea of a presidential “ticket” has become so engrained in the minds of American voters that they often do not realize how anomalous it is within the national electoral landscape.⁴⁷

There are, of course, years when we are struck by its starkness. Consider 1988, when George H.W. Bush selected relatively inexperienced Indiana Senator Dan Quayle as his running mate.⁴⁸ There were many voters who (fairly or not) considered Quayle underqualified to become President and perhaps likely to lose in a head-to-head race against the vice presidential candidate of the other party (Senior Senator Lloyd Bensten of Texas).⁴⁹ Even as the head of the ticket President Bush proved more electable than his Democratic opponent Michael Dukakis.⁵⁰ Twenty years later, in 2008, Republican standard bearer Senator John McCain surprised most observers by picking Alaska Governor Sarah Palin, a true newcomer to the national political scene and (again) someone whom many millions of Americans did not think was remotely qualified to ascend to the presidency if needed.⁵¹ Political scientists will debate whether and how much Palin’s presence on the ticket hurt McCain’s chances against the ultimate victor, Barack Obama.⁵² But the question I want to put on the table here, is why should a running mate ever pull the presidential candidate down or up—why should we even have running mates rather than a system in which voters elect

jun/14/opinion/op-59805 (noting that since 1978, “the sitting governor and lieutenant governor have been from different political parties”).

46. See Amar & Amar, *supra* note 43, at 915–16.

47. *Id.* at 933 (noting that “the current system of selective vote tying seems more an inherited product of the nineteenth century’s political climate and the twentieth century’s inattention than a deliberate, self-conscious choice” and that “inertia also looms large in this area”).

48. Associated Press, *Bush Picks Sen. Quayle of Indiana as Running Mate: 41-Year-Old-Conservative in 2nd Term*, L.A. TIMES (Aug. 16, 1988), http://articles.latimes.com/1988-08-16/news/mn-743_1_bush-s-running-mate.

49. Amar & Amar, *supra* note 43, at 916–18.

50. *Id.*

51. See, e.g., Michael Cooper & Dalia Sussman, *Growing Doubts on Palin Take a Toll, Poll Finds*, N.Y. TIMES (Oct. 30, 2008), <http://www.nytimes.com/2008/10/31/us/politics/31poll.html>.

52. See, e.g., Philip Bump, *Sarah Palin Cost John McCain 2 Million Votes in 2008, According to a Study*, WASH. POST (Jan. 19, 2016), <https://washingtonpost.com/news/the-fix/wp/2016/01/19/sarah-palin-cost-john-mccain-2-million-votes-in-2008/>; Matthew Continetti, *Five Myths About Sarah Palin*, WASH. POST (Oct. 17, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/14/AR2010101404794_pf.html.

someone to each office separately? Why, in other words, were voters not permitted to select a George Bush–Lloyd Bentsen or John McCain–Joe Biden White House? Somewhat surprisingly (at least it surprised me when I first began thinking on it a few decades ago), nothing in the federal Constitution or election law requires that voters in each state choose between internally unified Republican and Democratic tickets.⁵³

Indeed, having a president of one party and a vice president of the other is not unprecedented; as noted earlier in this essay, in 1796, Thomas Jefferson was elected to serve as John Adams’s vice president, even though the two men—bitter rivals—represented and headed opposing parties.⁵⁴ Interestingly, some early Americans “thought a ‘split’ executive promoted checks and balances and was thus something to be embraced, not lamented.”⁵⁵ Perhaps for that reason, there was no great movement to amend the Constitution in the wake of the 1796 election to prevent the recurrence of a divided White House.⁵⁶

My older brother and fellow constitutional law professor Akhil Reed Amar and I explained in a law review article in 1992 that the adoption of the Twelfth Amendment eight years hence (in 1804) did make it easier for political parties (a formidable reality by the mid-1790s, even though their existence at the constitutional founding was neither guaranteed nor prohibited) to elect an aligned president and vice president, but nothing in the Amendment requires states to tie voters’ hands the way all states currently do.⁵⁷ Instead, over the last two centuries, with the increased strength of the national political party apparatuses, each state has simply *chosen* to structure its presidential election ballot so as to require voters to pick between opposing slates, rather than allowing voters to choose separately for presidential and vice presidential candidates.⁵⁸ (Part of the explanation here is that ticket splitting among voters more generally was, as noted earlier, not common at all until the middle of the twentieth century, so the idea of bundling or unbundling presidential party tickets was not really important to consider either way.)⁵⁹

53. See Amar & Amar, *supra* note 43, at 918–27.

54. See *supra* notes 34–35 and accompanying text.

55. Amar, *supra* note 43.

56. See Amar & Amar, *supra* note 43, at 921–23.

57. *Id.* at 923–24.

58. *Id.* at 924–26.

59. See *supra* note 46 and accompanying text.

Many decisions that states make about the mechanics of federal elections can best be understood through the lens of rational maximization of each state's self-interest.⁶⁰ Economists would quickly explain the fact that (nearly) every state awards its group of presidential electors (in the so-called Electoral College) on a "winner take all" rather than a proportional basis in terms of each state's desire to reward the presidential candidate who takes that state's concerns and issues most seriously by devising policies and making promises to win over that state's median or swing voter.⁶¹ But, as we explained in much more depth, the decision to bind voters to executive party tickets cannot so easily be explained by rational state selfishness.⁶² Any or all states could, if they wanted to, begin untying the voters' choices in this regard without causing any obvious harm to the states that so decide.⁶³

It may be true (and perhaps increasingly so in our hyper-polarized last decade) that most voters in most states would never split their federal executive votes.⁶⁴ Indeed, it might be true that a majority of voters prefer a unified presidential ticket of either party (so that there is policy consistency and increased party accountability) over a split ticket.⁶⁵ But the same might be true of ticket splitting between the presidency and Congress; a small number of voters can effectively send a split message from a state even if a majority of voters would prefer a unified message in either direction.⁶⁶ And, of course, a state could, if it wanted, structure its ballot so that voters' second-choice preferences are given effect.⁶⁷ This could be done by having a ballot that first asks for presidential preferences and then asks for vice presidential preferences, depending on who wins the presidency, so that voters who have an "I'd prefer a straight Democratic presidential ticket, but I would rather have a unified Republican ticket than a president of one party

60. See *infra* note 61 and accompanying text.

61. Amar & Amar, *supra* note 43, at 928.

62. *Id.* at 927–37.

63. See *id.* at 946.

64. See Ronald Brownstein, *Voters Don't Split Tickets Anymore*, ATLANTIC (Sept. 1, 2016), <http://www.theatlantic.com/politics/archive/2016/09/senate-trump/498287/> (describing the increasingly polarized political landscape and decrease in ticket splitting).

65. See Amar & Amar, *supra* note 43, at 937–40.

66. See *id.* at 941.

67. See *id.* at 937 n.69 (noting that "[i]f a conditional ballot were deemed too confusing, a roughly similar result could be obtained by simply holding the election for Vice President twenty-four hours after the presidential election results are tabulated").

and a vice president of the other” mindset would have their preferences registered.⁶⁸

None of this is to deny any of the potentially significant policy reasons for voters to generally prefer having a president and vice president of the same political party.⁶⁹ For instance, a general desire to have policy consistency within a four-year period in the event of a presidential vacancy, or a desire not to encourage the incentive for political assassination, might counsel in favor of a unified president–vice president team.⁷⁰ But those policy reasons could be overcome in an unusual year with unusual vice presidential candidates.⁷¹ (I should also note here that the practice of ticket “balancing,” wherein each presidential candidate picks a running mate to placate a different wing of the party, already creates some potential for policy inconsistency over a four-year term, as happened during Andrew Johnson’s succession in the wake of Abraham Lincoln’s death.⁷² In some cases, ticket balancing can even create some incentive for a crazy person to assassinate a president, as in the case of James Garfield’s assassin, who said he committed the crime so that Chester Arthur, who came from a different strand of the party, would exercise power.⁷³) Generally speaking, with respect to policy reasons in favor of a unified White House, our traditional preference in American democracy is to let voters—rather than government—weigh competing policies and personalities.

More important than all that, if voters had the power to split their executive votes, they very likely would never need to exercise it.⁷⁴ If states did not bind voters to party tickets, then Senator McCain could, as a

68. *See id.*

69. *See id.* at 937–40.

70. *Id.*

71. For examples of unusual years with unusual vice presidential candidates, see *supra* notes 48–52 and accompanying text.

72. *See* BRUCE A. ACKERMAN, *WE THE PEOPLE* 83 (1991) (“The martyrdom of Lincoln further heightened the symbolic centrality of his office, setting the stage for the epoch-making effort by Andrew Johnson to take the plebiscitarian Presidency to then-unprecedented heights. After intervening decisively in support of the Thirteenth Amendment, Johnson reversed field and used the Presidency as the leading edge of a vast popular movement against the Fourteenth.”).

73. *See* CANDICE MILLARD, *DESTINY OF THE REPUBLIC: A TALE OF MADNESS, MEDICINE, AND THE MURDER OF A PRESIDENT* 168 (2011) (explaining that by the time Arthur assumed the presidency, “[i]t was already widely known that, as [Charles Guiteau, President Arthur’s assassin] was being hurried away from the train station, the would-be assassin had shouted, ‘I am a Stalwart, and Arthur will be president!’”).

74. *See* Amar & Amar, *supra* note 43, at 945.

practical matter, never have chosen the untested Governor Palin as his running mate; he would have anticipated that the Palin choice, rather than enhancing his ticket, would trigger a possible McCain–Biden win instead, teeing up Biden, a Democrat, to be in the line of presidential succession.⁷⁵ Instead, Senator McCain would likely have chosen someone who was a stronger, nationally credible, candidate.⁷⁶ So unbinding voters' hands would not result in modern day Adams–Jefferson situations; instead it would simply eliminate the Sarah Palins and Dan Quayles from party slates.⁷⁷ As a result, the quality of those actually elected as vice presidents would likely improve.⁷⁸

In addition to pulling up the quality of vice presidential candidates, untying presidential and vice presidential votes might also reduce the incentive to “balance” the ticket across the various wings of the party because a vice presidential candidate who appeals to some of the party but not its mainstream might risk losing against a candidate from the other party with broader appeal.⁷⁹ Ironically, then, unbundling presidential and vice presidential elections could end up generating vice presidents who are not just better qualified and more mainstream, but also more unified with the presidents alongside whom they serve.⁸⁰

Finally, separating presidential and vice presidential voting could give the elected vice presidents more credibility and legitimacy should they ever ascend to exercise the powers of the presidency (either temporarily or for the balance of an elected president's term), or should they ever run for the presidency down the road, addressed below.⁸¹ The biggest difficulty many modern vice presidents have arises from their lack of any independent electoral mandate—and thus the absence of electoral credibility—which in turn might place limits on the kinds and scopes of tasks they are given to perform.⁸²

Changing the way presidential ballots are structured is obviously a big deal, and the question of electing presidents and vice presidents separately is

75. *See id.*

76. *See id.*

77. *See id.* at 945–46.

78. *See id.*

79. *See id.*

80. *See id.* at 944–45.

81. *See infra* Part IV.

82. Amar & Amar, *supra* note 43, at 946–47.

not one on which I have come to rest. But I do think (and have thought for some time) that it is a question worth examining carefully, as each passing election gives us information about how we might improve American democracy.

IV. THE ROLE OF WHITE HOUSE COPILOT

As my fellow Symposium participant Jody Baumgartner and others have pointed out, the modern vice president, once in office, does many things besides presiding (and sometimes voting) in the Senate.⁸³ Princeton historian Julian Zelizer put the point this summer in the following terms: “When Americans think of vice president, many probably imagine Julia Louis-Dreyfus’ character on the hit sitcom ‘Veep,’ recalling how in the first few seasons she didn’t have much to do except sit around with her staff and gripe about POTUS.”⁸⁴ However, Zelizer notes that this conception is far from accurate.⁸⁵ He points out:

Most vice presidents since Walter Mondale have demonstrated that they can wield considerable influence in Washington. Vice presidents are formidable policymakers and forceful political actors. They command large professional staffs and enjoy their own line in the executive budget. Vice presidents are regularly included in high-level White House meetings and they are granted access to the ongoing flow of classified documents that come through the Oval Office. They serve as top advisers to the president.⁸⁶

Of course, all of these activities take place because the President enables and encourages them.⁸⁷ But recent presidents have made significant use of vice presidents.⁸⁸ President Carter sent a powerful message in allowing Walter “Mondale [to operate] at the forefront of the struggle to pass

83. *See generally* JODY C. BAUMGARTNER, *THE AMERICAN VICE PRESIDENCY: FROM THE SHADOW TO THE SPOTLIGHT* (2015).

84. Julian Zelizer, *The Vice Presidency Is No Longer a Joke*, CNN (July 11, 2016) <http://www.cnn.com/2016/07/11/opinions/what-does-vice-president-do-opinion-zelizer>.

85. *Id.*

86. *Id.*

87. *See id.*

88. *See id.*

economic policy measures and [help] formulate the SALT II Treaty.”⁸⁹ Indeed, with the exception of Dan Quayle (1989–1993), every vice president for the last four decades has done very important policy work in the Executive Branch.⁹⁰ Al Gore may not have invented the Internet, but he was instrumental in securing the enactment and implementation of the North American Free Trade Agreement (NAFTA)—one of President Clinton’s signature legislative enactments—in Congress, in addition to providing meaningful leadership on international environmental agreements and other ambitious and enduring initiatives.⁹¹ Fellow symposium participant and former Vice President Dick Cheney provided national defense and counterterrorism advice, especially after 9/11, and also famously worked on the energy-policy task force that provided foundational research and ideas for President George W. Bush’s subsidy and regulatory framework for the energy industry.⁹² And Joe Biden was involved centrally by President Obama in the stimulus program adopted after the 2008 financial crisis, among other things.⁹³

It is not a coincidence, I think, that all of these more prominently important and ambitious vice presidents served after the Twenty-fifth Amendment, which was ratified and took effect in 1967.⁹⁴ (Richard Nixon, the first post-Twenty-fifth Amendment President, was known for his paranoid distrust even of those around him, so it should not be surprising that his vice presidents, one of whom—Spiro Agnew—was beset with legal problems of his own, would not have been given much responsibility; but after that, the vice presidency began to blossom.)⁹⁵ The Twenty-fifth Amendment, proposed and ratified after John Kennedy’s assassination,⁹⁶

89. *Id.*

90. *Id.*

91. *Id.*

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

93. See Ben Wolfgang, *Joe Biden Clings to Obama Record, Boasts that He ‘Administered’ Stimulus Package*, WASH. TIMES (Oct. 8, 2015), <http://www.washingtontimes.com/news/2015/oct/8/biden-clings-to-obama-record-boasts-that-he-admini/>.

94. U.S. CONST. amend. XXV.

95. See Nicole Hemmer, *Why the Vice Presidency Matters*, ATLANTIC (July 21, 2016), <http://www.theatlantic.com/politics/archive/2016/07/why-the-vice-presidency-matters/492128/>.

96. *How JFK’s Assassination Led to a Constitutional Amendment*, NCC (Nov. 22, 2015), <http://blog.constitutioncenter.org/2015/11/how-jfks-assassination-led-to-a-constitutional-amendment/>.

fills many of the gaps left open by the Founders.⁹⁷ For starters, the Amendment resolves the question John Tyler confronted by making clear that when the President dies or resigns or is removed from office, then—and only then—the Vice President does in fact “become President.”⁹⁸ Otherwise, if the President is merely disabled (perhaps only temporarily) from exercising the powers and duties of his office, then the vice president may step in and “assume the powers and duties of the office as Acting President” without prejudice to the President’s ability to resume his post, if and when he has recovered from his disability.⁹⁹ That, by the way, is exactly what Dick Cheney did a few years back when George Bush was under anesthesia.¹⁰⁰

The amendment also provides a clearer framework for determining whether the president is in fact disabled, and for how long. This framework specifies the precise roles of the president, the vice president, the cabinet, and the Congress in resolving questions about possible disability. In some crucial substantive and symbolic ways, the vice president is treated in this process as the head of the cabinet for assessing whether the president is disabled. Yet another provision of the amendment allows a president, with congressional approval, to fill a vice presidential vacancy. Through this amendment, Richard Nixon named Gerald Ford to the vice presidency when Spiro Agnew left office in 1973; and Ford in turn appointed Nelson Rockefeller in 1974 when Ford himself became president upon Nixon’s resignation.

. . . . By formalizing succession, by making the vice president part of (and indeed a leader of) the cabinet for purposes of determining presidential disability, and by making clear that the president gets to choose persons to fill vice presidential vacancies—making succession apostolic, if you will—the amendment strongly suggests that, today at least, the vice president is a full member of the

97. See *infra* notes 98–101 and accompanying text.

98. See U.S. CONST. amend. XXV, § 1; *John Tyler*, HISTORY, <http://www.history.com/topics/us-presidents/john-tyler> (last visited Jan. 17, 2017).

99. See U.S. CONST. amend. XXV, § 4, cl. 1.

100. Peter Baker, *Bush Will Temporarily Hand Reins to Cheney*, WASH. POST (July 21, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001790.html>.

president's executive team. This amendment, much more so than [the original Constitution] or the Twelfth [Amendment], then, formally concretizes an evolving importance of the vice presidency to the executive branch.¹⁰¹

As a result, the Amendment provides a constitutional platform on which the President can comfortably confer various copilot duties.¹⁰²

But copilots do not just assist the head pilot while he is flying (and take over should the head pilot, say, die of a heart attack midair).¹⁰³ Copilots often take charge of the plane when the pilot needs a temporary rest.¹⁰⁴ As noted above, the Twenty-fifth Amendment empowers the office of an acting president during periods of presidential disability.¹⁰⁵ But thus far, we tend to think of disability in physical or cognitive terms only, and perhaps have failed to see instances in which presidents sometimes suffer political disability that would justify—indeed warrant—temporary vice president takeover.¹⁰⁶ Consider the situation President Bill Clinton faced when he was impeached by the Republican House of Representatives in 1998.¹⁰⁷ As Professor Akhil Amar mused at the time, perhaps Bill Clinton—and the country—would have been well served had the President turned over the reins of government to Vice President Gore until he was acquitted by the Senate:

What would be the constitutional and political implications of this unprecedented reaction to an unprecedented impeachment of a duly elected president? . . . The constitutional mechanism enabling Clinton to step aside, temporarily, is elaborated in the Twenty-fifth Amendment, adopted in the wake of President Kennedy's assassination. Under Section 3 of this Amendment, "Whenever the President transmits . . . his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits . . . a written declaration to the contrary, such powers and duties

101. See Amar, *supra* note 92, at 185, 207.

102. See *supra* notes 99–100.

103. See generally *Airline Copilot Job Description*, AM.'S JOB EXCH., <http://www.americasjobexchange.com/airline-copilot-job-description> (last visited Jan. 17, 2017).

104. *Id.*

105. See U.S. CONST. amend. XXV, §§ 3–4.

106. See *infra* notes 107–10 and accompanying text.

107. H.R. Res. 611, 105th Cong. (1998) (unenacted).

shall be discharged by the Vice President as Acting President.” Note that the inability here need not be physical. Clinton could simply say that, during the pendency of his trial, he deems it politically and morally better for the country that the high powers of the presidency be wielded by someone who is not under any cloud, and that he will retake the office only once the cloud has lifted, upon his due acquittal by the Senate. Legally, Clinton would be free at any time to take back the reins of power—but his pledge not to do so until the end of the trial would, as a practical matter, make it hard for him to renege. . . . And what’s in it for Clinton? Just possibly the recovery of his honor and a shot at redemption. Stepping aside temporarily would be a penance he imposed on himself rather than a penalty forced upon him by others. Too often, his concessions thus far have come just one step ahead of the law. . . . The time to make concessions and show contrition is when you are winning—and in that sense now is the most opportune moment since the scandal broke, because it seems clear that, if he stands pat, he will win in the Senate. . . . Yes, by stepping aside temporarily, he imperils his presidency—he utterly unsettles matters and risks losing all. But it is precisely this willingness to take the risk of losing what he loves—power—that may help redeem him in the eyes of his countrymen and history. If he declines to step down, odds are that he will “win” in the Senate and stay in office—but he may well win by losing, because his acquittal would come after a simple majority of the Senate voted to oust him, rather than two-thirds. Will he be able to lead after this, or will he just mark time? Won’t any “victory” in the Senate taste sour unless he can somehow bring a measure of nobility back to himself and his office? By contrast, if he wins in the Senate after stepping down—sacrificing himself and making it easier to vote against him—any acquittal would seem a more genuine vindication, a more dramatic rebirth.¹⁰⁸

Interestingly, at least one twentieth century foreign presidential constitution, patterned largely after America’s, provides explicitly for this kind of temporary vice presidential takeover when the President is impeached.¹⁰⁹ Brazil’s constitution requires that, as soon as the Federal

108. Akhil Reed Amar, *Take Five*, NEW REPUBLIC, Feb. 8, 1999, at 13–15.

109. See Vikram David Amar, *What We Could Learn from Brazil (and Vice Versa) About*

Senate institutes proceedings in an impeachment trial (which happened earlier this year to President Dilma Rousseff):¹¹⁰

The president “shall be suspended from his [or her] duties” for a period of 180 days or until the end of the trial, whichever comes first. If, at the end of 180 days, the trial is still going on, the president’s suspension “shall end, without prejudice to the normal progress of the [still ongoing trial] proceedings.”¹¹¹

It may strike some as

“un-American” (or at least “un-North-American”) for someone to have his duties taken away from him before he has been convicted in a trial-like proceeding. But we should remember that the impeachment mechanism is not principally about punishment—it is instead focused on the removal of people from office who are no longer fit to perform their official jobs. And the mere impeachment (accusation) vote by the lower house may (combined with the factual predicate on which it was based) make it very hard for a president to continue to do his job while an impeachment trial is going on.¹¹²

As noted above, in America the Twenty-fifth Amendment allows a president to do the right thing (by enshrining a textually broad notion of temporary presidential inability), but we still have to trust a president to take the right step.¹¹³ By contrast, in Brazil, the constitution itself takes the decision out of the president’s hands, and requires removal during the trial.¹¹⁴ At least food for thought.

Presidential Impeachment Procedures (and Related Matters), JUSTIA (Apr. 22, 2016), <https://verdict.justia.com/2016/04/22/what-we-could-learn-from-brazil-and-vice-versa-about-presidential-impeachment-procedures-and-related-matters>.

110. *See id.*

111. BRAZIL CONST. art. 86, §§ 1–2.

112. Amar, *supra* note 110; *see also* U.S. CONST. art. II, § 4.

113. *See supra* notes 96–99 and accompanying text.

114. BRAZIL CONST. art. 86, §§ 1–2. One reason Brazil’s approach might be particularly apt for Brazil itself is another procedural difference between the two constitutions. In Brazil, a presidential impeachment does not pass the lower house unless two-thirds of the members vote to accuse; in the United States (as we saw in the Clinton episode), it takes only a bare majority of the House of Representatives to impeach (even though in both countries it takes two-thirds of the upper house, the Senate, to convict in an impeachment proceeding). Because a two-thirds requirement in the lower

V. ALL GOOD LEADERS HAVE A SUCCESSION PLAN

Many people think, not without some good reason, that appointments to the Supreme Court tend to generate a president's longest-lasting political, philosophical, or policy legacy.¹¹⁵ But presidents can also extend their legacies through handpicked successors, who throughout successful presidencies have tended to be individuals who have served as vice presidents.¹¹⁶

Think, for a moment, about transformational presidencies that ushered in important political epochs—Thomas Jefferson effectively extended his vision through James Madison; Abraham Lincoln through Ulysses S. Grant; Franklin Delano Roosevelt through Harry Truman; and Ronald Reagan through George H.W. Bush.¹¹⁷ Some presidents, of course, did not try to help their vice presidents become president (as Dwight Eisenhower did not do much to help Richard Nixon in 1960),¹¹⁸ and other presidents may have brought down the chances their vice presidents had to succeed them by their own presidential misdeeds and controversies (think about President Bill Clinton's complicated effect on Al Gore's unsuccessful 2000 presidential bid).¹¹⁹ But even though the succession-through-vice-presidency strategy does not always succeed, it is a very powerful element in modern

house may tend to reduce the incidence of insubstantial and partisan impeachment drives, those cases that do move to the Senate may tend (on average) to be more weighty, thus making temporary suspension of duties more sensible. Again, at least food for thought in America about whether Brazil's two-thirds requirement for impeachment itself may make sense (especially in times of excessive partisan zeal, the kind America has witnessed over the last two decades).

115. See, e.g., Ari Berman, *The Supreme Court Is the Most Important Issue in the 2016 Election*, NATION (Feb. 16, 2016), <https://www.thenation.com/article/the-supreme-court-is-the-most-important-issue-in-the-2016-election/>.

116. See *infra* note 117 and accompanying text.

117. See, e.g., *Ulysses S. Grant: Impact and Legacy*, MILLER CTR. PUB. AFFAIRS, <http://millercenter.org/president/biography/grant-impact-and-legacy> (last visited Jan. 17, 2017) (noting that “[o]nly more recently have historians begun to appreciate [Ulysses S.] Grant’s commitment to African Americans. He fought to protect the rights of African Americans more than any other nineteenth-century President. He worked hard to ensure the passage of the Fifteenth Amendment and tried to make it possible for blacks to vote”).

118. Eisenhower famously was at a loss to offer any significant policies on which Vice President Nixon helped out, saying, “If you give me a week, I might think of one.” David A. Graham, *‘If You Give Me a Week, I Might Think of One,’* ATLANTIC (May 27, 2016), <http://www.theatlantic.com/notes/2016/05/if-you-give-me-a-week-i-might-think-of-one/484556/>.

119. See generally David W. Moore, “Clinton Factor” May Be Hurting Gore in Presidential Race, GALLUP (Mar. 16, 2000), <http://www.gallup.com/poll/3085/clinton-factor-may-hurting-gore-presidential-race.aspx>.

elections.¹²⁰ As has been pointed out:

In the last sixty years, most sitting vice presidents or former veeps have not only sought the presidency when their presidents were no longer in the running but have also have won their party's nomination: Richard Nixon in 1960, Lyndon Johnson in 1964, Hubert Humphrey in 1968, Richard Nixon in 1968 and 1972, Gerald Ford in 1976, Walter Mondale in 1984, George H.W. Bush in 1988 and 1992, and Al Gore in 2000. What requires explanation, then, is not that Gore ran in 2000, but that Cheney didn't in 2008.¹²¹

Is it possible that one important factor here was dynastic? Consider that

Cheney in 2000 was chosen in part because he was loyal to the Bush family and would likely be too old and infirm to run in his own right in 2008—the year slotted for Jeb Bush, had this Bush grandson/son/brother chosen to run. In part because of Iraq and Hurricane Katrina, the Bush dynasty ended up not seeking a fourth term in 2008, but isn't it noteworthy that George W's choice of Cheney in 2000 nicely preserved this option?¹²²

There are many ways a president can help his vice president succeed him in the next election for president. The examples noted earlier of presidents involving their vice presidents in highly visible substantive policy areas can help develop important expertise and create the right kinds of public perceptions.¹²³ Campaigning for one's vice president (or other handpicked successor) can also be quite important.¹²⁴ So too would temporary hand-offs of the kind mentioned earlier in the context of the Clinton impeachment.¹²⁵

Did the Constitution's framers recognize this ability of a president to succeed through handpicked successors? Maybe not early, but the history

120. *See infra* note 121 and accompanying text.

121. Akhil Reed Amar, *THE CONSTITUTION TODAY: TIMELESS LESSONS FOR THE ISSUES OF OUR ERA* 28 (2016).

122. *Id.*

123. *See supra* notes 88–93 and accompanying text.

124. *See generally* Domenico Montanaro, *Why President Obama Campaigning for Clinton Is Historic*, NPR (July 5, 2016), <http://www.npr.org/2016/07/05/484817706/looking-back-at-a-century-of-presidents-not-campaigning-for-their-successor>.

125. *See supra* notes 107–08 and accompanying text.

surrounding the enactment of the Twenty-second Amendment, limiting presidents to serving two elected terms, is quite interesting; the tradition of presidents serving only two terms to prevent the presidency from devolving into royalty was established by George Washington and remained strong, though sometimes tested, until the Great Depression and the unprecedented four-election stint of FDR.¹²⁶

The Twenty-second Amendment, enacted shortly after FDR died,¹²⁷ was certainly a personal reaction that enabled FDR's political opponents to retroactively cast negative light on his presidency—to defeat him after his death when they could not during his political lifetime.¹²⁸ And indeed that was one powerful criticism of the proposed Amendment—that it was motivated by personal animosity rather than policy wisdom.¹²⁹

But the other big criticism of the move to enact presidential term limits was more theoretical: that denying voters the option of electing a president more than twice, should the exigencies of the day overcome what nearly everyone agreed should be an ordinary and strong presumption of no more than two terms in practice, was undemocratic; and that however attractive the idea of two terms only was as a general matter, it should be up to the voters, without their hands being tied, to decide whom they want to elect as president.¹³⁰ The most powerful form of this argument came by way of a comparison to the election of members of Congress, almost none of whom would have supported (or would support today) a constitutional amendment limiting members of the House or Senate to a specified number of terms.¹³¹ Why, critics of the proposed Twenty-second Amendment asked, ought the

126. See Jack M. Beermann, *A Skeptical View of a Skeptical View of Presidential Term Limits*, 43 CONN. L. REV. 1105, 1109 (2011) (“It was subsequent political leaders who pointed to Washington’s example when they proclaimed the wisdom of the customary two-term limitation of presidential service. The association with Washington surely solidified the acceptance of the custom by nearly every subsequent President.”); *Franklin D. Roosevelt: Campaigns and Elections*, MILLER CTR. PUB. AFFAIRS, <http://millercenter.org/president/biography/fdroosevelt-campaigns-and-elections> (last visited Jan. 17, 2017).

127. U.S. CONST. amend. XXII.

128. See Bruce G. Peabody & Scott E. Grant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 588 (1999).

129. See ALAN P. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 117 (1987).

130. *Id.* at 117–19.

131. This is why a grass-roots movement, like Term Limits, Inc., was needed to have any chance of accomplishing federal legislative term limits. For background on this issue, see *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

President be treated differently than members of Congress for these purposes?¹³²

Supporters of the Twenty-second Amendment never offered a great answer that really addressed, let alone defused, the democratic critique, but the vice-president-as-handpicked-successor concept does help provide one: a two-term president can extend his policies if the voters want them extended, which would satisfy concerns of democracy much more easily than a member of Congress could upon departure from Congress. Because there is not a more effective or clear way for a member of Congress to set someone up to be a successor, a handpicked successor is a much more reliable device for a policy legacy than is a political party that may or may not follow through on what the prior incumbent really wanted to accomplish.

132. Grimes, *supra* note 129, at 118.