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# The Twice and Future President: Constitutional Interstices and the Twenty- Second Amendment

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## INTRODUCTION

It appears to be a commonly held view that when Bill Clinton's second term expires, he will be constitutionally prohibited from serving again as President of the United States.<sup>1</sup> This, we believe, is decidedly incorrect. The Twenty-Second Amendment to the United States Constitution states that "[n]o person shall be elected to the office of the President more than twice."<sup>2</sup> Although a twice-elected President may not again be "elected" to that Office, there are a number of circumstances in which such a person may still "serve" as President. We examine these circumstances in this Article.

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1. See, e.g., Lionel Van Deerlin, *Second-Term Curse Befalls Bill Clinton*, SAN DIEGO UNION-TRIB., Nov. 12, 1997, at B11, available in LEXIS, News Library, US File (explaining that after his second term Clinton "cannot serve again"); see also *Plugge v. McCuen*, 841 S.W.2d 139, 148 (Ark. 1992) (stating that "the twenty-second Amendment . . . limits the President to eight years of service") (Dudley, J., dissenting).

2. U.S. CONST. amend. XXII, §1. The Amendment further states that "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." *Id.* The Twenty-Second Amendment also stipulates that it did not apply "to any person holding the office of President" when it was proposed (exempting then-President Truman from its effects), and provides that it "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." *Id.*

While distinguishing between "election" and "service" may seem a matter of semantic parsing, we believe this differentiation is constitutionally significant and consequently, we contend that the Twenty-Second Amendment proscribes only the *reelection* of an already twice-elected President.<sup>3</sup>

The widespread misunderstanding about what the Twenty-Second Amendment actually prohibits<sup>4</sup> is in large measure due to the fact that it has been infrequently examined by courts and academicians. And who can blame them? Since the Amendment was ratified in 1951, only three Presidents before Clinton (Eisenhower, Nixon and Reagan) have been elected to a second term,<sup>5</sup> and none of them ever expressed any genuine interest in testing its legal parameters. Moreover, the relatively straightforward text of the Amendment seemingly provides little material for scholars to probe. As a result, there

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3. When using the phrase "twice-elected" we acknowledge that under the Twenty-Second Amendment a person "who has . . . acted as President, for more than two years of a term to which some other person was elected" is treated as if "elected" for purposes of determining eligibility for reelection. *See id.* For the duration of this Article we shall use the phrases "previously twice-elected" and "already twice-elected" to include such circumstances.

4. In addition to being described as preventing an already twice-elected President from "serving" again, *see supra* note 1, the Amendment also has been described as limiting a President's "terms" in Office. *See, e.g.,* Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 939 (1992) (stating that the Twenty-Second Amendment "limits Presidents to two terms"); Bruce E. Fein, *Original Intent and the Constitution*, 47 MD. L. REV. 196, 206 (1987) ("[T]he twenty-second amendment limits a President to two terms"); Stephen M. Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121, 2138 (1996) (noting that the Twenty-Second Amendment "limit[s] the President to two terms"); Sean Wilentz, *Over the Hill*, NEW REP., Oct. 12, 1992, at 40 ("As every schoolchild should know . . . the Twenty-Second Amendment . . . limits presidents to two elected terms in office").

Still others describe the Amendment as limiting presidential "tenure." *See, e.g.,* Lyle Denniston, *The Center Moves, the Center Remains*, 40 N.Y.L. SCH. L. REV. 877, 888 (1996) (stating that the Twenty-Second Amendment imposes "a two-term limit on any president's tenure"); Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limits*, 20 HOFSTRA L. REV. 341, 346 n.24 (1991) (stating that the Twenty-Second Amendment "limits presidential tenure to two four-year terms").

In general, interpretation and understanding of the Amendment would be advanced were commentators to describe more precisely the effect of the Amendment. *Cf.* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 491 (1989) (explaining that "the Twenty-Second Amendment forbade the President from seeking a third elected term in office").

5. Although Nixon resigned before completing his second term, he was formally prohibited by the Amendment from being elected to a third term.

is a dearth of legal scholarship about the Amendment,<sup>6</sup> and the infrequent references to it tend to assume (in our view, incorrectly) that it is clear and its interpretation unproblematic.<sup>7</sup>

This Article attempts to redress some of the inattention to the Twenty-Second Amendment. We strive to contribute to the understanding of the Amendment by exploring its history, its text, and its meaning. More specifically, the first major part of this Article (Part II) examines the political and legal traditions that gave rise to the Twenty-Second Amendment, helping to place the Amendment in historical context. In Part II we consider, in turn, discussions of the issue of presidential reeligibility at the Constitutional Convention, how the issue played out in presidential elections leading up to Franklin Roosevelt's third and fourth terms (which spurred the subsequent adoption of the Twenty-Second Amendment), and a long line of congressional efforts to limit presidential tenure. We then examine in some detail the debates and political processes that led to Congress's approval of the Amendment and its eventual ratification by the states. Finally, we conclude our historical analysis by surveying reactions to, and assessments of, the Amendment since its enactment.

With this historical background in mind, the second major part of this Article (Part III) focuses on what we consider the central interpretive issue presented by the Amendment—identifying what, precisely, it proscribes and allows. We examine this issue by exploring and testing the constitutionality of six scenarios in which an already twice-elected President

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6. See John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 494 (1997) (calling the Twenty-Second Amendment a "forgotten friend").

7. See, e.g., Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 714-15 n.55 (1995) (commenting that any prejudice stemming from the deferral of lawsuits against a sitting President is tempered because "the Twenty-Second Amendment . . . itself assures that plaintiffs will not have to wait more than eight years . . . . In rare cases, the Amendment would allow a person to serve as President for ten years."); Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1894 (1994) (explaining that the Twenty-Second Amendment "prohibits a President from serving three terms"); Johnathan Mansfield, *A Choice Approach to the Constitutionality of Term Limitation Laws*, 78 CORNELL L. REV. 966, 994 (1993) (calling the Twenty-Second Amendment a "simple[ ] solution"); see also *Blow to Term Limits*, UNION LEADER (Manchester, NH), May 24, 1995, available in LEXIS, News Library, ACRNWS File ("The Twenty-Second Amendment . . . provide[s] a definite term limit.") (emphasis added).

might reassume Office, acting as or again becoming President.<sup>8</sup> Specifically, we examine whether the Twenty-Second Amendment, or some other constitutional provision, precludes a previously twice-elected President from:

(1) serving as Vice President<sup>9</sup> and then becoming President in the case of removal, death or resignation of the President;<sup>10</sup>

(2) serving as Vice President and then acting as President during a period in which the President is unable to discharge the powers and duties of the Office, as authorized by (a) a written declaration from the President him or herself,<sup>11</sup> or (b) other constitutional mechanisms;<sup>12</sup>

(3) becoming Vice President-elect and then President if "at the time fixed for the beginning of the term of the President, the President-elect shall have died";<sup>13</sup>

(4) becoming Vice President-elect and then acting as President if "a President shall not have been chosen before the time fixed for the beginning of [the] term, or if the President-elect shall have failed to qualify";<sup>14</sup>

(5) acting as President under circumstances provided for by the Succession Act of 1947,<sup>15</sup> which comes into play if (a) the President and the Vice President both die, resign, or are unable to discharge their duties,<sup>16</sup> or (b) the President-elect

8. The Constitution distinguishes between "acting" as President and "being" or "becoming" President. Compare, e.g., U.S. CONST. art. II, § 1, cl. 6 (elaborating conditions under which a person might "act as President") with *id.* amend. XX, § 3 (explaining terms under which a Vice President-elect "shall become President"). See also Scott E. Gant & Bruce G. Peabody, *Musings on a Constitutional Mystery: Missing Presidents and "Headless Monsters"?*, 14 CONST. COMM. 83, 87 n.14 (1997). Here, we consider acting as President and being President as different ways of "serving" as President.

9. Later we take up the question of whether a previously twice-elected President can subsequently serve as Vice President. See *infra* Part III.

10. See U.S. CONST. amend. XXV, § 1.

11. See *id.* § 3.

12. See *id.* § 4. The Twenty-Fifth Amendment authorizes "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" to submit a "written declaration that the President is unable to discharge the powers and duties of his office" with the effect that the Vice President shall then act as President.

13. *Id.* amend. XX, § 3.

14. *Id.*

15. 3 U.S.C. §19 (1994).

16. See U.S. CONST. art. II, § 1, cl. 6. This was much more likely to have occurred prior to the ratification of the Twenty-Fifth Amendment, which provides for the filling of the vice presidency should it become vacant. Prior

and the Vice President-elect are both constitutionally unqualified to hold office;<sup>17</sup>

(6) becoming President if so chosen by the House of Representatives in the event no person received a majority of the electoral votes in an election for President.<sup>18</sup>

Part III's assessment of the constitutionality of these six basic scenarios<sup>19</sup> begins with what might be described as a

to 1967, when the Twenty-Fifth Amendment was ratified, the vice presidency had been vacant sixteen times. See GEORGE C. EDWARDS III & STEPHEN J. WAYNE, *PRESIDENTIAL LEADERSHIP: POLITICS AND POLICY MAKING* 460 (1994).

17. See U.S. CONST. amend. XX, § 3 (empowering Congress to "provide for the case wherein neither a President-elect nor a Vice President-elect shall have qualified").

While Congress has passed a single statute to provide for the succession circumstances referenced in both Article II, § 1 and the Twentieth Amendment, it might have chosen instead to enact separate laws addressing the contingencies described by these constitutional provisions. Furthermore, while the Succession Act of 1947 is the current "law of the land," this legislation might change in the future; indeed we speculate later about the wisdom and propriety of revised succession legislation.

18. See U.S. CONST. amend. XII. We presume that this is the scenario most likely to be viewed as legally suspect. It hinges upon the idea that the House's "choosing" of a President is not an "election." If the House does not "elect" a President through its "choosing," then a twice-elected President might not only reassume the Office as the House's choice as provided for in the Twelfth Amendment, but also through a statute (as yet unpassed) allowed for by the Twentieth Amendment. See U.S. CONST. amend. XX, § 4 (stating that "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").

19. It may be helpful to conceptualize our scenarios by organizing them temporally, grouping them by stages in the electoral process. Thus, Scenario 6 would take place only if the election had been thrown to the House; Scenarios 3, 4, and 5b would occur only if a President and Vice President had been "elected" but had not yet formally entered Office and begun their terms; and Scenarios 1, 2, and 5a could occur only once a term—as defined by the Twentieth Amendment—had begun (and the President and Vice President had actually been elected).

Scenarios 3, 4 and 5b, then, necessarily beg the question of when has an "election" taken place and a presidential candidate become a President-elect. Does this occur after the national election? Is it after the electoral college has convened and cast its votes, but not yet announced them or had them formally counted? Or is it after it has convened and had its votes counted and certified by the President of the Senate and Congress (as specified by the Twelfth Amendment)? If a person is considered President-elect only upon having his or her status certified by the electoral college's formal announcement, what is the constitutional status of a candidate who dies after the college has cast its votes but before it has convened? For a general discussion of some of these issues, see WALTER BERNS, *AFTER THE PEOPLE VOTE: STEPS IN CHOOSING THE PRESIDENT* (1983).

conventional legal analysis of the scenarios, examining the text and legislative history of the Twenty-Second Amendment as well as other constitutional provisions to assess whether a twice-elected President could again occupy the Office of President after the expiration of his or her second term. We then discuss whether the "spirit" of the Constitution (or the spirit of the Twenty-Second Amendment) may bear on our inquiry and provide a basis for declaring that one or several of the scenarios outlined above would be unconstitutional, regardless of the results of our conventional legal analysis.<sup>20</sup>

## II. BACKGROUND AND ANTECEDENTS OF THE TWENTY-SECOND AMENDMENT

While much of the proximate impetus for adopting the Twenty-Second Amendment seems to have derived from partisan opposition to the policies and legacies associated with Franklin Delano Roosevelt and his unprecedented four terms of presidential service, supporters of the Amendment—before and after its ratification—have argued that it codified a longstanding tradition of presidential term limits. We begin our examination of the Amendment by uncovering its historical and legal roots.<sup>21</sup>

### A. THE FOUNDING AND THE CONVENTION DEBATES

When the American colonies declared independence in 1776, they generally favored weak executives and strong leg-

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20. Some may suggest that the scenarios set out in this Article are implausible because the nation would never countenance a President continuing his or her service through the methods we have identified, and that the scenarios therefore fail to warrant the attention we have given them. We disagree for a number of reasons, among these our belief that what is unimaginable today might become conceivable in the future. Cf. D.M. Risinger, *Honesty in Pleading and Its Enforcement: Some 'Striking' Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 57 (1976) (arguing that "[t]oday's frivolity may be tomorrow's law" and noting further that "the law often grows by an organic process in which a concept is conceived, then derided as absurd (and clearly not the law), then accepted as theoretically tenable (though not the law), then accepted as the law"). Moreover, part of taking constitutionalism seriously is to stretch and test the terms of our constitutional document and the traditions and practices that it helps to generate. We have tried to do so here.

21. Part II generally puts off prolonged discussion of how our historical observations bear on the six scenarios; these issues are examined closely in Part III.

islatures.<sup>22</sup> Post-independence state constitutions reflected this preference; in addition to limiting the executive to a short term of office, a number of states prohibited reelection.<sup>23</sup> Even before the Articles of Confederation were adopted in 1781, the disinclination to recognize a strong, independent executive was manifest at the national level, where executive powers and officers were controlled by the Continental Congress.<sup>24</sup> The presiding officer in Congress, the president, exercised a number of executive functions including meeting with state executive officers and foreign heads of state. In addition, "a principle of rotation was firmly established for presidents [of the Continental Congress], no doubt reflecting once again the fear of executive power as a potential threat to liberty."<sup>25</sup> The Articles of Confederation formally provided that the president not serve "more than one year in any term of three years."<sup>26</sup>

During the Constitutional Convention the question of how long the President should serve was discussed extensively.<sup>27</sup> In debates on the question during the summer of 1787, Edmund Randolph, Governor of Virginia and author of the nationalist "Virginia Plan" for the Constitution (much of which was ultimately adopted in the final version of the document),<sup>28</sup> called for an executive chosen by the national legislature and ineligible for more than one term of service. Measures proposed by other Convention delegates left the question of reeligibility open-ended and called for some form of presidential election, as opposed to selection by the legislature.<sup>29</sup>

22. See Thomas E. Cronin, *Presidential Term, Tenure and Reeligibility*, in *INVENTING THE AMERICAN PRESIDENCY* 61, 62 (Thomas E. Cronin ed., 1989).

23. See *id.* at 62-63.

24. See *id.* at 64.

25. *Id.*

26. ARTICLES OF CONFEDERATION art. IX.

27. See THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 118-19, 130-31, 141, 166-68, 170 (Ralph Ketcham ed., 1986) [hereinafter ANTI-FEDERALIST PAPERS]; 2 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 48, 270, 274, 282, 287, 313, 318-23, 325 (Gaillard Hunt & James Brown Scott eds., 1987). According to political scientist Thomas Cronin, "at least sixty votes were taken on the issues of the proper length of term for the president, of who should do the electing, and of reeligibility." Cronin, *supra* note 22, at 65.

28. See SAMUEL ELIOT MORISON ET AL., A CONCISE HISTORY OF THE AMERICAN REPUBLIC 115-16 (2d ed. 1983).

29. Early versions of the Constitution included a proposal that the President be directly elected by the federal legislature. Critics charged that the only way to guarantee an independent executive under this arrangement

By July 26, the Convention approved a plan in which the executive was to be chosen by Congress for a term of seven years, with no reeligibility.<sup>30</sup> Opponents of this plan, including Alexander Hamilton<sup>31</sup> and Gouverneur Morris, argued in favor of reeligibility and the Committee of Eleven (to which a number of unresolved issues had been referred by the Convention delegates) suggested that the Convention adopt a four-year presidential term.<sup>32</sup> On September 15, an acceptable compromise was finally reached, and the Convention agreed to a four-year term with election by an electoral college and no restriction on reeligibility.<sup>33</sup> Morris, author of the New York state constitution and Pennsylvania delegate to the Convention,<sup>34</sup> was among the most vocal and forceful in arguing against limiting presidential reeligibility. He maintained that without the option of reeligibility, Presidents would lose their appetite for "public esteem" and their "love of fame . . . the great spring to noble and illustrious action."<sup>35</sup> Morris also thought that limiting the presidential term of service would incline a President to corruption and to "accumulate wealth and provide for his friends."<sup>36</sup> And he intimated that constitutional restrictions on the terms of presidential service might simply give way during a crisis: "In moments of pressing danger the tried abilities and established

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was to limit service to one term. See ANTI-FEDERALIST PAPERS, *supra* note 27, at 119, 130. The insistence of some Convention delegates that the President be "elected" rather than chosen by the legislature may lend some support to our supposition that the House of Representatives' "choosing" of a President (under the terms of the Twelfth Amendment) is not an "election" as the term is used in the Twenty-Second Amendment. See *supra* note 18 and accompanying text (discussion of Scenario 6).

30. See ANTI-FEDERALIST PAPERS, *supra* note 27, at 141. Specifically, Article Ten of the August 6, 1787 version of the Constitution stated that the President "shall hold his office during the term of seven years; but shall not be elected a second time." *Id.*

31. At one point during the Convention proceedings Hamilton proposed that the chief executive be chosen for life, remaining in office as long as he maintained "good behavior." See STEPHEN W. STATHIS, PRESIDENTIAL TENURE: A HISTORY AND ANALYSIS OF THE PRESIDENT'S TERM OF OFFICE, CONG. RES. SERV. REP. NO. 81-129, at 10 (1981).

32. See Cronin, *supra* note 22, at 68.

33. See 2 MADISON, *supra* note 27, at 323.

34. While beginning his career in New York, Morris was appointed as a Pennsylvania delegate to the Constitutional Convention with the support of his political mentor, Robert Morris. See THE READER'S COMPANION TO AMERICAN HISTORY 750-51 (Eric Foner & John A. Garraty eds., 1991).

35. ANTI-FEDERALIST PAPERS, *supra* note 27, at 117.

36. *Id.*

character of a favorite Magistrate will prevail over respect for the forms of the Constitution."<sup>37</sup>

After the Convention closed, resistance to open-ended service persisted, as some critics voiced concerns that reeligible Presidents would "endanger the public liberty."<sup>38</sup> The Virginia, New York and North Carolina ratifying conventions called for amendments prohibiting the President from serving more than two terms.<sup>39</sup> But the merits of not limiting presidential reeligibility were revisited in *The Federalist*. In *Federalist No. 69* Hamilton elaborated how the Constitution was premised on a reeligible executive, with democratic checks to counter the threat of a tyrannical President (or a servile President continually installed by a domineering Congress in elections thrown to the House).<sup>40</sup> The President, Hamilton explained, "is to be elected for four years; and is to be re-eligible as often as the people of the United States shall think him worthy of their confidence."<sup>41</sup>

Defense of a (potentially perpetually) reeligible President was further developed in *Federalist No. 72*, which asserted that a number of evils flowed from limiting the number of terms a President could serve. In arguments reminiscent of those employed by Morris, Hamilton asserted that presidential term limits would remove "inducements to good behavior" and diminish the incentives of ambitious politicians to pursue the public good.<sup>42</sup> Moreover, a brief or fixed tenure would provide a greater temptation to abuse power. Term limits would also needlessly exclude the wisdom and insights of experienced Presidents, which would be especially important for overcoming crises in the new republic. In addition, electoral continuity was needed to promote stable and consistent

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37. *Id.* This argument was made 160 years later by Democratic opponents of the Twenty-Second Amendment. The power of Morris's arguments is suggested by their continuing resonance among those supporting presidential reeligibility before and after the ratification of the Twenty-Second Amendment.

38. *Id.* at 166.

39. See RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 150 (1993).

40. See THE FEDERALIST NO. 69, at 415-23 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

41. *Id.* at 416.

42. THE FEDERALIST NO. 72, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

policies. Ultimately, these arguments prevailed and the Constitution was adopted with the original Convention language intact—that is, without a limit on presidential service.

## B. THE TWO-TERM LIMIT: A CHERISHED TRADITION?

There seems to be something of a consensus among scholars that, starting with George Washington's refusal to run for a third term in 1796, a presidential two-term tradition was founded and continued uncontested until Roosevelt's reelection to a third term in 1940. As David Kyvig puts it in his history of constitutional amendments, the notion that a President should serve no longer than two terms was "established by George Washington, reinforced by Thomas Jefferson, and observed for one reason or another by the seven other once-re-elected chief executives" up to FDR.<sup>43</sup> Similarly, FDR historian Doris Kearns Goodwin offers that "[e]ver since George Washington refused a third term, no man had even tried to achieve the office of the Presidency more than twice."<sup>44</sup>

But a close inspection of the debates on presidential term limits between 1789 and 1939, as well as an examination of political practices during that period, casts doubt upon these accounts of presidential reeligibility. To begin with (as we discuss below), Washington himself did not appear to favor limiting the number of times a President could serve. Furthermore, even Jefferson, the President most strongly associated with presidential term limits and the principle of "rotation in office," suggested that there were circumstances

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43. DAVID KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, at 325 (1996); see also LOUIS W. KOENIG, *THE CHIEF EXECUTIVE* 64 (1964) ("[T]he principle of unlimited eligibility for reelection was innocently but irreparably undermined in practice by the man in whose behalf it had been established, George Washington himself."); SIDNEY M. MILKIS & MICHAEL NELSON, *THE AMERICAN PRESIDENCY* 90 (1994) ("[Washington's] retirement set a precedent for limiting presidents to two terms that endured for nearly 150 years."); ALAN GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 114 (1978) ("There was no argument that the two-term tradition had been begun by Washington, supported by Jefferson, and observed by all succeeding Presidents prior to Franklin Roosevelt."); EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 43 (1948) ("[T]he custom which limits any individual's tenure of the presidential office to two terms was initiated by Washington himself . . ."); Johnathan Mansfield, *A Choice Approach to the Constitutionality of Term Limitation Laws*, 78 *CORNELL L. REV.* 966, 995 (1993) (explaining that "George Washington established th[e] precedent" that Presidents should refuse to seek a third-term).

44. DORIS KEARNS GOODWIN, *NO ORDINARY TIME* 106 (1994).

under which a third term would be appropriate. And even if, prior to the Twenty-Second Amendment, there was an unwritten rule that Presidents should not seek a third term, it was a rule questioned by a number of Presidents after Jefferson, and challenged—politically, but not legally—by others.<sup>45</sup> Whatever the precise contours of the “two-term tradition” of presidential service, until 1940 (when its abandonment was implicitly sanctioned with the election of FDR to a third term), it seems to have led what Paul and George Willis describe as something of a “precarious life.”<sup>46</sup> If this perspective is correct, then a better understanding of the mixed historical attitudes towards the two-term tradition may help refine scholarly attitudes about its significance and provide additional insight into the purposes and scope of the Twenty-Second Amendment.

In this analysis of presidential history prior to FDR we seek to address a number of questions: Was there a fairly identifiable presidential “custom” regarding the appropriate limits of presidential tenure? If so, how was it created? What did it proscribe? We engage these questions to clarify the historical background of the Twenty-Second Amendment and to assess the arguments made before and after the Twenty-Second Amendment by those who have invoked “history” in defense of limiting presidential service.

### 1. George Washington: Founder of a Two-Term Tradition?

As already noted, those recognizing a longstanding historical custom of limited presidential service usually trace it to President Washington.<sup>47</sup> Some accounts of the two-term tradition suggest that Washington’s refusal to run for a third

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45. In addition to Franklin Delano Roosevelt, Ulysses S. Grant and Theodore Roosevelt appear to have been prepared to serve as President for more than two terms. See *infra* notes 81-83 and 91-93 and accompanying text.

46. Paul G. Willis & George L. Willis, *The Politics of the Twenty-Second Amendment*, 5 W. POL. Q. 469, 469 (1952).

47. Ironically, it is the standing of Washington himself that may have prompted the constitutional Framers to allow the president to be reeligible. There is substantial evidence suggesting that the Framers’ commitment to reeligibility was predicated upon the understanding that Washington would continue to serve as President. See CORWIN, *supra* note 43, at 43 (stating that “the prevailing sentiment of the Convention of 1787 favored the indefinite reeligibility of the President, a sentiment which was owing in considerable part to the universal expectation that Washington would be the first person to be chosen President, and would be willing to serve indefinitely”).

term—despite popular and political enthusiasm for his continued service<sup>48</sup>—helped steer the nation clear of monarchy and established a de facto two-term limit on presidential service.

Adherents to this conception of Washington as the “father” of a two-term tradition point to several pieces of supporting evidence, including a 1792 farewell address (drafted by James Madison) that Washington intended to deliver upon completing his first term.<sup>49</sup> In the text, Washington described the virtues of setting “an early example of rotation in an office of so high and delicate a nature,” and asserted that such a rotation would “accord with the republican spirit of our Constitution, and the ideas of liberty and safety entertained by the people.”<sup>50</sup> Washington’s emphasis on “rotation in office” (a term also invoked frequently by Jefferson)<sup>51</sup> appears to reflect strong opposition to open-ended service and to secure a powerful foundation for limiting presidential service in the future.

But Washington’s remarks on the importance of office “rotation” were never conveyed to the public, since he ultimately ran in 1792 and did not include the remarks in his 1796 farewell address.<sup>52</sup> Moreover, the evidence that Washington championed presidential term limits for anyone but himself is insubstantial. While he refused a third term in

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48. Richard Brookhiser posits that “[h]ad Washington wanted a third term, there is no question that he would have been reelected once more.” RICHARD BROOKHISER, *FOUNDING FATHER* 100 (1996). On the political impact of Washington’s refusal to run for a third term, see GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 205-06 (1991) and BROOKHISER, *supra*, at 101-03.

49. Washington was inclined to retire in 1792 after serving only one term, but he was persuaded by Hamilton, Jefferson, and Madison to make himself eligible again, and he did not publicly resist his reelection. See BROOKHISER, *supra* note 48, at 84-85. As we discuss below, there are good reasons to think that what Washington desired for himself and what he thought appropriate for future presidents were two different matters. See *infra* notes 53-55 and accompanying text.

50. George Washington, Draft of Farewell Address (1792) in YOUNG B. SMITH, *THE THIRD TERM PRINCIPLE AND ITS SIGNIFICANCE TODAY* 3 (1940). See generally STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM* 290-92 (1993).

51. See our discussion of Jefferson *infra* Part II.B.1.b.

52. Washington’s 1796 Farewell Address was based in part on his 1792 text and completed with the assistance of Alexander Hamilton, but the language on “rotation” was not included. See SMITH, *supra* note 50, at 25.

1796,<sup>53</sup> despite continued enthusiasm for his leadership, Washington nowhere decried continued reelection per se. Washington seems to have retired not out of a sense of constitutional propriety but because he wanted to leave politics and return to Mount Vernon.<sup>54</sup> As political scientist Thomas Cronin put it, "Washington retired, not because he favored a two-term tradition, but because he was tired and wanted to return to private life."<sup>55</sup>

Moreover, it is worth recalling that Washington presided over the Constitutional Convention that explicitly considered and rejected limiting presidential service and enforcing "rotation in office."<sup>56</sup> Indeed, less than a year after the Convention, Washington wrote to the Marquis de Lafayette, indicating that while opinions were likely to vary,

on the eligibility of the same person for President, after he should have served a certain course of years . . . I confess I differ widely myself from Mr. Jefferson and you, as to the necessity or expediency of rotation in that department. The matter was freely discussed in the convention and to my full conviction.<sup>57</sup>

Washington continued: "I can see no propriety in precluding ourselves from the services of any man who in some great emergency shall be deemed universally most capable of serving the public."<sup>58</sup>

To some extent, of course, Washington's beliefs about presidential service may be less important than how his actions have been perceived and interpreted. In this way, Washington may have contributed to a "tradition" of two terms of service, regardless of whether he thought it a necessary part

53. Earl Spangler notes that "Hamilton pleaded with Washington in 1797-1798 to run again in 1800." EARL SPANGLER, *PRESIDENTIAL TENURE AND CONSTITUTIONAL LIMITATION* 9 (1977).

54. See MILKIS & NELSON, *supra* note 43, at 303 ("Washington had stepped down voluntarily from the presidency after two terms . . . not as a matter of principle but because he longed for 'the shade of retirement.'").

55. Cronin, *supra* note 22, at 77.

56. For a discussion of the Convention debates concerning whether presidential "rotation" should be secured through constitutional mechanisms, see 2 MADISON, *supra* note 27, at 318-23.

57. Letter from George Washington to the Marquis de Lafayette (Apr. 28, 1788), *reprinted in* CORWIN, *supra* note 43, at 389.

58. *Id.* In 1938, Senator Simeon Fess argued against limiting presidential service by attacking the view that Washington embraced presidential term limits. Fess insisted "I will not admit that he believed that a third term was vicious, or that he ever thought it was unpatriotic, or that he thought it would not be a wise course." 93 CONG. REC. 1949 (1947) (reprinting an excerpt from the Congressional Digest of 1938).

of the new republic's political practices.<sup>59</sup> We continue with our investigation to see, then, if Washington's legacy was indeed applied in a way that established a coherent custom of limited presidential service.

## 2. Thomas Jefferson and the Tradition of Term Limits

Thomas Jefferson, the next President to be elected twice, spoke unambiguously and consistently in favor of the "necessity of rotation in office, and most particularly in the case of the President."<sup>60</sup> Indeed, Jefferson originally intended to serve only one term, but decided that the "unbounded calumnies" of his Federalist political opponents compelled him to run again.<sup>61</sup> Just before his second inauguration, Jefferson spoke at length about his views regarding the acceptable parameters of presidential service, concluding that he favored Washington's example of retiring after eight years.<sup>62</sup> "[A] few more [such] precedents," Jefferson proclaimed, "will oppose the obstacle of habit to anyone after a while who shall endeavor to extend his term" beyond this tenure. Jefferson explained that his attachment to the principle of rotation and his distaste for the "perpetual re-eligibility of the same President" was born out of a fear that "the indulgence and attachments of the people will keep a man in the chair after he becomes a dotard, that re-election through life shall become habitual, and election for life follow that."<sup>63</sup> Moreover, Jefferson worried that a continually elected President would become subject to foreign influences, corruption and threats of force.<sup>64</sup> Despite Jefferson's arguments about the dangers of an entrenched Chief Executive and trepidation about presidential service

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59. See MILKIS & NELSON, *supra* note 43, at 90 ("Although Washington did not intend that it do so, his voluntary retirement set a precedent for limiting presidents to two terms that endured for nearly 150 years.").

60. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in THE POLITICAL WRITINGS OF THOMAS JEFFERSON 140 (Edward Dumbauld ed., 1955). Jefferson originally supported only a single (seven-year) presidential term, but he was convinced by Washington's example that a person might serve two terms without aggrandizing the powers of the Office. See MILKIS & NELSON, *supra* note 43, at 90; Letter from Thomas Jefferson to John Taylor (Jan. 6, 1805), in THE POLITICAL WRITINGS OF THOMAS JEFFERSON, *supra*, at 142.

61. SPANGLER, *supra* note 53, at 10.

62. See Letter from Thomas Jefferson to John Taylor, in THE POLITICAL WRITINGS OF THOMAS JEFFERSON, *supra* note 60, at 142.

63. *Id.*

64. See BERNSTEIN & AGEL, *supra* note 39, at 150.

beyond two terms, his objection to open-ended reeligibility does not appear to have been entirely inflexible. In 1805 Jefferson stated “[t]here is . . . one circumstance which could engage my acquiescence in another election; to wit, such a division about a successor, as might bring in a monarchist.”<sup>65</sup> Thus, we might fairly conclude that even the most outspoken presidential advocate for term limits recognized the necessity of deviating from this general rule under extraordinary conditions.

### 3. Perceptions of Presidential Term Limits After Jefferson

Between Presidents Jefferson and Andrew Jackson, the question of whether there should be a limit on the number of terms a President could serve received little attention from Presidents—although a number of Congressional measures during this period attempted to address the issue.<sup>66</sup> Jackson, elected to the presidency in 1828 but still angered by the “corrupt bargain” that denied him victory in the election four years earlier,<sup>67</sup> called for sweeping changes in how the President was elected and how long he could serve. In his first message to Congress in 1829, and in subsequent public statements,<sup>68</sup> Jackson called for a direct vote for President and for limiting the President to a single term of four or six years. No measure supporting these changes was passed by Congress, however.

Martin Van Buren was the only President between Jackson and Lincoln to be renominated for a second term, although he lost the second election and served only one term. During Van Buren’s administration, Congress passed ten resolutions calling for a one-term limit on presidential service—perhaps indicating, as Earl Spangler has argued,

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65. Letter from Thomas Jefferson to John Taylor, in *THE POLITICAL WRITINGS OF THOMAS JEFFERSON*, *supra* note 60, at 142.

66. See *infra* note 72 and accompanying text.

67. In the 1824 presidential election, Jackson received 99 electoral votes, John Quincy Adams 84, and Henry Clay 37. Since no candidate received a majority, the presidential selection was sent to the House where Clay threw his votes to Adams, securing him the presidency. Jackson’s supporters asserted that a “corrupt bargain” was struck between Adams and Clay, a charge that became more pointed when Adams named Clay as Secretary of State. See *THE ENCYCLOPEDIA OF AMERICAN HISTORY* 228 (John Mack Faragher ed., 4th ed. 1991).

68. At the beginning of each session of Congress for the next five years, Jackson reiterated his interest in making Presidents ineligible for second terms. See *STATHIS*, *supra* note 31, at 29.

"some intra-party disaffection with him."<sup>69</sup> In 1840, President-elect William Henry Harrison pledged to serve only one term, and in 1844, the Whigs included a one-term plank in their national platform.<sup>70</sup> While he was still a member of Congress, James Buchanan (who became President in 1857) expressed his support for "[t]he example of Washington, which has been followed by Jefferson, Madison, and Monroe . . . that no President shall be more than once re-elected."<sup>71</sup> While we have found no discussion about whether Lincoln ever contemplated a third term, Andrew Johnson called for a single presidential term in a special message to Congress, shortly after assuming office. In addition, during Johnson's administration, Congress introduced twelve resolutions recommending single terms for the President.<sup>72</sup>

The relative inattention the two-term issue received after Jefferson ended with the presidency of Ulysses Grant. Not long after Grant won reelection in 1872, a serious debate percolated within Republican political circles about the possibility of his running again in 1876. Although the President himself remained reticent in public about the subject,<sup>73</sup> the prospect of an 1876 run met with increasing attention and resistance, and in 1875 the Republican conventions of a number of states passed resolutions declaring their opposition to presidential service beyond two terms.<sup>74</sup> Responding to the Pennsylvania convention's expression of "unalterable opposition" to a third term run, Grant wrote a letter to the convention president indicating that he was not,

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69. SPANGLER, *supra* note 53, at 11.

70. *See id.*; see also Joseph E. Kallenbach, *Constitutional Limitations on Reeligibility of National and State Chief Executives*, 46 AM. POL. SCI. REV. 442 (1952).

71. 10 CONG. DEB. 321 (1892) (statement of Rep. Buchanan), reprinted in SMITH, *supra* note 50, at 8. Buchanan continued his remarks by arguing that "[t]his principle [that no President shall be reelected more than once] is [sic] now become as sacred as if it were written in the Constitution." *Id.*

72. *See Moves to Limit the Term, 1787-1947*, 26 CONG. DIG. 14, 15 (1947) (summarizing political initiatives to limit "the Presidential tenure of office" from 1787 to 1947).

73. *See* SPANGLER, *supra* note 53, at 20; see generally *id.* at 17-25.

74. *See id.* at 21; see also 93 CONG. REC. 1953 (1947) (statement of Sen. Lodge). The states were: Iowa, Kansas, Massachusetts, Minnesota, Nevada, New Hampshire, New York, Ohio, and Pennsylvania.

nor had he "ever been, a candidate for a renomination."<sup>75</sup> Grant further indicated that he "would not accept a nomination if it were tendered unless it should come under such circumstances as to make it an imperative duty—circumstances not likely to arise."<sup>76</sup> But in expanding on this last point, Grant noted that there were no constitutional prohibitions against serving more than two terms and that under certain circumstances it might be wise to extend a President's time in office beyond eight years.<sup>77</sup> On December 15, 1875, however, the House passed a resolution indicating that retirement from office after two terms was a "time-honored custom" and that any departure from this tradition was "unwise, unpatriotic, and fraught with peril to our free institutions," and interest in a third term for Grant temporarily disappeared.<sup>78</sup>

Although the prospect of a third term was a dead issue for Grant at the end of 1875,<sup>79</sup> by 1880 his candidacy was alive again (with some convinced that the lapse of four years between Grant's last service as President made him reeligible for office).<sup>80</sup> Indeed, as early as the summer of 1878, the Illinois State Republican Convention endorsed Grant as its candidate for an 1880 run.<sup>81</sup> At the 1880 national Republican convention, Grant led all other candidates through thirty-five ballots, but on the thirty-sixth ballot anti-Grant forces combined to nominate James A. Garfield.<sup>82</sup> Despite this outcome, and notwithstanding the examples of Washington

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

76. *Id.*

77. See *Moves to Limit the Term*, *supra* note 72, at 15 (noting that Grant argued "that the Constitution did not restrict the Presidential term to two terms, and that under certain circumstances it might be unfortunate to make a change at the end of eight years").

78. CONG. GLOBE, 44th Cong., 1st Sess. 228 (1875) (quoting the resolution proposed by Rep. Springer), *reprinted in* SMITH, *supra* note 50, at 9.

79. Grant's 1876 "bid" was officially terminated when the Republican National Convention nominated Rutherford B. Hayes.

80. See 93 CONG. REC. 1953 (1947) (statement of Sen. Lodge). After the election of 1876—which was again thrown to the House—President Hayes "recommended a single six-year term . . . in his first inaugural address." *Moves to Limit the Term*, *supra* note 72, at 15.

81. See SPANGLER, *supra* note 53, at 27-42 (discussing Grant and the possibility of his being elected to a third term).

82. See Stathis, *supra* note 75, at 64; MORISON ET AL., *supra* note 28, at 413 (detailing the history of Grant's 1880 "candidacy").

and Jefferson, the prospect of a President serving for at least three terms was clearly very much alive in 1880.<sup>83</sup>

The issue continued to garner attention during the presidency of Grover Cleveland, the only President to serve two nonconsecutive terms. In 1884 Cleveland spoke out against reeligibility while accepting the Democratic nomination. Cleveland went on to win the general election of that year, although he lost his reelection bid four years later.<sup>84</sup> But in 1892, Cleveland was elected for a second time, and following his victory, thirteen proposed constitutional amendments were introduced in Congress seeking to limit the presidential term in a variety of ways.<sup>85</sup>

At the beginning of the Progressive era, in an atmosphere of political and democratic reform, the issue of whether there were any limits on the duration of presidential service reemerged.<sup>86</sup> The Democratic platform of 1896 declared

it to be the unwritten law of this Republic, established by custom and usage of a hundred years, and sanctioned by the example of the greatest and wisest of those who founded and maintained our Government, that no man should be eligible for a third term of the Presidential office.<sup>87</sup>

Shortly after his second inauguration in 1901, President William McKinley was the subject of third term speculation—speculation diminished after McKinley insisted he would not

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83. Indeed, Spangler has speculated that if not for the 1880 Republican Convention's rejection of the unit rule—awarding the entirety of a state delegation's votes to the winner of a majority of the delegates—Grant would have secured the nomination. See SPANGLER, *supra* note 53, at 39.

84. Cleveland won the popular vote for three elections in a row, but during the second of these elections (in 1888) he lost the electoral college vote to Benjamin Harrison. Cleveland received 48.6% of the popular vote compared with Harrison's 47.8% but lost the electoral vote 168 to 233. See MILKIS & NELSON, *supra* note 43, at 462.

85. See *Moves to Limit the Term*, *supra* note 72, at 16. According to Congressional Research Service historian Stephen Stathis, Cleveland also "did virtually nothing to discourage talk of a fourth nomination" in 1896, although he was not ultimately selected by his party. STATHIS, *supra* note 31, at 33.

86. See generally RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955); GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM* (1963); Nancy Unger, *Progressivism (circa 1890s to 1917)*, in 2 *POLITICAL PARTIES AND ELECTIONS IN THE UNITED STATES 888-89* (L. Sandy Maisel ed., 1991).

87. *Moves to Limit the Term*, *supra* note 72, at 16 (providing an excerpt from the Democratic platform).

seek a third term and ultimately rendered moot by his assassination on September 14, 1901.<sup>88</sup>

McKinley's successor, Vice President Theodore Roosevelt, eventually raised serious questions about how long (and under what conditions) a person might occupy the Office of President. After serving as President-through-succession for three and a half years, Roosevelt was elected to office in 1904. Shortly after his victory, Roosevelt announced that he regarded his service after McKinley's assassination as his first term, and, in support of "[t]he wise custom which limits the President to two terms," he would refuse any further nominations. "Under no circumstances will I be a candidate for or accept another nomination," Roosevelt declared.<sup>89</sup>

But eight years later Roosevelt—convinced that his successor, President William Taft, had drifted from (and even betrayed) his foreign affairs and domestic policies<sup>90</sup>—challenged the incumbent for the Republican nomination. Explaining his run for the presidency and reversal of his earlier position (insisting that he would refuse further nominations), Roosevelt argued that since 1904 was his first "election" his reelection in 1912 would not betray Washington's legacy.<sup>91</sup> Between February 26, 1912 when Roosevelt finally publicly indicated that he would accept a presidential nomination, and June of the same year, when the Republican Convention assembled, the third term issue became a prominent part of the campaign. Critics warned of Roosevelt's "inordinate ambition" and the threat of dictatorship should he continue to serve, and the Democratic platform of 1912 called for a single six-year term.<sup>92</sup>

Despite Roosevelt's challenge, Taft was renominated on the first ballot, prompting Roosevelt to run as a third-party Progressive candidate.<sup>93</sup> Roosevelt's electoral hopes came to a true end with his defeat in the general election, but concern over the third term issue had already been fading since his defeat at the Republican Convention. Nevertheless, a few

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88. See SPANGLER, *supra* note 53, at 12 (discussing political speculation surrounding McKinley).

89. SMITH, *supra* note 50, at 11-12 (quoting Theodore Roosevelt) (citations omitted).

90. See MORISON ET AL., *supra* note 28, at 527 (describing Roosevelt's growing misgivings about Taft).

91. See BERNSTEIN & AGEL, *supra* note 39, at 157.

92. See SPANGLER, *supra* note 53, at 12.

93. See MORISON ET AL., *supra* note 28, at 527-28.

weeks after the election Taft called for a six-year term presidential limit with no possibility for reelection.<sup>94</sup> And in February 1913, the Senate passed a resolution<sup>95</sup> providing for an amendment that also would have limited Presidents to a single six-year term. The House did not act on the measure.<sup>96</sup>

The only other President before FDR to be elected to a second term was Woodrow Wilson. Before Wilson's health problems (beginning with a stroke on September 25, 1920) there is some evidence that he aspired to a third term. The 1912 Democratic platform on which Wilson ran included a plank calling for a constitutional amendment "making the President of the United States ineligible for reelection" and pledging their candidate to this commitment,<sup>97</sup> but Wilson distanced himself from this pledge.<sup>98</sup> After Wilson's second election in 1916, there was speculation that a 1920 Wilson-Roosevelt presidential battle would render the third term issue unavoidable.<sup>99</sup> While Wilson was not nominated at the 1920 Democratic convention, he at no time declared himself unwilling to serve or unfit for reelection.

Prior to FDR, Calvin Coolidge in 1927 made the last presidential statement related to the question of how long a President could serve. Coolidge, after serving part of Harding's term and being elected once on his own, indicated that he did not "choose" to run for President in 1928 (implying that he had the option to do so).<sup>100</sup>

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94. See SPANGLER, *supra* note 53, at 82.

95. See S.J. Res. 78, 62d Cong. (1913).

96. See *Moves to Limit the Term*, *supra* note 72, at 16 (describing the outcome of the "Works' Resolution"); cf. generally SPANGLER, *supra* note 53, at 83-92 (discussing the politics of presidential term limits around the period of the Taft administration).

97. 93 CONG. REC. 1954 (1957) (citations omitted).

98. See KOENIG, *supra* note 43, at 64 (noting that Wilson "quickly repudiated" the presidential term-limit plank of the Democratic platform).

99. See MILKIS & NELSON, *supra* note 43, at 304 (arguing that Wilson "would have liked to serve another four years" but was too unpopular to be renominated); SPANGLER, *supra* note 53, at 12.

100. See SPANGLER, *supra* note 53, at 13. Coolidge's suggestion that he might have run for a third term may have prompted passage of the La Follette Resolution discussed *infra* note 133. See SMITH, *supra* note 50, at 14 (arguing that "opposition of Democrats, Progressives and Independents" to the "mere possibility" of Coolidge serving for a third term prompted passage of the La Follette Resolution).

### C. TURNING FROM TRADITION?: FDR AND THE THIRD-TERM QUESTION

As we have already seen, despite statements by scholars to the contrary, the custom of a two-term limit on presidential service appears to have been upheld somewhat contingently. The examples of Grant and Theodore Roosevelt suggest that at least two already "twice-elected" Presidents were prepared to challenge the custom had their political fortunes unfolded differently.<sup>101</sup>

We turn now to FDR, the only President who has served for more than two full terms. We do this to understand the immediate background of the debates and ratification processes that led to the Twenty-Second Amendment, and to see how the themes that surrounded the two-term issue in the 150 years prior to Roosevelt's third election played out in 1940 and thereafter.<sup>102</sup>

The third-term question was salient during the 1940 election.<sup>103</sup> Although FDR stated in 1937 that his "great ambition . . . [was to] turn over this desk and chair in the White House" on Inauguration Day, interest in (and concern over) extending the Roosevelt presidency persisted, and over time the President's interest in running apparently grew stronger, particularly as Germany extended the Second World War into Western Europe and Scandinavia.<sup>104</sup> In September

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101. Roosevelt was elected only once but served almost a full term after McKinley's death and would have been treated as if "twice-elected" under the terms of the Twenty-Second Amendment.

102. We do not offer any conclusions about whether the motivations behind the adoption of the Twenty-Second Amendment were primarily partisan or were bound up with a broader concern that an important constitutional custom needed to be clarified and codified. In general, we do not think it terribly realistic or feasible to separate entirely these different motivations, and, at any rate, there is plausible evidence on both sides of the issue. For an argument that the Twenty-Second Amendment *was* essentially a partisan measure, see GRIMES, *supra* note 43, at 113-22. Stephen Stathis also builds a strong case that the Amendment was passed by a coalition of Republicans and southern Democrats opposed to Roosevelt's economic and civil rights policies. See Stathis, *supra* note 75, at 68-72.

103. Speculation about a third term for FDR arose almost immediately after his 1936 reelection, but FDR's early insistence that he would not run and his later silence on the issue seem to have somewhat diffused attention towards the issue prior to 1940. See generally SPANGLER, *supra* note 53, at 96-106.

104. See generally *id.* See also MILKIS AND NELSON, *supra* note 43, at 304. Public opinion regarding a third-term run by Roosevelt appears to have reached a critical turning point between the summers of 1936 and 1937.

and October of 1940, a special subcommittee of the Senate Judiciary Committee conducted sixteen days of hearings on "the propriety of a third term."<sup>105</sup> Campaign literature and political pamphlets railed against the dangers of allowing a President to serve as a would-be dictator and made thinly veiled comparisons between Roosevelt and the Axis powers leaders.<sup>106</sup> Republican presidential candidate Wendell Wilkie, responding to concerns about the issue of open-ended presidential tenure, announced that if elected he would ask Congress to make passage of a presidential term limit amendment his first order of business.<sup>107</sup> As the Democratic National Convention opened in July 1940, FDR's continuing reluctance to run openly made it unclear who would be the Democratic nominee. Although Roosevelt indicated that all delegates pledged to support him were free to choose whatever candidate they desired, his message was interpreted to mean he was willing to be drafted, and he subsequently was renominated on the Convention's first ballot.<sup>108</sup>

In response to the nomination, between 1940 and 1943, eight state legislatures passed resolutions calling for presidential term limits.<sup>109</sup> The Republican National Convention of 1940 sought a constitutional amendment to enforce a two-term limit "to insure against the overthrow of our American system of

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During this period a (narrow) majority of those polled went from being for a "two term limit" to being against it, although between April 1943 and December 1943, this position switched again. See Kallenbach, *supra* note 70, at 450 n.43; see also *infra* note 111.

105. Stathis, *supra* note 75, at 65; KYVIG, *supra* note 43, at 325.

106. See KYVIG, *supra* note 43, at 327 (discussing the remarks of Congressman Karl Mundt who warned that if Presidents continued to remain in office for protracted periods "Americans might lose the freedom to vote officials out of office, as had Germans under Hitler"). See generally SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE ON THE SUBJECT OF LIMITATION OF TENURE OF OFFICE OF THE PRESIDENT OF THE UNITED STATES (Sept. 9, 1940) (statement of Jacob Gould Schurman) (arguing for a strict limitation on the number of years a President could serve), reprinted in THOMAS H. REED, *THE FUNDAMENTAL ISSUE: A BRIEF AGAINST THE THIRD TERM* (1940).

107. See KYVIG, *supra* note 43, at 326.

108. See SPANGLER, *supra* note 53, at 120.

109. The states were New Jersey, New York and Rhode Island, which passed their resolutions before the 1940 election, and Illinois, Indiana, Iowa, Michigan, and Wisconsin, which passed their resolutions afterwards. See *Moves to Limit the Term*, *supra* note 72, at 16.

government.”<sup>110</sup> Seven Gallup polls taken in 1943 and 1944 reported that between 45% and 62% of those surveyed favored a constitutional amendment that would prohibit Presidents from being elected more than twice, with support for such an amendment increasing during that period.<sup>111</sup> Nevertheless, Congress took no action on the question during Roosevelt’s presidency. FDR’s victories in 1940 and 1944 were decisive (although not as decisive as his previous elections), and in any event interest in establishing a presidential term limit faded after the attack on Pearl Harbor and the subsequent involvement of the United States in the war.

FDR’s elections to third and fourth terms both illuminate and obfuscate our understanding of where the nation stood on the question of presidential term limits at the time. On the one hand, the elections of 1940 (with Roosevelt majorities in thirty-eight states) and 1944 (majorities in thirty-six states) might be understood as representing a national plebiscite on the question of whether a President could serve more than two terms.<sup>112</sup> At the same time, Roosevelt’s third-term candidacy energized his political opponents, who objected to his continued service, and, as noted, polls indicate that the percentage of those favoring a two-term limit on presidential service

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110. KYVIG, *supra* note 43, at 326. The Republican platform of 1944 also contained a plank for limiting the number of terms a President could serve. *See id.*; *Moves to Limit the Term, supra* note 72, at 16. Wilkie promised to promote the Convention’s pledge immediately upon election.

111. Between April 29 and May 5, 1943, the Gallup polling organization asked “Would you favor adding a law to the constitution to prevent any President of the United States in the future from serving more than two terms?” Responses were: Yes - 47%, No - 46%, and No Opinion - 7%. During the same period Gallup asked a different group a slightly different question: “Would you favor adding a law to the constitution which would prevent any President of the United States from being reelected in the future if he has already served two terms?” Responses were: Yes - 45%, No - 48%, and No Opinion - 6%. This same question was asked four times during 1943 and 1944. The responses were: Yes - 45%, No - 49%, and No Opinion - 7% (May 1943); Yes - 50%, No - 43%, and No Opinion - 7% (November-December 1943); Favor - 57%, Oppose - 43% (March 1944); and Yes - 54%, No - 41%, and No Opinion - 5% (June 1944). Also during that same period, in June 1944, Gallup asked: “Would you favor adding a law to the Constitution which would prevent any President of the United States from being reelected after this year’s election if he has already served two terms?” Responses were: Yes - 62%, No - 32%, and No Opinion - 6%.

112. Of course, the electorate may have voted for Roosevelt out of compelling expediency even while condemning or thinking unwise the prospect of having a President serve for third and fourth terms.

increased steadily between 1940 and 1945.<sup>113</sup> In addition, Roosevelt seems to have been cautious in confronting the third-term issue in the 1940 election. According to Kyvig, he engaged in "an elaborate charade of not running and only accepting a Democratic draft" for President.<sup>114</sup> When Roosevelt did address the issue of his continuing service, he remained circumspect and stressed the extraordinary nature of the times. In his last speech of the 1940 campaign, Roosevelt somewhat obliquely justified a third term by explaining that:

[t]here is a great storm raging now, a storm that makes things harder for the world. And that storm, which did not start in this land of ours, is the true reason that I would like to stick by these people of ours until we reach the clear, sure footing ahead.<sup>115</sup>

Whether or not there was a presidential custom limiting service to two terms, Roosevelt's reelections in 1940 and 1944 demonstrated that it was not a custom deemed binding by either him or the electorate. And when political interest in limiting presidential tenure resurfaced following FDR's death and the conclusion of the war, Roosevelt and his unprecedented four terms of service became the common referent for those arguing for (as well as against) setting a constitutional limit. In the eyes of some, the case for limiting presidential tenure was made vivid by perceived excesses of the New Deal, FDR's aggressive attempts at power accretion (like the Court-packing plan of 1937<sup>116</sup> and his dramatic reorganization of the executive branch<sup>117</sup>) and the overall

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113. See Kallenbach, *supra* note 70, at 450 n.43.

114. KYVIG, *supra* note 43, at 325.

115. HERBERT S. PARMET & MARIE B. HECHT, NEVER AGAIN: A PRESIDENT RUNS FOR A THIRD TERM 268 (1968) (quoting Franklin Delano Roosevelt). Roosevelt's intimation—that the political crisis facing the nation should allow him to continue his service—is not dissimilar from the statements made by those who generally supported limited presidential service, including Jefferson and Grant. See our discussion of these Presidents, *supra* notes 65 and 76 and accompanying text.

116. On Roosevelt's efforts to "pack the Court" with justices sympathetic to his New Deal measures, see Mark E. Herrmann, *Looking Down From the Hill: Factors Determining the Success of Congressional Efforts to Reverse Supreme Court Interpretations of the Constitution*, 33 WM. & MARY L. REV. 543, 564-65 nn.126-27 (1992); see generally David E. Kyvig, *The Road Not Taken: FDR, the Supreme Court, and Constitutional Amendment*, 104 POL. SCI. Q. 463 (1989).

117. On FDR's reorganization of the executive branch, see RICHARD POLENBERG, REORGANIZING ROOSEVELT'S GOVERNMENT (1966).

growth of a powerful "modern" presidency.<sup>118</sup> For those who saw Roosevelt as a symbol of economic recovery, national unity, and victory in the war against the Axis powers, FDR served as the perfect argument for retaining open-ended presidential service.

#### D. CONGRESSIONAL EFFORTS TO CODIFY THE TWO-TERM "TRADITION"

Continuing partisan opposition to the policies and politics of FDR, coupled with the strong showing of Republicans in the 1946 Congressional elections, set the stage for legislative action on presidential term limits. In the 1946 mid-term election, Republicans achieved majorities in the House and Senate for the first time since 1929, and they pushed forward a presidential term limits amendment as one of their first orders of business, as promised during the campaign.

As already indicated, this was hardly Congress's first attempt to promote an amendment to limit presidential eligibility. There is a lengthy history of efforts by both houses of Congress to pass measures that would fix the terms of service of Presidents, although, until the Twenty-Second Amendment, not a single proposed amendment on the subject was ever adopted by Congress and passed on to the states for ratification.

##### 1. Early Congressional Debates on Presidential Term Limits

Adoption of the Constitution did not put an end to the debates over presidential term limits. Instead, for over a

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118. Arguments along this general line developed during the congressional debates over the Twenty-Second Amendment. As one Representative contended, interest in the Twenty-Second Amendment grew

directly out of the unfortunate experience we had in this country in 1940 and again in 1944 when a President who had entrenched himself in power by use of patronage and the public purse refused to vacate the office at the conclusion of two terms, but used the great powers of the Presidency to perpetuate himself in office.

93 CONG. REC. 857-58 (1947) (remarks of Rep. Karl Mundt). For an argument that FDR's tenure and the New Deal ushered in the "modern" presidency, see generally Fred I. Greenstein, *Change and Continuity in the Modern Presidency*, in *THE NEW AMERICAN POLITICAL SYSTEM* (Anthony King ed., 1978); Fred I. Greenstein, *Introduction: Toward a Modern Presidency*, in *LEADERSHIP IN THE MODERN PRESIDENCY* (Fred I. Greenstein ed., 1988). For an argument that features of the "modern" presidency are not recent developments, see JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987) (especially ch. 1).

century and a half after the Constitutional Convention, members of Congress periodically attempted to limit the number of terms a President could serve, suggesting that this was a longstanding and persistent concern of the nation's lawmakers. Indeed, between 1789 and 1947, 270 proposals to limit the terms of office of the President were introduced in Congress.<sup>119</sup>

In 1803, following the contested election of 1800 (which was thrown to the House of Representatives), Congress first considered a proposal to limit presidential tenure to two successive terms, and three terms overall.<sup>120</sup> The measure was soundly rejected. After that, there appears to have been little congressional interest in the question until President Monroe was nearing the end of his seventh year in office in 1823. Although there is no evidence Monroe was considering another run, political supporters of the various candidates hoping to succeed the President pressed for a measure to codify the "principle" limiting a President to two terms of service.<sup>121</sup> In 1824, the Senate passed a joint resolution providing that no person should be chosen President for more than two terms.<sup>122</sup>

Following another highly contested election in 1824 (when Jackson lost even after receiving a plurality of popular and electoral college votes), a number of proposals to reform the way in which Presidents were elected and the length of their tenure in office were again considered. Among these was a measure passed by the Senate in 1826 calling once again for a two-term limit.<sup>123</sup> During Jackson's presidency, with the

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119. See 93 CONG. REC. 847, 864 (1947) (remarks of Rep. Graham, discussing the history of efforts to limit presidential reeligibility).

120. The resolution specified "that no person who has been twice successively elected President shall be eligible as President until four years elapse, when he may be eligible to office for four years and no longer." *Moves to Limit the Term*, *supra* note 72, at 15.

Not surprisingly, each of the three times the presidential selection process has been sent to the House of Representatives, calls to reform the presidential selection process, including calls for limiting the number of times a President could be elected, have followed.

121. See JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 41 (1986).

122. See STATHIS, *supra* note 31, at 29.

123. Neither the 1824 nor the 1826 measure approved by the Senate was supported by the House. See *Moves to Limit the Term*, *supra* note 72, at 15; Stathis, *supra* note 75, at 63; SUNDQUIST, *supra* note 121, at 41 n.1. Kyvig has mistakenly identified the 1824 and 1826 resolutions as House measures. See KYVIG, *supra* note 43, at 326.

President indicating his preference for a single term, Congress considered twenty-one proposals seeking to alter the Constitution's provisions regarding presidential service. However, none of these measures were passed by both houses.<sup>124</sup>

The absence of a serious prospect for a third-term challenge seems to have resulted in limited congressional activity on the presidential term limit issue for the next forty years.<sup>125</sup> But in December 1875, responding to the possibility of a third-term run by President Grant,<sup>126</sup> the House passed, by a 234 to 18 vote, the "Springer resolution" stating that:

the precedent established by Washington and other Presidents of the United States in retiring from the Presidential office after their second term has become, by universal concurrence, a part of our republican system of government, and that any departure from this time-honored custom would be unwise, unpatriotic and fraught with peril to our free institutions.<sup>127</sup>

As indicated in our previous discussion, at the time the Springer resolution was passed, Grant presented a credible threat to the two-term tradition. But after encountering political resistance to the idea of his running for a third term, he ultimately refused to be a candidate in 1876, although he was an unsuccessful candidate for the Republican nomination in 1880.

The longstanding political movement to limit presidential terms appears to have gained some strength after 1900, when the number of relevant legislative proposals increased.<sup>128</sup> In 1912 alone, twenty-one amendments were introduced in

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124. See SPANGLER, *supra* note 53, at 10.

125. In 1841, the legislatures of Connecticut, Delaware, Indiana, Maine, Massachusetts, Rhode Island, and Vermont approved resolutions supporting a single presidential term. See STATHIS, *supra* note 31, at 29.

126. See our discussion of Grant, *supra* text accompanying notes 73-83.

127. *Moves to Limit the Term*, *supra* note 72, at 15. The measure was introduced by Representative William M. Springer. See *id.* Kyvig has mistakenly identified the 1875 amendment as an initiative of the Senate. See KYVIG, *supra* note 43, at 326.

128. See *Moves to Limit the Term*, *supra* note 72, at 16. From 1789 to 1889 Congress passed an average of 1.25 term-limit proposals per session (125 total) and from 1890 to 1946 an average of 1.79 term-limit proposals per session (100 total), including one proposal to limit the term to 5 years, 79 to limit it to 6 years, 3 to limit it to 7 years, 3 to limit it to 8 years and 14 to limit it to two terms of 4 years.

Congress "proposing a limitation on the Presidential term."<sup>129</sup> Prior to Wilson's first inauguration in 1913, the Senate passed a resolution limiting the President to a single six-year term by a two-thirds margin, but the House did not act on the measure.<sup>130</sup>

In the 1920s, Congress once again introduced numerous resolutions that sought to limit presidential service, with early 1927 a particularly active period. During this time, Representative Fairchild called for an amendment to the Constitution specifying that:

[n]o person shall be eligible to the office of President who has previously served two terms, whether by election or by succession due to the removal, death, resignation, or inability of the President where the term by succession shall have continued for a period of 2 years or more.<sup>131</sup>

Representative Beck introduced a measure almost identical to the House resolution of 1875 (recognizing the "time-honored" tradition of retiring after two terms of service).<sup>132</sup> A few weeks later, Senator Robert La Follette, Jr., son of the Progressive presidential candidate, introduced a resolution in the Senate limiting the President to two terms. In January 1928, Senator La Follette's resolution was reintroduced, amended and passed by the Senate in a form that was again nearly identical to the 1875 House measure.<sup>133</sup> This was the last time Congress considered legislation on presidential eligibility before FDR became a candidate for a third term in 1940. With FDR's candidacy the movement for term limitations was briefly renewed, but it flagged after FDR's death, gaining sufficient political energy only after Republicans subsequently took over the 80th Congress.

On the whole, a review of congressional efforts to enact presidential term limits suggests that while concerns about the question of reeligibility were expressed quite steadily, these concerns were not addressed through any systematic campaign to limit presidential reeligibility. Although members of Congress had frequently fretted about the threat of Presidents

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129. See 93 CONG. REC. 1954 (1947) (excerpt from the Congressional Digest of 1938 reprinted in the Congressional Record at the request of Sen. Kilgore).

130. See *id.*

131. *Id.*

132. See *Moves to Limit the Term*, *supra* note 72, at 16.

133. See S. Res. 128, 70th Cong., 1st Sess. (1928); see also GRIMES, *supra* note 43, at 114-15; Stathis, *supra* note 75, at 62-64.

entrenching their power through indefinite tenure in office,<sup>134</sup> the legislative responses to this perceived threat were substantively varied, somewhat fitfully pursued, and, until 1947, unsuccessful.

## 2. Proposal and Ratification of the Twenty-Second Amendment

Despite some loss of interest in the question of presidential term limits after Roosevelt's 1940 election and the eventual involvement of the United States in World War II, the issue resurfaced not long after the death of FDR and the end of the war. The strong showing of Republicans in the 1946 elections—and their resulting possession of majorities in the House and Senate for the first time in eighteen years—enabled them to advance a term limit amendment.

On January 3, 1947, the first day of the first session of the 80th Congress, House Judiciary Chairman Earl C. Michener and Speaker of the House Joseph Martin introduced a presidential term limit amendment, House Joint Resolution 27 (H.J. Res. 27),<sup>135</sup> which was referred to the House Judiciary Committee.<sup>136</sup> H.J. Res. 27, as originally written, specified that:

[n]o person *shall be chosen or serve* as President of the United States for any term, or *be eligible to hold* the office of President during any term, if such person shall have heretofore served as President during the whole or any part of each of any two separate terms.<sup>137</sup>

The proposal was modified by the House Judiciary Committee, which reported H.J. Res. 27 to the full House on February 5 with the following revision (replacing the language above):

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134. For a representative account of these concerns, see 93 CONG. REC. 852 (1947) (remarks of Rep. Jennings):

Without such a limit on the number of terms a man may serve in the Presidency, the time may come when a man of vaulting ambition becomes President. Such a man, clothed with the vast powers of the Presidency and backed by a subservient Congress, as Commander in Chief of our Army and Navy, could well have in his hands the two mightiest instrumentalities of governmental power, the sword and the purse.

135. Generally speaking, joint resolutions deal with legislative matters of an unusual nature (such as proposed constitutional amendments) while concurrent resolutions address issues of organization, procedure, and opinion relevant to both houses and issues of concern to a single chamber. See RICHARD A. WATSON, *PRESIDENTIAL VETOES AND PUBLIC POLICY* 20 (1993).

136. See 93 CONG. REC. 47-48 (1947).

137. *Id.* at 849 (emphasis added).

Any person who has served as President of the United States during all, or portions, of any two terms, *shall thereafter be ineligible to hold the office of President.*<sup>138</sup>

The House Judiciary Committee's language does not appear to have altered the original measure's substance: under each proposal, regardless of whether a President was elected or assumed the Office through some other means, his or her service was limited to a maximum of two terms.<sup>139</sup>

On February 6, H.J. Res. 27 was brought to the floor under a rule allowing two hours of debate, which Democratic opponents of the measure decried as inappropriately restrictive for a proposed amendment to the Constitution.<sup>140</sup> Along with forty-seven Democrats (thirty-seven of whom were from the South) voting for the proposal, all 238 Republicans present supported the measure, leading some commentators to argue that the Amendment was propelled by partisan concerns and regional interests.<sup>141</sup>

The Senate received H.J. Res. 27, as revised and approved by the House, on February 7 and referred the measure to its Judiciary Committee. The Senate Judiciary Committee modified the language still further to provide that:

A person who has held the office of President, or acted as President, on three hundred and sixty-five calendar days or more in each of two terms *shall not be eligible to hold the office of President, or to act as President, for any part of another term.*<sup>142</sup>

Like the original House resolution, the Senate Judiciary Committee's language addressed presidential *service* generally, rather than limiting itself, as the Twenty-Second Amendment ultimately would, to presidential *reelection*.

During the early part of March 1947, the Judiciary Committee debated this resolution on the Senate floor,

138. H.R. REP. NO. 80-17, at 1 (1947) (emphasis added).

139. The Committee Report contains no discussion about why the Committee amended the original language of H.J. Res. 27.

140. See KYVIG, *supra* note 43, at 327.

141. See 93 CONG. REC. 872 (1947) (listing the results of voting for H.J. Res. 27). Koenig describes the Twenty-Second Amendment as resulting from "a mixture of political motivations, partisan and personal" and as "posthumous revenge against Franklin Roosevelt." KOENIG, *supra* note 43, at 66. For background on the changing partisan alignments that help to explain the coalition that supported the Twenty-Second Amendment, see generally WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* (1970) and JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM* (1983).

142. S. REP. NO. 80-34, at 1 (1947) (emphasis added).

rejecting a proposal to amend it further to enforce a single six-year presidential term.<sup>143</sup> Then, on March 10, the Senate considered an amendment offered by Democratic Senator Warren Magnuson that would have replaced the Judiciary Committee's language with the seemingly more straightforward provision that "[n]o person shall be elected to the office of President more than twice."<sup>144</sup> Magnuson explained that the language in his proposal, unlike the "complicated legal language"<sup>145</sup> of the Committee version, "could be easily understood by everyone, and . . . would not involve complicated legal questions," such as "When is a man Acting President? When does he assume the office" and, "to what period he should be limited" when "elevated to the office of President through circumstances beyond his control?"<sup>146</sup> Magnuson argued that his proposal would bypass these questions by focusing on what was "really intended to be reached"—preventing a President from "perpetuat[ing] himself in office."<sup>147</sup> Finally, Magnuson suggested that the Judiciary Committee version of the resolution would unduly restrict a person elevated to the Office of President "through circumstances beyond his control, and with no deliberation on his part . . . but because of an emergency or an unfortunate circumstance," from subsequently running for office.<sup>148</sup> Although Magnuson acknowledged that his proposal did not account for the possibility that someone might serve or act as President without being elected, he discounted these contingencies as beyond the immediate focus of the 80th Congress and its concern with limiting the number of times a person could be elected.

A number of Magnuson's colleagues echoed his position on H.J. Res. 27. Senator Joseph Tydings, one of the authors of the

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143. The proposal, which would have fixed the maximum tenure of all elected federal officials at six years, was defeated 82-1 on March 7. See 93 CONG. REC. 1794 (1947).

144. *Id.* at 1863 (remarks of Sen. Magnuson).

145. *Id.* Magnuson later explained that the "only purpose [of his amendment] is to make it simple so that the people of the United States will know what they are voting on when it is presented to the States." *Id.* at 1865.

146. *Id.* at 1863. Although Magnuson indicated that there was extensive discussion in the Judiciary Committee about how the term limit proposal would affect an acting President, the precise content of this discussion is only alluded to in the Committee report. See S. REP. NO. 80-34, *supra* note 142.

147. 93 CONG. REC. 1863 (1947).

148. *Id.*

version of the resolution that would eventually become the Twenty-Second Amendment, spoke in favor of Magnuson's Amendment:

What we are trying to do is to stop any man from being elected President more than twice . . . . But under the committee amendment a man could be prohibited from being elected President more than once, provided that he had served more than 1 year prior to the time he was elected President . . . . I think that provision is a little stringent.<sup>149</sup>

Like Magnuson, Tydings emphasized the restrictive nature of the Senate Judiciary Committee's language, especially in limiting persons elevated to the presidency without seeking election to that Office. As Tydings explained:

If it is right to have a limitation of 8 years for a twice-elected President, then why in heaven's name is it not right to give a Vice President the 3 years which he may serve in the term of his predecessor plus one full term, rather than limit him to 5 years [which the committee amendment would do]?<sup>150</sup>

A number of Senators were unswayed by the arguments of Tydings and Magnuson and thought it important to consider the very issues Magnuson's proposal did not directly address, including, for example, questions about how the amendment affected persons elevated to the office through non-electoral means.<sup>151</sup> Senator Bourke Hickenlooper spoke out against the Magnuson amendment, explaining that it would create a "peculiar situation" whereby "an individual who becomes President by accident, an act of divine providence, or otherwise, and who was not originally elected to the position, is *the only person* who can hold protracted office in the Presidency" (by still being eligible for election and reelection).<sup>152</sup> Magnuson conceded that this was a fair reading of his proposal but did not think the amendment should be so

149. *Id.* (remarks of Sen. Tydings).

150. *Id.* at 1865. The five years refers to the limit on presidential service (under the Senate Committee proposal) for an individual "accidentally" placed in the presidency for a year, who then desired to run for office. *See id.* at 1863 (remarks of Sen. Lucas). It is not entirely clear what proposal Tydings favored; he did indicate at one point that he wished to "see the Presidency limited to two terms," although it is not obvious how this (vague) formulation would necessarily address his concerns about limiting the electoral options of those propelled into the presidency through non-electoral means.

151. Indeed, many of the very questions that Magnuson suggested were beyond the immediate purposes of the Amendment seem to have preoccupied the Judiciary Committee. *See S. REP. NO. 80-34 (1947); 93 CONG. REC. 1863 (1947).*

152. 93 CONG. REC. 1864 (1947) (remarks of Sen. Hickenlooper) (emphasis added).

detailed that it would “deal with contingencies whereby a man because of circumstances beyond his control is elevated to a high office.”<sup>153</sup> Other Senators expressed concerns about how long an individual could serve as President under Magnuson’s proposal. Senator Robert Taft objected to Magnuson’s amendment, pointing out that a person who was elevated to the Office of President through non-electoral means might still be elected twice and serve “as long as 11 1/2 years . . . [which] is too long.”<sup>154</sup> Perhaps sensing that he did not have sufficient support for his amendment, Senator Magnuson modified his version of H.J. Res. 27 to prohibit successive elections, but still found his amendment soundly rejected on the Senate floor.<sup>155</sup>

On March 12, Senator Taft sought a compromise between supporters of Magnuson’s amendment and those still troubled by its inattention to those who might assume the presidency without being elected to that Office. Taft’s amendment drew on the “election” language of Magnuson’s amendment and avoided the controversy of the Committee amendment, which was seen as unduly restricting the reeligibility of those called on to act as or become President through no doing of their own.<sup>156</sup> Specifically, Taft’s amendment provided that:

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 2 years of a term to which some other person was elected President, shall be *elected* to the office of the President more than once.<sup>157</sup>

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153. *Id.* (remarks of Sen. Magnuson).

154. *Id.* (remarks of Sen. Taft). It is not entirely clear how Taft came up with the figure of 11 1/2 years although it appears to have been merely an example of how long someone might serve (as opposed to a perceived absolute limit of service) under Magnuson’s amendment. Taft and his colleagues do not seem to be wholly consistent in interpreting the Magnuson amendment on this point. Despite his references to 11 1/2 years, Taft suggests at one point that eleven years was the “extreme” for the amendment, and at still another point argued that the amendment “might permit a man to serve 12 years if the President should die between the date of the election and the date of his inauguration.” *Id.* at 1938.

Our analysis is consistent with this last interpretation. It appears that the Magnuson amendment would have allowed a Vice President to serve as acting President for what would be essentially a full term (minus only however long the President served) in addition to two full terms as elected President.

155. *See id.* at 1944-45.

156. *See id.* at 1938.

157. *Id.* (remarks of Sen. Taft, reading his own amendment) (emphasis added).

The Taft amendment was intended to balance the concerns of those (like Senator Tydings) who thought that the "five-year" limit provided by the Committee Amendment was too short and those who thought the "11 1/2 year limit" of Magnuson's amendment was too lengthy. Taft believed his amendment was "clearer" than the Committee's amendment, although he did not explain how this was so (and there are good reasons to believe Magnuson's and Taft's language left many issues unclear).<sup>158</sup>

The compromise Taft worked out with Tydings and others would eventually rule the day, becoming the language of what we now know as the Twenty-Second Amendment. No Senate Republican voted against the Taft proposal (just as no House Republican had voted against H.J. Res. 27), and a substantial bloc of southern Democrats also voted for the measure, ensuring relatively comfortable passage by a fifty-nine to twenty-three vote.<sup>159</sup> The next day, March 13, the Senate returned the measure to the House. After several days of debate, on March 21 the House adopted the Taft version of the proposed amendment by the constitutionally required two-thirds margin and sent it to the states for ratification.<sup>160</sup>

Within two months of its introduction in the House, the Twenty-Second Amendment had been presented to the states. Between the filing of the amendment with the Secretary of State on March 24, and the end of the year, eighteen state legislatures ratified the measure. "Republican-dominated" and

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158. See *id.* (remarks of Sen. Taft) ("I believe that the language of the suggested amendment is somewhat clearer than the language of the committee amendment.").

159. See 93 CONG. REC. 1978, 2389 (1947). Article Five of the Constitution only specifies that "two thirds of both Houses" are required to propose amendments. One might read this as requiring proposals by two-thirds of the total membership of each house (a requirement that would invalidate many current amendments to the Constitution, including the Twenty-Second). Yet in 1920 the Supreme Court ruled that the two-thirds requirement referred to a quorum rather than full congressional membership. See *The National Prohibition Cases*, 253 U.S. 350, 386 (1920); see also JOHN R. VILE, *CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS* 8 (1993). Since those voting numbered eighty-two, the measure required fifty-five votes for two-thirds passage.

160. 93 CONG. REC. 2392 (1947). While the margin of votes met the constitutional two-thirds requirement, the actual number of voters was considerably less than the full House. (The final vote in the House was 81-29.) As Everett Brown notes, "[o]bjection to the vote on the ground[s] of absence of a quorum was made and then withdrawn." Everett Brown, *The Term of Office of the President*, 41 AM. POL. SCI. REV. 447, 447 (1947).

southern legislatures tended to pass the measure in relatively short order, but ratification proceeded very slowly after this first wave of support, and it was not until 1951 that the required two-thirds of the states approved the proposed amendment.<sup>161</sup>

During the ratification process only twenty-five Republican state senators and fifty-eight Republican state representatives, out of 3,272 Republican legislators whose votes were recorded, opposed the Twenty-Second Amendment.<sup>162</sup> As James Davis explains, the Twenty-Second Amendment was ratified because of the determination of Republicans (and southerners) "not to see a repeat performance of four successive presidential victories by another FDR-type candidate."<sup>163</sup>

### 3. Assessing the Congressional Debates

Having examined the immediate context in which the Twenty-Second Amendment was proposed, considered and ratified, we move on to a preliminary assessment of the congressional debates on the Amendment. Specifically, we seek to answer two questions. First, do the debates reveal the purpose of the Amendment as it was perceived at the time? Second, how is one to explain the shift from the language approved by the House, and even that supported by the Senate Judiciary Committee, to what was eventually endorsed by both houses of Congress and ratified by the states?

The congressional debates on the Twenty-Second Amendment revolved around three broad concerns relevant to our analysis: (1) the sorts of contingencies the Amendment should address; (2) the effect on presidential (re)eligibility of having previously acted as or become President without being elected; and (3) particular sensibilities about absolute limits on the number of years someone could serve as President under the Amendment.

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161. See KYVIG, *supra* note 43, at 331; see also NELSON AND MILKIS, *supra* note 43, at 305 (describing the ratification process). The four years it took to ratify the Twenty-Second Amendment was longer than it took to ratify any other amendment except for the Twenty-Seventh, whose constitutional standing has been the subject of debate because of the 203 years required for its ratification. See Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501 (1994).

162. See Stathis, *supra* note 75, at 70.

163. JAMES W. DAVIS, *THE AMERICAN PRESIDENCY* 406 (1995).

Although these issues received considerable attention on the floors of the House and Senate, our review of the congressional debates suggests that the text of the Amendment was probably shaped most decisively by the impulse for compromise. The shift from the House's references to presidential "service" and "tenure" to the Senate's eventual reliance on simply limiting presidential "election" appears largely to have been a function of political give-and-take. Taft, in fact, acknowledged that his amendment was intended to balance the concerns of proponents and critics of Magnuson's proposal. Similarly, when the House considered the Senate-endorsed version of the eventual Twenty-Second Amendment, although some House members found the measure "pregnant with questions" and indicated that they preferred the original House language, they recognized the need for "compromise" as part of the legislative process.<sup>164</sup>

This willingness to compromise may have contributed to the imprecision that characterized the language used by members of Congress as they considered H.J. Res. 27 and its various formulations. Members of both the House and Senate, for example, often vaguely suggested that they were attempting to limit presidential "tenure" without elaborating exactly what they had in mind or using the term consistently. And, as we have seen, those debating the Amendment at times appeared to conflate the notion of "election" with the other ways in which a President might come to serve, but at other moments they clearly distinguished elections from non-electoral means of assuming the Office of President.

Furthermore, congressional interest in not "penalizing" those unelected but nonetheless called upon to serve or act as President led Congress to focus on "elections" as the cornerstone of the Amendment's proscriptions—a focus that prohibited only *reelection* of an already twice-elected President. In prohibiting "reelection" only, Congress seemingly glossed over the significance of limiting subsequent election rather than subsequent "service," and unwittingly (we presume) left open the possibility of a previously twice-elected President reassuming Office to again serve (or act) as President.

In view of these observations, it is difficult to divine precisely what those adopting the Amendment meant for it to foreclose and permit. Neither the general content of Congress's

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164. See 93 CONG. REC. 2390 (1947) (remarks of Sen. Michener).

deliberations nor the precise words they selected for the various amendments they considered provide clear guidance on this question. The evidence does suggest, however, that most members of Congress—or at least most of those who discussed the Amendment—thought that it was designed to prevent an individual from becoming entrenched in the presidency, even if supported by the electorate.<sup>165</sup> Yet it remains difficult to say much more about Congress's intentions, and this general sentiment alone may not provide adequate guidance when evaluating the constitutionality of the six scenarios, an assessment we take up in Part III.

#### E. THE TWENTY-SECOND AMENDMENT SINCE ENACTMENT

Before proceeding to Part III, we conclude our historical evaluation of the Twenty-Second Amendment by examining how the Amendment has been assessed and interpreted in the years following ratification. This review is organized around four periods: the first three are marked by the presidencies of Eisenhower, Nixon, and Reagan, and the last extends from the end of Reagan's presidency to the present.<sup>166</sup> We organize our analysis in this way because the first three individuals reelected to the presidency following ratification of the Twenty-Second Amendment have drawn attention to (and prompted criticism of) the Amendment.<sup>167</sup> At a number of points both Eisenhower and Reagan spoke out against the Amendment, and an effort to repeal it developed following Nixon's reelection—and died rapidly after the revelations of Watergate. We review the period after Reagan to illustrate contemporary evaluations of the Twenty-Second Amendment, and to suggest

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165. As Senator Revercomb explained, "I believe there should be a definite and fixed time beyond which no man, whoever he may be, now or in the future, through the life of the Nation, may hold the office of President." *Id.* at 1946 (remarks of Sen. Revercomb).

166. One of the ironic developments of the Twenty-Second Amendment is that a measure initiated and passed in large measure by Republican efforts has formally constrained three Republican Presidents (Eisenhower, Nixon, and Reagan) and only one Democrat (Clinton).

167. To the best of our knowledge, no serious repeal effort has been proposed since Clinton's 1996 reelection. Clinton himself has not weighed in on the issue, although he has said about running for a third term: "I'd do it again . . . if I could." See Nancy Mathis & Alan Bernstein, *Clinton Gives City the Old College Try; President Emphasizes Education*, HOUSTON CHRONICLE, Jan. 10, 1998, at A1 (noting the restrictions of the Twenty-Second Amendment).

that concern with the Amendment remains very much alive as we near the turn of the century.

### 1. The Eisenhower Years

Only five years after ratification of the Twenty-Second Amendment, President Eisenhower, on the verge of an overwhelming reelection, publicly questioned the Amendment's wisdom. One month before the 1956 election he told reporters that the electorate "ought to be able to choose for its President anybody that it wants, regardless of the number of terms he has served," and explained that the Amendment may not be "wholly wise."<sup>168</sup>

In 1956 two resolutions were introduced in the House to repeal the Twenty-Second Amendment.<sup>169</sup> And after the new Congress convened in January 1957, five resolutions were introduced to repeal the Amendment.<sup>170</sup> Senator Richard Neuberger indicated that the intent of at least one of the proposals was to give "to the American people the right to continue Dwight Eisenhower in office."<sup>171</sup> Eisenhower responded to these initiatives by indicating that he would not seek a third term even if the Amendment was repealed,<sup>172</sup> but the issue of presidential reeligibility continued to receive political attention.<sup>173</sup>

In 1959, the House and Senate held hearings on the Twenty-Second Amendment, and former President Truman<sup>174</sup>

168. Dwight D. Eisenhower, *The President's News Conference of October 5, 1956*, in PUBLIC PAPERS OF THE PRESIDENTS: DWIGHT D. EISENHOWER, 1956, at 860 (David C. Eberhart ed., 1958). Despite this early public support for reeligibility, Louis Koenig suggests that "both before and after assuming office" Eisenhower was intrigued with the idea of serving a single term and then ceding the Office to someone younger. "Eisenhower came within an eyelash of incorporating this proposal into his first inaugural address . . . [but] at the last minute he was talked out of it." KOENIG, *supra* note 43, at 64.

169. See STATHIS, *supra* note 31, at 44.

170. See Stathis, *supra* note 75, at 73.

171. 103 CONG. REC. 825 (1957) (remarks of Sen. Richard Neuberger).

172. See *President Bars a 3rd-Term Race Even If 'They Repeal' Ban on It*, N.Y. TIMES, Jan. 31, 1957, at 14.

173. Representative Stewart Udall, with the assistance of the American Historical Association and the American Political Science Association, surveyed over thirty leading historians and political scientists on the question of repealing the Twenty-Second Amendment and reported the results to Congress. Twenty-four of the twenty-nine who responded favored immediate repeal. See 103 CONG. REC. 843 (1957).

174. Truman was exempted from the reach of the Amendment, which specified that it "shall not apply to any person holding the office of President

appeared before the Senate Judiciary Subcommittee on Constitutional Amendments to criticize the Amendment and urge its repeal.<sup>175</sup> The Amendment, according to Truman, was unwisely passed by "Roosevelt haters" and made a "lame duck" out of every second term President for all time in the future.<sup>176</sup> The Twenty-Second Amendment, Truman added, put a President "in the hardest job in the world . . . with one hand tied behind his back."<sup>177</sup> Some members of the Subcommittee expressed sympathy with the repeal position, and the Subcommittee approved a repeal resolution in September of 1959. But after Eisenhower backed away from his earlier criticism of the Amendment (calling for "careful thought" on the question of repeal, and continued experimentation to see how it functioned),<sup>178</sup> the repeal movement lost momentum.<sup>179</sup>

As the election of 1960 neared, however, attention again turned to the Twenty-Second Amendment. In a press conference on January 13, Eisenhower invited reporters to look into the question of whether he would be eligible to run as a vice presidential candidate under the terms of the Twenty-Second Amendment.<sup>180</sup> As Eisenhower put it, "the only thing I know about the Presidency the next time is this: I can't run.

when this Article was proposed by the Congress." U.S. CONST. amend. XXII, § 1.

175. Truman apparently retreated from an earlier position approving limits on presidential service, reflected in his statement: "When we forget the example of such men as Washington, Jefferson and Andrew Jackson, all of whom could have had a continuation in the office, then we will start down the road to dictatorship and ruin." 2 HARRY S. TRUMAN, *MEMOIRS: YEARS OF TRIAL AND HOPE* 488-89 (1956). In a 1952 press conference, Truman also indicated that "eight years were enough for any man to demonstrate what he could do for the welfare of the nation."

176. KYVIG, *supra* note 43, at 334 (quoting SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS OF THE SENATE COMMITTEE ON THE JUDICIARY ON REPEAL OF THE 22ND AMENDMENT (May 4, 1959) (statement of Harry S. Truman)).

177. Paul B. Davis, *The Results and Implications of the Enactment of the Twenty-Second Amendment*, 9 PRES. STUD. Q. 289, 290 (1979) (quoting Harry S. Truman).

178. Dwight D. Eisenhower, *The President's News Conference of May 13, 1959*, in PUBLIC PAPERS OF THE PRESIDENTS: DWIGHT D. EISENHOWER, 1959, at 387 (David C. Eberhart ed., 1960). It is not clear why Eisenhower changed his position about the wisdom of the Twenty-Second Amendment. Kyvig suggests that "Eisenhower, reflexively at odds with his predecessor" recanted his position simply to be contrary to Truman. KYVIG, *supra* note 43, at 335.

179. See KYVIG, *supra* note 43, at 334-35; Stathis, *supra* note 75, at 73.

180. See *Nixon is His Choice, President Indicates*, N.Y. TIMES, Jan. 14, 1960, at 17.

[Laughter] But someone has raised the question that were I invited, could I constitutionally run for Vice President, and you might find out about that one. I don't know. [Laughter]"<sup>181</sup>

The question appears to have been raised somewhat in jest,<sup>182</sup> particularly since, according to the *New York Times*, when the issue "had arisen in White House inner circles" it was quickly rejected based on the belief that if Eisenhower were serving as Vice President and events called for presidential succession, he would be bypassed as a successor (because of the terms of the Twenty-Second Amendment), and the presidency would automatically go to the Speaker of the House<sup>183</sup> under the terms of the 1947 Succession Act.<sup>184</sup> Since the Speaker might very well be a Democrat, this chain of events was deemed undesirable.

At a press conference two weeks after Eisenhower first raised the possibility of his serving as Vice President, he was

181. Dwight D. Eisenhower, *The President's News Conference of January 13, 1960*, in PUBLIC PAPERS OF THE PRESIDENTS: DWIGHT D. EISENHOWER, 1960-1961, at 23 (Warren R. Reid ed., 1961). Eisenhower's comments prompted some scholarly and political commentary on the issue. Former Secretary of State Dean Acheson, for example, said that the prospect of Eisenhower running as Vice President was "more unlikely than unconstitutional," and Senator Hennings of Missouri concluded that Eisenhower could not only run for Vice President, but could "also inherit the Presidency." George Dixon, *Ike's Right to V.P. Spot*, WASH. POST, Jan. 21, 1960, at A23. It is unclear if Louis Koenig was referring to these or other commentators when he noted that "[a]dmirers of former President Eisenhower . . . concluded after reading . . . [the Twenty-Second Amendment's] text that he could well be restored as chief executive by the route of succession after first being elected as Vice President." KOENIG, *supra* note 43, at 65.

182. This view is supported by the laughter at the press conference and by what the *New York Times* reported was a "highly qualified source" who explained "the President was having some fun because in his case the situation could never arise." *Nixon is His Choice, President Indicates*, *supra* note 180, at 17. Stephen Stathis has also supported this view. See Stathis, *supra* note 75, at 76 (stating that "in jest [Eisenhower] raised the intriguing possibility that he just might run for vice president."); see also Telephone Interview by Bruce G. Peabody with Stephen W. Stathis, Senior Specialist in American National Government and Public Administration with the Government Division of the Congressional Research Service (June 24, 1997). (During the interview, Stathis speculated that Eisenhower's remarks about running as Vice President was part of the President's efforts to get reporters to "chase their own tails.")

183. *Nixon is His Choice, President Indicates*, *supra* note 180, at 17. The fact that the question was debated within the President's "inner circles" suggests that the matter may not have been taken lightly, at least preliminarily.

184. 3 U.S.C. § 19 (1994).

asked whether he had received an "official opinion" on the question. Eisenhower was somewhat circumspect but he did say that

the afternoon of that [first] press conference, there was a note on my desk saying a report from the Justice Department—I don't know whether the Attorney General himself signed this,<sup>185</sup> but the report was, it was absolutely legal for me to do so. That stopped it right there, as far as I'm concerned.<sup>186</sup>

The prospect of a Vice President Eisenhower was raised again briefly when the Republican National Convention convened in July. On July 21, 1960, at the Convention, Representative James Fulton announced that he would nominate Eisenhower to be Vice President alongside Richard Nixon,<sup>187</sup> but Fulton's proposal seems to have generated little attention or political support.

While Eisenhower ultimately backed away from the idea that he might run as Vice President, there is some evidence that, despite the constraints of the Twenty-Second Amendment, he did not completely relinquish his presidential ambitions at the end of his second term. Only four months after Kennedy's inauguration in May 1961, Eisenhower indicated that he would

185. President Eisenhower's Attorney General at the time was William P. Rogers. We wrote him about the report referenced by Eisenhower, asking for his recollections about counseling "whether President Eisenhower could have, or should have (from a constitutional standpoint) run as Vice-President after having already twice been elected, and having served two terms as President." He responded, in writing, saying:

I have no recollection of any report and doubt that I made such a report either in writing or orally. The idea that President Eisenhower might want to run for Vice-President under those circumstances is so outrageous that I cannot imagine ever having given attention to the subject.

Letter from William P. Rogers to Theresa Ferrero (for Scott E. Gant) (Nov. 12, 1997) (on file with authors). Rogers's account, however, contradicts a *New York Times* report that "Vice President Nixon said . . . Attorney General, William P. Rogers had studied the problem [of whether Eisenhower might run as Vice President]. Mr. Rogers, he said, informed him that under the Constitution the President could run for the Vice-Presidency if he wanted to." *Nixon and Eisenhower? Well, G.O.P. Can Hope*, N.Y. TIMES, Jan. 17, 1960, at 26.

186. Dwight D. Eisenhower, *The President's News Conference of January 26, 1960*, in PUBLIC PAPERS OF THE PRESIDENTS: DWIGHT D. EISENHOWER, 1960-1961, *supra* note 181, at 133. We have been unable to find any references by Eisenhower to the Justice Department report or the prospect of his running as Vice President in the period between the first and second press conferences, or after the latter press conference.

187. See *Vote for Eisenhower: Delegate Says He'll Propose Him for Vice-Presidency*, N.Y. TIMES, July 22, 1960, at 8.

have considered running for a third term if he had not been constitutionally barred from doing so and he had been able to foresee Nixon's defeat in the 1960 election.<sup>188</sup> Eisenhower's son, John, also indicated that he and White House officials believed that had Eisenhower not been barred from running for reelection, he probably would have done so in 1960.<sup>189</sup> And some political commentators have speculated that if Eisenhower had run, he would have been renominated and reelected.<sup>190</sup>

## 2. The Nixon Years

Between Eisenhower and Nixon the Twenty-Second Amendment generated little political interest. Despite this relative inattention to the Amendment, some members of Congress called for its repeal. Joint resolutions to do away with the Amendment were introduced in the Eighty-Seventh, Eighty-Eighth and Eighty-Ninth Congresses (between 1961-1966), although none of these measures received a great deal of political support.<sup>191</sup> Moreover, the two Presidents between Eisenhower and Nixon each offered views on the Amendment. John F. Kennedy supported the Amendment. Having voted for it as a member of Congress in 1947, he was asked during an interview at the end of 1962 whether he still supported the Amendment. Kennedy responded by explaining: "[eight] years is enough, and I am not sure that a President, in my case if I

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188. See *Eisenhower Says He'll Speak Out on Issues Confronting the Nation*, N.Y. TIMES, May 9, 1961, at 1 ("General Eisenhower also disclose[d] that he might have decided to run for a third term had there been no constitutional amendment preventing it, and had he been able to foresee the defeat of Richard M. Nixon . . ."). However, shortly after the 1960 election, while still serving as President, Eisenhower indicated that "on balance . . . I believe the two-term amendment was probably a pretty good thing." Dwight D. Eisenhower, *The President's News Conference of January 18, 1961*, in PUBLIC PAPERS OF THE PRESIDENTS: DWIGHT D. EISENHOWER, 1960-1961, *supra* note 181, at 1045.

189. See MICHAEL R. BESCHLOSS, *MAYDAY: EISENHOWER, KHRUSHCHEV AND THE U-2 AFFAIR* 3 (1986).

190. See DAVIS, *supra* note 163, at 406 (stating that "most political pundits agreed that he [Eisenhower] would have easily won renomination and reelection"). Political scientist James Sundquist is skeptical about how seriously Eisenhower considered a third-term run, noting that "with his history of serious illnesses and his belief that no man over seventy should serve as president (he reached that age just before his second term expired), [Eisenhower] would never have considered another race." SUNDQUIST, *supra* note 121, at 132.

191. See STATHIS, *supra* note 31, at 47 n.139.

were reelected . . . [is placed] at such a disadvantage" in his second term because of the limits of the Amendment.<sup>192</sup>

As for Kennedy's successor, in his memoirs published during Nixon's first term, Lyndon Johnson endorsed a single six-year term for Presidents.<sup>193</sup> In fact, proposals for a single presidential term garnered some political attention during Nixon's first term, and congressional hearings on the issue were held in 1971 and 1973.<sup>194</sup> Nixon himself indicated that the six-year term should be further studied,<sup>195</sup> although he had voted for H.J. Res. 27 while a member of the House of Representatives.<sup>196</sup>

In fact, his congressional vote notwithstanding, Nixon may have been interested in repealing the Amendment.<sup>197</sup> This idea had some popular currency after Nixon's reelection in 1972. In March 1973, Projects for Peace, Inc., a New York advertising agency, was hired by a voters organization, "Citizens for Nixon '76," seeking repeal of the Twenty-Second Amendment.<sup>198</sup> But as revelations about the President's involvement in the Watergate scandal became public the repeal movement quickly ebbed.<sup>199</sup>

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192. See John F. Kennedy, *Television and Radio Interview: "After Two Years—A Conversation with the President" (Dec. 17, 1962)*, in *PUBLIC PAPERS OF THE PRESIDENTS: JOHN F. KENNEDY*, 1962, at 892 (Warren R. Reid ed., 1963). Kennedy also indicated that he had no regrets about supporting the Amendment in 1947. See *id.*

193. Johnson argued that the "federal machinery" would be strengthened by extending

the term of the Presidency from four to six years and mak[ing] the incumbent ineligible for reelection. This stipulation almost became a provision of our Constitution when it was originally written. The case for it is even stronger in modern times. The growing burdens of the office exact an enormous physical toll on the man himself and place incredible demands on his time.

LYNDON BAINES JOHNSON, *THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY 1963-1969*, at 344 (1971).

194. See STATHIS, *supra* note 31, at 57.

195. See *id.* at 60.

196. See 93 CONG. REC. 872 (1947) (listing the yeas and nays for H.J. Res. 27).

197. Political scientist Paul Davis indicates that he was twice informed by the leaders of "Citizens for the Repeal of the 22nd Amendment" that "President Nixon . . . highly encouraged their activities to repeal the Twenty-second Amendment." Davis, *supra* note 177, at 301.

198. See *Four More Years More?*, NEWSWEEK, Mar. 5, 1973, at 20; STATHIS, *supra* note 31, at 47.

199. Historian Harry Jeffrey has speculated that without Watergate the Twenty-Second Amendment might very well have been repealed, allowing

### 3. The Reagan Years

After 1972, the most recent serious repeal effort occurred after Ronald Reagan's reelection in 1984.<sup>200</sup> In September 1985, Reagan told a group of conservative state legislators that it was "ridiculous" to prevent voters from sending Presidents to office for more than two terms.<sup>201</sup> During an interview the following February, Reagan indicated that while no President should advocate repeal of the Twenty-Second Amendment "with himself in mind," in the future "we ought to take a serious look and see if we haven't interfered with the democratic rights of the people" by limiting their ability to choose a President.<sup>202</sup>

In 1986, Congressman Guy Vander Jagt (then Chairman of the National Republican Congressional Committee) provided an outlet for Republican interest in repeal that, the President's protests notwithstanding, remained importantly linked to the prospect of a third Reagan term. In July, Vander Jagt introduced a joint resolution calling for a repeal of the Twenty-Second Amendment.<sup>203</sup> Although this measure eventually obtained sixty-five co-sponsors, support for a third Reagan term waned after revelations about the Iran-Contra affair.<sup>204</sup>

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Nixon to seek and win a third term. See Larry Peterson, *Richard Nixon: A President Comes Home, History's Verdict Still in the Making*, ORANGE COUNTY REGISTER, July 15, 1990, at N1, available in 1990 WL 7657131 (quoting from interview with Harry Jeffrey).

200. See KYVIG, *supra* note 43, at 335 (stating that repeal efforts "were renewed momentarily after Richard Nixon's election to a second term in 1972 and Ronald Reagan's in 1984"); see also STATHIS, *supra* note 75, at 77-78 (providing general background on contemporary repeal efforts).

Between the 90th and 97th Congress (1967-1982) over fifty amendments seeking to limit further the presidential term were introduced (typically proposing a single six-year term). See STATHIS, *supra* note 31, at 57. In addition, on April 27, 1979, President Carter informed a group of journalists that he favored a single presidential term of six years instead of the eligibility provisions of the Twenty-Second Amendment. "I think one six-year term would be preferable. I think that if I had a six-year term, without any prospect of re-election, it would be an improvement." Davis, *supra* note 177, at 302. President Ford voted for the Amendment as a House member. See *id.*

201. Stathis, *supra* note 75, at 78.

202. *Id.* (quoting Ronald Reagan in an interview with Lou Cannon and David Hoffman of the *Washington Post*, Feb. 10, 1986).

203. See H.R.J. Res. 687, 99th Cong. (1986).

204. The Gallup organization asked three questions gauging attitudes about the Amendment during 1986. In August of that year Gallup asked: "Have you heard or read about the proposal to repeal the 22nd Amendment to the Constitution to enable a president to serve more than two four year terms?" The respondents answered: Yes - 61%, No - 37%, and Don't Know -

There seems to be mixed evidence about how seriously Republican political forces considered the repeal effort in the 1980s, with some simply identifying it as an effective fundraising effort or “gimmick.”<sup>205</sup> While political and popular support for a repeal effort gained little headway after Reagan, the 1986 movement contributed to an ongoing colloquy on the issue, which carried over into the 1990s.

#### 4. Opposition to the Twenty-Second Amendment After Reagan

Although Ronald Reagan was the last President to serve as a kind of figurehead for the repeal effort, interest in abolishing the Twenty-Second Amendment has persisted, even after he left office in 1989. Resolutions to repeal the Twenty-Second Amendment have been introduced in every Congress since 1991.<sup>206</sup> In addition, a number of public officials—from both major parties, and from all branches of government—have

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2%. The same group was then asked: “Would you favor or oppose such a proposal (to repeal the 22nd Amendment to the Constitution to enable a president to serve more than two four year terms)?” The respondents answered: Favor - 37%, Oppose - 60%, and Don’t Know - 3%. Then in September 1986, Gallup asked: “If this [Twenty-Second] Amendment were repealed and presidents could run for more than two terms, would you like to see President Reagan run for a third term, or not?” The respondents answered: Yes - 39%, No - 58%, and Don’t Know - 3%.

205. Stathis, *supra* note 75, at 80.

206. *See, e.g.*, H.R.J. Res. 88, 105th Cong. (1997); H.R.J. Res. 51, 105th Cong. (1997); H.R.J. Res. 39, 105th Cong. (1997); H.R.J. Res. 38, 105th Cong. (1997); H.R.J. Res. 19, 105th Cong. (1997); H.R.J. Res. 81, 104th Cong. (1995); H.R.J. Res. 71, 104th Cong. (1995); H.R.J. Res. 68, 104th Cong. (1995); S.J. Res. 23, 104th Cong. (1995); H.R.J. Res. 107, 103d Cong. (1993); H.R.J. Res. 101, 102d Cong. (1991).

The 1993 resolution and several others are notable not only for their stated objective (eliminating the Twenty-Second Amendment) but also for the way they characterize the application of the Amendment, and the consequences of its repeal. Repealing the Twenty-Second Amendment would remove “the restrictions on the number of terms an individual may serve as President.” H.R.J. Res. 107, 103d Cong. (1993) (emphasis added). Like a number of presidential term limit proposals of the past, the 1993 resolution (among others) incorrectly equates presidential election with service. *See also* H.R.J. Res. 71, 104th Cong. (1995); H.R.J. Res. 19, 105th Cong. (1997); H.R.J. Res. 39, 105th Cong. (1997).

Also notable is that during 1993 and 1994 resolutions were introduced in Congress providing “[n]o person may serve [as President, among other positions] . . . either individually or cumulatively, for more than 12 years.” *See* H.R.J. Res. 277, 103d Cong. (1993); H.R.J. Res. 324, 103d Cong. (1994).

publicly criticized the Amendment and called for its repeal.<sup>207</sup> Moreover, in recent years, a number of scholars have also spoken out against the Amendment.<sup>208</sup> And popular enthusiasm for repeal has been sufficient to generate at least one internet site committed to undoing the Twenty-Second Amendment.<sup>209</sup>

Generally, critics have charged that the Amendment was ill-conceived and needlessly restricts the democratic choices of the electorate. It is also unpopular among some who believe it hampers presidential effectiveness. But a number of commentators have suggested that the Amendment is unlikely to be repealed, at least "in the foreseeable future."<sup>210</sup> Thus, the question whether there are constitutional means to circumvent the Amendment is not only an intriguing theoretical problem but potentially an issue of future political significance.

207. For instance, former Senator and presidential candidate Eugene McCarthy concluded in 1989 that "the current evidence is that the amendment has served no national good." Eugene J. McCarthy, *Give Bush Another 100 Days*, N.Y. TIMES, Mar. 3, 1989, at A39. Abner Mikva, who served for five terms in the United States Congress, for 15 years as a Federal Appeals Court Judge, and as White House Counsel in 1994-1995, argued that the "two-term limit" should be eliminated. "[T]he notion of beginning a four-year job as a lame duck thwarts an otherwise good system." *Hat Trick*, WASHINGTONIAN, Mar. 1997, at 34 (interview of Mikva by Ken Adelman).

208. Political Scientist James W. Davis, for example, has argued that the Amendment "makes a chief executive a lame duck the day after he is reelected." See DAVIS, *supra* note 163, at 406. This view has also been expressed by presidential scholar Gary L. Rose. See GARY L. ROSE, *THE AMERICAN PRESIDENCY UNDER SIEGE* 135-37 (1997). Rose argues that "[t]o further enhance the president's governing capacity, reformers should also consider repealing the Twenty-Second Amendment" which turns the President into a "lameduck leader." *Id.* at 135. Presidential historians Michael Beschloss and Stephen Ambrose have attacked the Amendment even more directly, saying "it should be repealed" and calling it a "damn fool thing to do," respectively. *The Second Time Around: An Exploration of Presidential Second Terms*, (Jan. 13, 1997) <<http://www.pbs.org/newshour/forum/january97/terms5.html>>.

209. The site is identified as a "Grassroots Movement to Abolish the 22nd Amendment of the Constitution of the United States of America," and can be found at <<http://www.trader.com/users/5011/1612/smtm.htm>>.

210. Stathis, *supra* note 75, at 88; see also KYVIG, *supra* note 43, at 335. Kyvig notes that steady

[c]oncerns have been voiced about the amendment's negative influence on a second-term president's power and effectiveness at home and abroad, not to mention the people's sovereign right to their choice of leaders. [And] yet to date every effort to initiate repeal has collapsed in the face of perceived partisan benefit and the obstacles of Article V.

*Id.*

### III. INTERPRETING AND APPLYING THE TWENTY-SECOND AMENDMENT: ASSESSING THE SIX SCENARIOS

While the Twenty-Second Amendment has been referenced in a number of litigation settings, neither the Amendment's precise limits concerning its central subject (the reelection of a President) nor the specific scenarios set out in this Article have been tested in the courts.<sup>211</sup> We proceed now to analyze the application of the Twenty-Second Amendment and other constitutional provisions to the "six scenarios" outlined at the beginning of this Article, which represent the non-electoral processes through which a twice-elected President might again serve as President.

We divide Part III into two sections. First, we undertake what can be described as a conventional legal and interpretive analysis. Second, we consider the nature of legal arguments

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211. Although a fair number of judicial opinions refer to the Twenty-Second Amendment or describe it in passing, we could not find a single reported decision truly "interpreting" the Amendment—by which we mean deciding a case or controversy in a way that turns on divining the meaning of the Amendment and determining its effects.

The Supreme Court has only occasionally mentioned the Twenty-Second Amendment. See, e.g., *Roe v. Wade*, 410 U.S. 113, 157 (1973) (citing the Amendment in discussing the definition of a "person" under the Constitution); *Baggett v. Bullitt*, 377 U.S. 360, 370 (1964) (finding a state oath requirement unconstitutionally vague and asking, rhetorically, whether supporting the repeal of the Twenty-Second Amendment would be considered "subversive" activity). Other courts have also had little to say about the Amendment, although a number have cited it in term limit cases not involving the presidency. See, e.g., *Legislature of Cal. v. Eu*, 816 P.2d 1309, 1326 (Cal. 1991); *State ex rel. Rhodes v. Brown*, 296 N.E.2d 538, 540 (Ohio 1973). In one recent case the United States Court of Appeals for the Ninth Circuit relied on its understanding of the Twenty-Second Amendment in deciding whether to invalidate a California referendum limiting the terms of state assembly members. See *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (en banc), cert. denied, 118 S. Ct. 1302 (1998). There, the Court explained: "the twenty-second amendment to the Constitution uses similar language: 'no person shall be elected to the office of the President more than twice . . . .' There certainly is *no confusion* that this language imposes a lifetime ban on the office of the President—even though the amendment does not specifically use the term 'lifetime.'" *Id.* at 846 (emphasis added). But, for reasons we discuss below, the Court *should* have been confused about what the Twenty-Second Amendment provides, for it is by no means clear that it effects a "lifetime ban on the office of the President." *Id.* A similarly overreaching conclusion about the Amendment was offered by another federal court. See *Halperin v. Kissinger*, 434 F. Supp. 1193, 1195 (D.D.C. 1977), *rev'd*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'g in part, cert. dismissed in part*, 452 U.S. 713 (1981) (declining to grant the relief requested because President Nixon "is *prohibited* by the Twenty-Second Amendment *from regaining* the Office of President") (emphasis added).

rooted in the "spirit" of the Constitution in general and the spirit of the Twenty-Second Amendment in particular, and how these arguments might apply to our scenarios.

#### A. LEGAL ANALYSIS OF THE TWENTY-SECOND AMENDMENT

Before proceeding with our constitutional analysis, it may be helpful to recap the six ways in which a twice-elected President might reassume Office despite the Twenty-Second Amendment's prohibition against that person again being "elected to the office of President." Scenarios 1 and 2 involve situations in which a Vice President becomes President in the event of the chief executive's death, resignation, or removal, or acts as President during a period in which the chief executive is unable to discharge the powers and duties of the Office.

Scenarios 3 and 4 also involve the vice presidency, but unlike Scenarios 1 and 2, these provide for the Vice President-elect to become President if "at the time fixed for the beginning of the term of the President, the President elect shall have died,"<sup>212</sup> or act as 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."<sup>213</sup>

Scenario 5 encompasses the circumstances provided for in the Succession Act of 1947,<sup>214</sup> which comes into play if the President and the Vice President both die, resign, or are unable to discharge their duties, or the President-elect and the Vice President-elect are both constitutionally unqualified to hold office. And Scenario 6 addresses the situation in which the House of Representatives would "choose" a President in the event that no person received a majority of the electoral votes in an election for that Office.

We begin our evaluation of the constitutionality of these scenarios by examining the text of the Twenty-Second Amendment. We then consider the legislative history of the Amendment and what insight it may provide in assessing the scenarios. Next, we turn to constitutional provisions other than the Twenty-Second Amendment that might assist us in determining its application and scope. And we complete our conventional interpretive analysis by considering the constitutional principle of separation of powers. In each of

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212. U.S. CONST. amend. XX, § 3.

213. *Id.*

214. 3 U.S.C. §19 (1994).

these subsections our focus is on the applicability of particular constitutional provisions or principles to the scenarios in general, although specific scenarios are discussed where one or more of them warrant particular attention.

## 1. Text

Recall that the Twenty-Second Amendment specifies:

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 President more than once.<sup>215</sup>

Notably, the text of the Amendment restricts only *reelection* of an already twice-elected President.<sup>216</sup> The words themselves do not (1) limit the amount of time, consecutively or cumulatively, a person may serve, or (2) proscribe such a person from reassuming the Office of President by means other than election. In this respect, the text of the ratified Twenty-Second Amendment contrasts with the provisions of other versions of the Amendment considered by Congress, including, for example, the Senate Judiciary Committee's original language, which categorically declared that a person serving or acting as President "on three hundred and sixty-five calendar days or more in each of two terms shall not be eligible to hold the office of President, or to act as President, for any part of another term."<sup>217</sup>

It is also worth noting the Amendment's limit on reeligibility (to a single reelection) of a person who has "served as President for more than two years of a term to which some other person was elected President."<sup>218</sup> Although the Amendment does not detail the ways in which someone might assume the presidency without being elected, this provision suggests those adopting it were aware that the Constitution provides for such a possibility.

These observations alone do not dispose of the question whether any of our scenarios can withstand constitutional

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215. U.S. CONST. amend. XXII. We note, incidentally, that there seems to be no constitutional prohibition against a twice-elected President simply *running* for the presidency once again.

216. We have previously defined "twice-elected" to include a person elected once "who has [also] . . . acted as President, for more than two years of a term to which some other person was elected." See *supra* note 3.

217. S. REP. NO. 80-34, at 1 (1947).

218. U.S. CONST. amend. XXII.

scrutiny. Nevertheless, they provide evidence that, on its own, the text of the Twenty-Second Amendment does not preclude a former president from assuming the presidency through any of the six non-electoral paths to the presidency we have identified.

## 2. Legislative History and Intent

Because the text of the Twenty-Second Amendment fails to foreclose our six scenarios, we next consider the legislative history of the Amendment to help assess their legality. We acknowledge the difficulties of such an approach. There are well-developed arguments outlining the perils of divining and applying legislative intent when interpreting statutes.<sup>219</sup> These arguments seem no less telling when interpreting a measure ultimately adopted as a constitutional amendment. Indeed, in the context of the amendment process, the problem of ascertaining legislative "intent" may be magnified by the abundance of interpreters who have an opportunity to assess, debate, and support (or reject) the proposed measure. Whose intent counts in construing the legislative intent of an amendment? The views of the Congress proposing the amendment?<sup>220</sup> The views of the states ratifying the amendment?<sup>221</sup> What if these diverge? Should we consider the views of those states voting *after* an amendment has already secured the constitutionally required ratification by three-quarters of the states? All of the difficulties suggested by these questions are compounded by observing that many of those who ultimately support an amendment never give voice to their reasons for doing so.

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219. See generally Frank Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1929-30); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407 (1989); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

220. Article Five provides: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . ." U.S. CONST. art. V. An amendment may be enacted, however, without Congress proposing it. See *id.* (providing that in lieu of Congress's proposing an amendment, "on the Application of the Legislatures of two thirds of the several States . . . a Convention for proposing Amendments" may be called). Yet each of the twenty-seven amendments to the Constitution was proposed by Congress rather than a Convention.

221. Moreover, should the views of those states declining to ratify the amendment be considered?

Interpreting the legislative intent behind the Twenty-Second Amendment comes with its own special set of problems. First, the debates were typically marked by a failure on the part of members of Congress to identify clearly either the purposes of their amendment proposals or the ways in which they hoped to effectuate the changes they sought. Second—and no doubt related to the first problem—the debates featured a remarkable lack of precision in choosing critical words. At various times the objectives of limiting a President's "service," "terms," "tenure" and "[eligibility for] reelection" were seemingly referenced interchangeably, as were a number of phrases describing the procedures through which members of Congress hoped to attain these ends. These different phrases were employed without substantial attention to the implications of these word choices, or to the several ways in which the Constitution already provided terms and procedures for election, succession, and other ways in which a person might assume the Office of President without being elected.<sup>222</sup> Third, it is significant that the congressional deliberations about the Amendment generally have been considered curtailed. The House debates took place under a restrictive rule limiting debate to two hours (not a particularly long time for an amendment to the Constitution), and a number of commentators have suggested that neither the discussions in Congress nor those in the state legislatures were particularly extensive or informed.<sup>223</sup>

These observations about the difficulty of determining the intent behind the Twenty-Second Amendment might suggest that no conclusions can be reached with respect to the six

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222. See U.S. CONST. art. II, §1; 3 U.S.C. §19 (1994).

223. Grimes refers to the rule under which the House considered H.J. Res. 27 as a "gag rule." GRIMES, *supra* note 43, at 116. Other commentators on the debates of the Amendment have similarly concluded that they were seriously truncated. Louis Koenig, for example, notes that "[f]or all of its controversial character, the amendment emerged from the House of Representatives with but a single day's debate." KOENIG, *supra* note 43, at 65. Nor do the state ratification discussions appear to have been particularly extensive, or to have stirred much public debate. *The Nation* noted that the Amendment "glided through legislatures in a fog of silence—passed by men whose election in no way involved their stand on the question—without hearings, without publicity, without any of that popular participation that should have accompanied a change in the organic law of the country." *The Two-Term Limit*, NATION, Mar. 10, 1951, at 216-17. And Koenig observed that the Amendment's "four-year journey through the state legislatures stirred a minimum of public discussion." KOENIG, *supra* note 43, at 65.

scenarios under which one may serve as President without being elected to that Office. There are, however, aspects of the congressional debates that affirmatively suggest at least some of these scenarios were contemplated (and not foreclosed) by those adopting the Twenty-Second Amendment. Like its text, the legislative record of the Amendment reflects some awareness that individuals can assume the Office of President without being elected.<sup>224</sup> Missing from the legislative record, however, is evidence that anyone debating the Twenty-Second Amendment anticipated an individual being elected President and subsequently acting as President or becoming President through non-electoral means. Nevertheless—and notwithstanding the Senate's gradual narrowing of its focus to *reelection*—members remained conscious of the difference between being elected President on the one hand and assuming that Office (temporarily or for the duration of the term of another) on the other.

In the end, we do not mean to suggest that it is impossible to uncover any legislative purpose from the debates on the Twenty-Second Amendment. The problem is that the one evident purpose—to prevent another President from serving four consecutive terms, as FDR had—is so specific and lacking in nuance that it is of little service in evaluating the constitutionality of our six scenarios. Indeed, identifying this legislative purpose tells us nothing about the permissibility of our scenarios under the Twenty-Second Amendment.<sup>225</sup> And yet the imprecision and relative brevity of the debates make it difficult to discern another (more illuminating) objective genuinely shared by those supporting the Amendment. On the whole then, we conclude that the congressional debates on the

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224. As the Senate Judiciary Committee explained in its report, “[i]t was the thought of the committee that the original [House] language did not adequately care for a contingency that might occur under both the language of article II of the Constitution as well as the twentieth Amendment thereof,” namely, that a person might serve as President or acting President without having been elected. S. REP. NO. 80-34, at 2 (1947).

225. In discussing how a person might succeed from the vice presidency to act as or become President, Congress seems to have touched on at least part of Scenario 1 during its deliberations on the Twenty-Second Amendment. The congressional debates do not appear to have engaged our other scenarios, however. In the case of Scenarios 2 and 5 this is hardly surprising, since neither the Twenty-Fifth Amendment nor the Succession Act of 1947 had yet been enacted. Less clear is why Congress failed to touch upon the issues raised by Scenarios 3, 4, and 6.

Twenty-Second Amendment do not provide a basis for declaring any of our scenarios unconstitutional.<sup>226</sup>

### 3. Other Constitutional Provisions

We turn now to provisions of the Constitution other than the Twenty-Second Amendment and other than the provisions directly related to the six scenarios<sup>227</sup> relevant to analysis of the constitutionality of our scenarios: the Twelfth Amendment and the "Guarantee Clause" of Article IV, Section 4.<sup>228</sup> We consider these provisions in light of their historical purposes and meaning, as well as their relationship to the Twenty-Second Amendment and the Constitution as a whole.

#### a. *The Twelfth Amendment*

The Twelfth Amendment provides, in part, that "[n]o person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States."<sup>229</sup> Prior to the Amendment's adoption the system for presidential election outlined in Article II, Section 2 of the Constitution failed to differentiate between votes for presidential and vice presidential candidates. Instead, electors simply voted for two individuals and the person receiving the most votes was made President while the next highest vote-getter became Vice President.

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226. We have focused almost exclusively on the debates in Congress. A comprehensive history of the Twenty-Second Amendment would also trace the ratification debates in the states. Our limited research in this area indicated that the state ratification debates were generally curtailed and press coverage of those debates spotty. See generally Brown, *supra* note 160, at 447; KYVIG, *supra* note 43, at 328; DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION 243 (1966); Stathis, *supra* note 75, at 71; *The Two-Term Limit*, *supra* note 223, at 216-17.

Of course, the nature of the debates in the states was quite different from those in Congress, for the states were deciding only whether to approve the proposed Amendment, not what language it should contain. Nevertheless, we assume the states' debates would have something useful to say about the presumed meaning and implications of the proposed Amendment.

227. See *supra* notes 10-18.

228. U.S. CONST. amend. XII; *id.* art. IV, §4. Although these provisions traditionally have not been the subject of much litigation, we believe they are relevant to a comprehensive analysis of our scenarios. It is conceivable that the courts' treatment of these provisions may change in the future. Moreover, interpretation is not a task only for the courts; nonjudicial actors also bear a responsibility to interpret and apply the Constitution—even those parts of it that courts are rarely asked to consider or have been held nonjusticiable.

229. *Id.* amend. XII.

The Twelfth Amendment was ratified in response to political turmoil surrounding the election of 1800. When Republican candidates Thomas Jefferson and Aaron Burr each received seventy-three electoral votes, the election of 1800 was thrown to the House of Representatives.<sup>230</sup> The House eventually selected Jefferson, "but not before Federalist mischief-makers kept the election uncertain through thirty-six ballots," resulting in soured relations between Jefferson and Burr, his Vice President.<sup>231</sup> Dissatisfied with these developments, and drawing on a suggestion made by Alexander Hamilton, Congress endorsed, and by 1804 the states ratified, the Twelfth Amendment.<sup>232</sup> The Amendment requires that electoral votes be cast separately for President and for Vice President.

Presumably, because presidential and vice presidential candidates were not formally distinguished prior to the Twelfth Amendment, anyone elected as Vice President was also qualified to be President.<sup>233</sup> However, once the Twelfth Amendment bifurcated the selection process for President and Vice President it apparently seemed necessary to stipulate that a person ineligible to be President was also ineligible to be Vice President.

What is the relationship between the Twelfth and Twenty-Second Amendments? Does the Twelfth Amendment's eligibility provision prevent someone twice elected President from serving as Vice President, thereby foreclosing Scenarios 1-4 (those in which a Vice President or Vice President-elect can ascend to the presidency without being elected to that Office)?

We believe the Twelfth Amendment does not bar any of these four scenarios. First, it is by no means clear that the term "eligibility" as used in the Twelfth Amendment refers to or incorporates a person's reeligibility under the Twenty-Second Amendment. At the time the Twelfth Amendment was written there was, of course, no Twenty-Second Amendment;

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230. See MORISON ET AL., *supra* note 28, at 145.

231. MILKIS & NELSON, *supra* note 43, at 413; BERNSTEIN & AGEL, *supra* note 39, at 63.

232. See BERNSTEIN & AGEL, *supra* note 39, at 63-65.

233. While the Constitution did not delineate candidates for President and Vice President before the Twelfth Amendment, political practice certainly did. During the first two presidential elections, for example, John Adams was clearly elected to serve as Vice President to George Washington. See generally MILKIS AND NELSON, *supra* note 43, at 98-99, 411-13.

therefore, the Twelfth Amendment could not have originally meant to preclude someone from being Vice President who had been elected President twice. Rather, the Twelfth Amendment's reference to "eligibility" likely pointed only to the "eligibility" provision of Article II, Section 1, clause 4, which states that

No Person except a natural born Citizen, or a Citizen of the United States . . . 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.<sup>234</sup>

Second, even if the Twelfth Amendment's eligibility provision is to be read in light of the proscriptions of the Twenty-Second Amendment, it could be read as affecting only persons who would *become* President. If this understanding is correct, the Twelfth Amendment's provision that "[n]o person *constitutionally ineligible to the office of President* shall be eligible to that of Vice President of the United States"<sup>235</sup> has no effect on individuals who might simply *act* as President. In other words, a Vice President "constitutionally ineligible to the office of President" might occupy the vice presidency and eventually act as President, while being ineligible to assume that Office by becoming President through succession. This interpretation would seemingly rule out Scenarios 1 and 3, while still allowing for Scenarios 2 and 4.

Third, and most importantly, even under the most expansive reading of what constitutional "eligibility" might include—a reading that superimposes the Twenty-Second Amendment on the Twelfth—there are good reasons for thinking that the constitutionality of the scenarios would remain unaffected. As we have been suggesting throughout this Article, we do not believe an already twice-elected President *is* "constitutionally ineligible to the office of President." Even if one leaves aside Scenarios 1-4,<sup>236</sup> there are

234. U.S. CONST. art. II, § 1, cl. 4 (emphasis added). This reference to "eligibility" is the only one found in the body of the original (unamended) Constitution. Edward S. Corwin has suggested, however, that Congress may add to the eligibility and qualification requirements of Article II through legislation. See CORWIN, *supra* note 43, at 42.

235. U.S. CONST. amend. XII (emphasis added).

236. We leave these aside with the understanding that the argument an already twice-elected President should not be considered "constitutionally ineligible to the office of President" because he or she *can* assume that office through succession from the vice presidency may seem circular. After all, that person's very ability to serve as Vice President depends on his or her being eligible for the Office of President.

other non-electoral means of reassuming Office available to a twice-elected President (viz., Scenarios 5 and 6). Thus, if the meaning of "eligibility" under the Twelfth Amendment was transformed with the adoption of the Twenty-Second Amendment, the Twenty-Second Amendment still does not render twice-elected Presidents "constitutionally ineligible to the office of President," and it therefore cannot be said that the Twelfth Amendment prohibits a twice-elected President from serving as Vice President.<sup>237</sup>

*b. The Guarantee Clause*

Another constitutional provision warranting attention is the so-called "Guarantee Clause," which provides: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."<sup>238</sup> With origins dating back to ancient Greece, the concept of "republicanism" has been connected with a variety of different political principles and institutional arrangements,<sup>239</sup> and consistently contrasted with monarchic rule.<sup>240</sup>

In the American context, the republicanism of the Constitution has been associated with a commitment to popular rule.<sup>241</sup> The Guarantee Clause was designed to ensure

237. We recall that Eisenhower and his advisors considered the advisability of his running as Vice President in 1960 and apparently presumed he was ineligible to reassume the presidency through succession if the elected President (Nixon) needed to be replaced. See our discussion *supra* notes 180-90 and accompanying text. Why Eisenhower's advisors thought he could serve as Vice President even while ineligible to be President is unclear, and our efforts to determine the answer by contacting the Eisenhower Presidential Library and the National Archives turned up nothing about the issue.

238. U.S. CONST. art. IV, § 4.

239. Compare NICCOLÒ MACHIAVELLI, *THE DISCOURSES* (Bernard Crick ed., 1970) (emphasizing the importance of civic virtue as the basis for a republican polity), with THE FEDERALIST NO. 39 (James Madison) (describing Madison's account of republican government). See generally J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

240. Cf. THE BLACKWELL ENCYCLOPEDIA OF POLITICAL THOUGHT 433-34 (1991) ("Whereas a traditional king enjoys personal authority over his subjects and rules his realm as his personal possession, government in a republic is in principle the common business (*res publica*) of the citizens, conducted by them for the common good.").

241. The most sustained and important early account of republican government and its relationship to the Guarantee Clause comes from James Madison. Madison identified a republican government as one "which derives all its powers directly or indirectly from the great body of the people, and is

that this principle was protected in the individual states.<sup>242</sup> Thus, the Clause pledges that the "United States shall guarantee to every State . . . a Republican Form of Government."<sup>243</sup>

Although there is little judge-made law about the meaning of the Guarantee Clause,<sup>244</sup> we believe the commitments it embodies arguably are challenged or undermined by a variant of our scenarios.<sup>245</sup> We therefore turn to that situation.

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administered by persons holding their offices during pleasure for a limited period, or during good behavior." THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

242. Madison conceded that the precise character of republicanism could vary: "Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican Constitutions." THE FEDERALIST NO. 43, at 275 (James Madison) (Clinton Rossiter ed., 1961).

243. U.S. CONST. art. IV, § 4 (emphasis added).

244. In a long line of cases the Supreme Court has held that the Clause is enforceable only by Congress, and therefore that claims turning on the meaning or interpretation of the Clause are nonjusticiable. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). Regardless of whether one reads a given judicial opinion as failing to declare that the Clause is non-justiciable, taken together the fact that the federal courts have been unwilling to interpret the Clause seems evident. Cf. Akhil Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 753 (1994) (arguing that *Luther* did not establish the "general nonjusticiability of the Clause"). For a discussion of state court and lower federal court decisions addressing the Clause, see Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 214 & n.3 (1987).

245. Judicial reticence about the Clause does not render it meaningless. After all, it is neither descriptively accurate nor theoretically tenable to assert that judges are the only interpreters of the Constitution. See generally Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359 (1997) (arguing for a diffusion of interpretive powers among both judicial and nonjudicial actors); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). Moreover, in recent years numerous commentators have both argued courts should reach the merits of at least some claims based on the Guarantee Clause and advanced particular conceptions of what the Clause means. Many of these arguments were presented on March 18, 1994 at a conference entitled "Guaranteeing a Republican Form of Government," held at the University of Colorado School of Law. The articles from that conference are collected in 65 U. COLO. L. REV. 709 (1994). See also Berg, *supra* note 244, at 214-16; Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984). Finally, judges themselves may someday reconsider the view that they should refrain from interpreting the Guarantee Clause. See *New York v. United States*, 505 U.S. 144, 184-85 (1992) (stating that despite "[t]he view that the Guarantee Clause implicates only

Reconsider our preceding discussion in which we posited that a twice-elected President might be elected Vice President and then reassume the Office of President. Specifically, suppose that an elected President immediately resigns (or otherwise steps aside) with the understanding that the Vice President (former President) will reassume his or her "rightful" office. This variant of our scenarios<sup>246</sup> could occur either with the ex ante awareness of the electorate (and complicity of enough of the electorate to ensure election of the presidential "proxy"), or as a covert activity, of which the public is informed only after-the-fact. Can either version of this purposeful effort to avoid the strictures of the Twenty-Second Amendment be condemned under the Guarantee Clause?

As noted, the Guarantee Clause provides that the "United States shall guarantee to every State . . . a Republican Form of Government,"<sup>247</sup> which suggests that this guarantee primarily "runs from the United States to the individual states."<sup>248</sup> Given the Clause's reference to the *states*, it would be understandable to conclude that a challenge to even the purposeful substitution of a duly elected President in the *federal* electoral process does not implicate the Guarantee Clause. Yet, insofar as the states indirectly, through the electoral college, elect the President of the United States,<sup>249</sup> one

nonjusticiable political questions . . . [m]ore recently, the Court has suggested that perhaps not all claims under the Guarantee Clause" are nonjusticiable).

246. This situation would most likely arise under Scenario 1, which specifically provides for succession in the case of resignation, but the former President could act as President under similar variants of Scenarios 2, 3, and 4.

247. U.S. CONST. art. IV, § 4 (emphasis added).

248. Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994).

249. See Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 312 n.207 (1997) ("Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it.") (quoting THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961)); see also Shlomo Slonim, *Designing the Electoral College*, in INVENTING THE AMERICAN PRESIDENCY 33-60 (Thomas E. Cronin ed., 1989) (providing background on the framers' debates on the electoral college and noting a number of ways in which the college was designed to reflect the interests of the states); GARY L. MCDOWELL, *CURBING THE COURTS* 80 (1988) ("By giving the states a voice in the selection of the president . . . the Constitution allows for regional opinions and interests to be introduced into the public forum. In this way, the prevailing popular opinion of each state is not excluded from national affairs . . .").

might conclude that a purposeful effort to substitute another person for the President-elect undermines the Clause's guarantee of a republican form of government. Understood in this way, the Clause may be read not only to provide a "guarantee" to the individual states<sup>250</sup> but also to forbid constituting the federal government in a manner that conflicts with the principles of republican government.<sup>251</sup>

Nevertheless, we are skeptical that such substitutions would encroach upon republican principles in a manner (or to an extent) that violates the Clause. For instance, where the substitution plan is carried out with the *ex ante* knowledge of the electorate, allowing the former President to reassume Office would seem to facilitate rather than frustrate the democratic will (and serve as a way of circumventing an amendment that may not allow the public to elect the person they most want to serve as President). Therefore, this substitution would be at odds with republican principles only if those principles valued the formalities of democratic procedure above the genuine fulfillment of popular sentiment.

In contrast, the covert version of the substitution plan is plainly in tension with the republican commitment to majority rule.<sup>252</sup> Yet even in this situation, although the public would not have known of the former President's intention to reassume the presidency, the electorate would have implicitly sanctioned that person's return to Office through succession by electing him or her as Vice President. In addition, the reassumption of Office by the former President would not

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250. See Hans A. Linde, *Who is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994) (explaining that the Clause "*committed the states to republican government and committed the nation to guarantee them*") (emphasis added).

251. Indeed, it would seem strange were the Constitution to commit the United States to ensuring that the states have republican forms of government and at the same time allow the United States to be constituted or governed contrary to the principles of republican government.

One can imagine, however, that the Guarantee Clause does not reference federal arrangements because the remainder of the Constitution is dedicated to constructing the federal system, and presumably the Constitution's express provisions were designed to reflect republican principles. For discussions of the Founder's views about the Clause and its inclusion in the text, see Berg, *supra* note 244, at 226.

252. See Amar, *supra* note 244, at 753 ("The concept of Republican Government does have a central meaning, intimately connected with popular sovereignty and majority rule.").

forestall the end of the presidential term and the opportunity for the electorate to exercise its will again.<sup>253</sup>

In view of this, our account of the Guarantee Clause does not suggest a basis for concluding that any other variant of our six scenarios would pose a constitutional problem. Having an already twice-elected President serve again in that Office by virtue of being Vice President or Vice President-elect in Scenarios 1-4 would not, in itself, subvert popular rule. Similarly, on their own, Scenarios 5 and 6 would not offend republican principles; under these scenarios only the reassumption of Office by a twice-elected President in a manner avoiding or overturning popular will would potentially implicate the Guarantee Clause.

#### 4. The Separation of Powers

Having examined specific constitutional provisions we turn now to consider whether the principles associated with the "separation of powers" doctrine inform an assessment of the constitutionality of our six scenarios. But identifying the appropriate separation of powers principles to apply is no simple task. To begin with, although ensuring a separation of powers was clearly an objective of the Founders they did not include specific separation of powers provisions in the Constitution.<sup>254</sup> The ultimate source of the doctrine of

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253. U.S. CONST. art. II, § 1. The importance of fixed terms in preserving republican rule is stressed by Madison in *The Federalist Papers*. See THE FEDERALIST NO. 39, at 240-41 (James Madison) (Clinton Rossiter ed., 1961) (describing the features of "the republican form" by examining the state constitutions, and noting that in the states "the tenure of the highest offices is extended to a definite period").

254. The Federalist case for the division of the federal government into three separate departments was made most systematically and forcefully in *The Federalist Papers*. See THE FEDERALIST NOS. 47-51 (James Madison). The division of the legislative, executive, and judicial powers into separate branches of government was seen as a way to protect the people against tyrannical rule. See THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."). But the American separation of powers system was also designed to define (inexactly) the limits and scope of the legal (and political) powers and functions of the various branches, in a way that would give each branch specialized responsibilities and keep power accountable and efficient. See James Ceaser, *In Defense of Separation of Powers*, in SEPARATION OF POWERS—DOES IT STILL WORK? 168 (Robert A. Goldwin and Art Kaufman eds., 1986); William B. Gwyn, *The Separation of*

separation of powers has been identified as discrete portions of the Constitution by some, and as the entire document (as well as additional sources)<sup>255</sup> by others. Thus, when constructing and applying separation of powers principles one cannot rely on the Constitution's text in the same way one can in many other interpretive endeavors.

An additional challenge is presented by the fact that the relevant jurisprudence addressing separation of powers arguments is somewhat conceptually untidy and difficult to categorize. Throughout its history, the Supreme Court has applied the doctrine in diverse and sometimes seemingly inconsistent ways. Legal commentators attempting to make sense of the Court's decisions have suggested that contemporary separation of powers doctrine is marked by a struggle between functional and formalist approaches.<sup>256</sup> Under the functional view, "the Court emphasize[s] checks and balances" and eschews strict divisions between various departments and their powers.<sup>257</sup> The Court embraces a "functional" approach by recognizing that the separation of powers is necessary to preserve "the essential functions of each branch" but that rigid boundaries between the branches are neither desirable nor possible.<sup>258</sup> Alternatively, under the formalist view, the Court acknowledges "[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others."<sup>259</sup>

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*Powers and Modern Forms of Government, in SEPARATION OF POWERS—DOES IT STILL WORK?*, *supra*, at 74.

255. See E. Donald Elliot, *Why Our Separation of Powers Jurisprudence is So Abysmal*, 57 GEO. WASH. L. REV. 506, 508 (1989) ("In a sense, the 'text' in separation of powers law is everything that the Framers did and said in making the original Constitution plus the history of our government since the founding.").

256. See Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57 (1990) (contending that the Court's jurisprudence has shifted between formalistic, rigid reading of separation of powers and a more flexible, pragmatic approach which appreciates the need for overlap and competition in the assignment of constitutional powers).

257. *Id.* at 58.

258. *United States v. Nixon*, 418 U.S. 683, 707-13 (1974); see also Fisher, *supra* note 256, at 58.

259. *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935); see also Stephen L. Carter, *From Sick Chicken to Synar: The Evolution of Subsequent De-Evolution of the Separation of Powers*, 1987 BYU L. REV. 719 (defending the formalist approach).

Under either approach, is there reason to believe any of the scenarios we have presented run afoul of separation of powers principles? For instance, recalling our now-familiar example, what if upon nearing the end of her second term a previously twice-elected President desired to avoid the strictures of the Twenty-Second Amendment and continue in office for a third term—or perhaps longer? Might the extension of that President's tenure collide with separation of powers tenets by, for example, augmenting the President's power at the expense of Congress?

Irrespective of how improbable this and similar scenarios might seem, we are unconvinced that separation of powers concerns alone could render them unconstitutional. After all, there was no limit on presidential service prior to ratification of the Twenty-Second Amendment in 1951, and no one, to the best of our knowledge, seriously suggested before then that serving more than two terms was unconstitutional. Should separation of powers principles be applied differently today (or in the future) than they were before 1951? Did the enactment of the Twenty-Second Amendment transform the relationship of the federal departments in a way that constitutionally forbids what was previously permitted?

We concede that the meaning of a constitutional provision may be altered by a subsequent amendment (and even that separation of powers principles may be altered by amendments to the Constitution and other changes). Nevertheless, we find no authority in the text of the Twenty-Second Amendment itself, in the congressional debates surrounding its proposal and ratification, or among any other evidence, to suggest that the Amendment was designed to, or did, alter the allocation of federal powers so profoundly that separation of powers concerns preclude a twice-elected President from reassuming the Office of President even though not prevented from doing so by the terms of the Amendment itself.<sup>260</sup>

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260. In addition, from a practical standpoint, procedural and political realities substantially constrain the circumstances under which the reassumption of Office by a twice-elected President could occur. Thus, we do not envision the reassumption of Office by a previously twice-elected President as capable of fundamentally altering the balance of power and responsibilities among the three branches of the federal government. Therefore we are untroubled in this regard by the prospect of a former President again serving as President for however long circumstances might permit.

## B. THE TWENTY-SECOND AMENDMENT AND THE "SPIRIT" OF THE CONSTITUTION

Having engaged in a conventional analysis of the Twenty-Second Amendment's text and the relevant legislative record, and having examined other constitutional provisions as well as separation of powers principles, we have not yet found a compelling basis for concluding that a twice-elected President could not serve again through the non-electoral means we have identified. One might contend, however, that we have failed to consider an obvious basis for arguing against at least some variants of the scenarios we have outlined—namely, that allowing an already twice-elected President to reassume Office could amount to an end-run around the Twenty-Second Amendment, thereby undermining the "spirit" of the Amendment, the entire Constitution, or both. Although we have doubts that the scenarios discussed here can be found unconstitutional under a conventional interpretive analysis, can some of them be declared unconstitutional if judged contrary to the Constitution's spirit?

Consider again a situation in which a previously twice-elected President ran as Vice President with the understanding that if elected, the President-elect would step aside and allow the twice-elected President to serve another term. Would this contravene the spirit of the Twenty-Second Amendment or the Constitution generally?<sup>261</sup> Might the

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261. In reflecting on these efforts to have a twice-elected President reassume Office despite the dictates of the Twenty-Second Amendment, one might also consider Article II, section 1, clause 8 of the Constitution, which specifies that "[b]efore [the President] enters on the Execution of his Office," he shall take the following "Oath or Affirmation": "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

The Clause invites us to contemplate what is entailed in "preserving," "protecting," and "defending" the Constitution. If we are to take the presidential Oath Clause seriously we must consider whether an already twice-elected President could subsequently act as or become President without betraying that oath. Cf. U.S. CONST. art. VI, cl. 3 (containing the Constitution's other oath clause, which provides: "The Senators and Representatives . . . and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .").

The oath clauses seemingly seek to ensure that the official actions of constitutional officers comport with the commands of the Constitution. See DAVID MORGAN, CONGRESS AND THE CONSTITUTION 47, 94 (1966); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1844

answer to this question depend on whether the American public is aware the President-elect plans to resign? Or would it matter if the twice-elected President intended to be Vice President and reassumed the presidency only upon the unforeseen death, resignation, removal or disability of the President-elect? The answer to these questions, we believe, may be gleaned by investigating the nature of "spirit" arguments generally and applying them to the topic at hand.

There have long been suggestions that one might separate the spirit of the law from its letter. Both *The Federalist*<sup>262</sup> and the Supreme Court<sup>263</sup> provided numerous early (if ambiguous) reflections on how analysis of the Constitution's "spirit" might apply to interpretation of the document. In assessing the power of Congress to charter the second Bank of the United States, Chief Justice John Marshall offered his famous test of constitutionality which drew on the letter-spirit dichotomy:

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(5th ed. 1891). In the view of one commentator, "[t]he Constitution [through its oath clauses] requires the President and the members of Congress to independently evaluate the constitutionality of their actions." K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397, 451 (1997). Nevertheless, it does not appear that a President's commitment to the oath would be compromised by reassuming Office under any of our six scenarios. First, as a practical matter, the presidential Oath Clause itself has never been the basis for invalidating any statute or official act. Second, even if the oath does commit a President to acknowledging the supremacy of the Constitution and accepting an independent responsibility to interpret the Constitution there are good reasons to believe (as we have argued throughout this Article), that the reassumption of Office comports with the Twenty-Second Amendment and the Constitution generally. Therefore, it does not seem as though an already twice-elected President's return to the Office would constitute a failure to preserve, protect or defend the Constitution.

262. *The Federalist Papers* makes a few references to the "spirit" of Constitution, but these references do not give particular insight into the question of how to construe the concept. For instance, *Federalist No. 81* defends the Supreme Court against the charge that it will construe "the laws according to the spirit of the Constitution . . . [in a way that will] mould them into whatever shape it may think proper." THE FEDERALIST NO. 81, at 482 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

263. See Morton J. Horwitz, *Foreword to The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 32, 51 n.91 (1993) ("Up through 1840, the Supreme Court used some version of the letter-spirit dichotomy 86 times . . ."); cf. Kent Greenfield, *Original Penumbra: Constitutional Interpretation in the First Years of Congress*, 26 U. CONN. L. REV. 79 (1993) (discussing the Founders' arguments based on the spirit of the Constitution); William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 498 (1994) (explaining that "many of the founding generation were 'anti-literalists' who believed constitutions should be interpreted in light of their spirit") (footnote omitted).

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the *letter and spirit* of the constitution, are constitutional.<sup>264</sup>

That same year, the Court also asserted that “the spirit of an instrument, especially of a constitution, is to be respected not less than its letter.”<sup>265</sup> And nearly a half century later the Court, invoking the Constitution’s spirit, condemned an act of Congress as interfering with the right to contract notwithstanding that the Constitution forbade only states from such interference. As Chief Justice Chase explained:

It is true that this prohibition [of the Contracts Clause]<sup>266</sup> is not applied in terms to the government of the United States . . .

But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.<sup>267</sup>

Although judicial appeals to constitutional spirit may be less frequent than in years gone by, the invocations have not ceased.<sup>268</sup> Perhaps the most recent prominent suggestion that the Constitution’s spirit matters in the interpretive process came from Justice O’Connor in her dissent in *Garcia v. San Antonio Metropolitan Transit Authority*, where she declared:

The spirit of the Tenth Amendment . . . is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme.

264. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819) (emphasis added).

265. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819).

266. See U.S. CONST. art. I, § 10, cl. 1.

267. *Hepburn v. Griswold*, 75 U.S. 603, 623 (1869); see also *Sinking-Fund Cases*, 99 U.S. 700, 744 (1878) (“[A] law which violates the spirit of the Constitution is as much unconstitutional as one that violates its letter.”) (Bradley, J., dissenting); David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865-1873*, 51 U. CHI. L. REV. 131, 182 (1984) (referring to Chase’s decision and explaining that “Marshall had encouraged such an interpretation by his reference to the ‘spirit’ of the Constitution”).

268. See Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 816 (1996) (discussing references to the “spirit” of the Constitution in the interpretive process).

It is not enough that the 'end [of Congress] be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution.<sup>269</sup>

Notwithstanding the Court's continuing invocation of the Constitution's spirit—and its likewise persistent suggestion that the Constitution's spirit has some content independent from (although perhaps related to) the Constitution's text—we are aware of no sustained judicial or scholarly discussions that elucidate how text and spirit relate to one another or how the question of "spirit" should be applied in constitutional analysis. We agree with those commentators who have observed that the actual substance of the letter-spirit dichotomy is somewhat elusive.<sup>270</sup> And although a full exploration of the subject of the Constitution's spirit is beyond the scope of this Article,<sup>271</sup> we offer a sketch of what an analysis of the "spirit" of the Constitution might entail.

It strikes us there are two general tacks for construing the "spirit" of the Constitution. Under the first conception, the Constitution's "spirit" is linked with basic principles that precede, inform, or limit interpretation and application of the constitutional document. The notion that there are such principles has numerous historical and scholarly adherents and is sometimes associated with claims that the Constitution rests on "natural law" principles.<sup>272</sup> The idea seems generally consistent, for example, with Justice Chase's suggestion in *Calder v. Bull*<sup>273</sup> that in addition to the explicit commands of the Constitution, there exist "certain vital principles in our free

269. 469 U.S. 523, 585 (1985) (O'Connor, J., dissenting) (footnote omitted).

270. See Horwitz, *supra* note 263, at 51 n.91; see also Gardbaum, *supra* note 268, at 816 ("As far as I am aware, the Supreme Court has never explicitly discussed the question whether the 'spirit' of the Constitution is part of the Constitution for interpretive purposes . . .").

271. A more exhaustive treatment of the Constitution's spirit would have to address comprehensively a number of questions, including: (1) is there such a thing as the Constitution's spirit?; (2) how is the spirit to be identified?; (3) does, or should, the spirit play a role in interpreting the Constitution (and can it ever be identified with sufficient particularity to serve as a basis for adjudication)?; (4) if the spirit is relevant to constitutional interpretation, what role should it play?; (5) can the Constitution's spirit ever displace or trump textual provisions?; and (6) if the Constitution's spirit is capable of trumping its text, are all textual provisions equally amenable to being trumped, or are some more susceptible than others?

272. See GARY JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* 67-69 (1986) (arguing that there is a connection between natural law and understanding the spirit of the Constitution).

273. 3 U.S. 3 (Dall.) 386 (1798).

Republican governments, which will determine and overrule an apparent flagrant abuse of legislative power."<sup>274</sup>

Under the second approach, the Constitution's spirit must be gleaned from its specific provisions (with some provisions perhaps more important than others). Gilbert Paul Carrasco and Peter W. Rodino argue, for example, that the Constitution's preamble should be consulted for insight into the overall "spirit" of the Constitution, for it gives the "document as a whole its direction" and in this way enhances constitutional interpretation.<sup>275</sup> Unlike the "exogenous," background principle conception outlined above, this "endogenous" conception is based on the understanding that whatever one construes as the constitutional spirit must arise from the existing provisions of the Constitution. In the words of Chief Justice Marshall, "the spirit [of the Constitution] is to be collected chiefly from its words."<sup>276</sup>

We believe that neither conception of the Constitution's spirit provides a basis for declaring unconstitutional the scenarios under which an already twice-elected President may reassume that Office. This conclusion is not based on the belief that the spirit of the Constitution is irrelevant to constitutional interpretation, nor is it based on the belief that spirit alone can never be the basis for declaring something unconstitutional. Rather, it is based on the particular conviction that spirit alone is not dispositive of the issues we examine here and does not rule out any of the ways in which an already twice-elected President might again assume that Office (or at least the six ways we have identified).

Consideration of the Constitution's spirit does not suggest an entirely different constitutional outcome than that provided

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274. *Id.* at 388. That Justice Chase considered these principles somehow prior to the letter of the Constitution is suggested in his further assertion that "[a]n act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." *Id.*

275. Gilbert Paul Carrasco & Peter W. Rodino, Jr., "Unalienable Rights," *the Preamble, and the Ninth Amendment: The Spirit of the Constitution*, 20 SETON HALL L. REV. 498, 508-09 (1990). Carrasco and Rodino actually suggest that the Declaration of Independence and the Preamble should both serve as bases for discerning the Constitution's spirit. *See id.* at 509.

276. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819). This notion, of course, presents additional questions about the Constitution's spirit: What portions of the Constitution are relevant to determining its spirit? Assuming the Constitution's spirit is based on the existing text, can the spirit be transformed through amendments?

by conventional legal analysis with respect to a question as central as: who may serve as President of the United States, and under what circumstances? It is difficult to imagine, for instance, that a twice-elected President should be prevented from reassuming Office based on a notion about the spirit of the Constitution if it is clear that the reassumption of Office would be permitted on all other interpretive bases.<sup>277</sup>

But this conclusion does not leave us without a constitutional basis from which to criticize some of the scenarios we have presented. Although arguments founded on the spirit of the Constitution are insufficient to hold our scenarios unconstitutional, one still might object to the scenarios for failing to comport with the sensibilities our Constitution and constitutional system have engendered. For example, in considering a conscious effort to circumvent the proscription of the Twenty-Second Amendment and install President Clinton for a third term, we might condemn such an undertaking based on constitutionally-inspired expectations or convictions, while stopping short of declaring it unconstitutional.

Borrowing a phrase from Stephen Carter, this and other end-runs around the Twenty-Second Amendment would seemingly amount to "constitutional improprieties."<sup>278</sup> Although these improprieties are not foreclosed by the Constitution from a strictly legal standpoint, they may be challenged on other bases, including arguments informed by

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277. Were the issue to arise, it likely would be difficult to isolate claims based on spirit from those based on "conventional" interpretative modalities. But to the extent an argument against non-electoral reassumption of office is predicated only on the spirit of the Constitution, we are disinclined to conclude such concerns could, or should, render the proposed reassumption of Office unconstitutional.

278. Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 391-92 (1990). What Carter calls a constitutional impropriety is

an official act that a court ought not or does not forbid but that nevertheless is contrary to the spirit of the document, as reflected in the document's history and in its role in the constitutional story that We the People of the United States, tell about ourselves. A constitutional impropriety, although not identical in a positivist sense to an unconstitutional act, is every bit as offensive to the Constitution, and ought therefore to be every bit as troubling to those who care about constitutionalism.

*Id.* at 391-92. Carter's phrase and argument are useful insofar as they offer a framework for thinking about acts that may not be unconstitutional but may nevertheless offend constitutional principles and our sensibilities about what is advisable under our constitutional system.

constitutional principles and commitments.<sup>279</sup> The conclusion that the Constitution does not forbid an act does not establish that the act comports with Constitution-based values and arrangements. In addition to engaging in legal analyses we can, and we should, debate the virtues of proposed acts, drawing on ideas and ideals shaped by our constitutional system. In so doing, we may avoid constitutional improprieties beyond the reach of our laws—even our supreme law.

### CONCLUSION

Our analysis leads us to the belief that the Twenty-Second Amendment and the Constitution as a whole leave open possibilities for a previously twice-elected President to reassume that Office. This prospect creates the potential for mischief. For instance, we have suggested that a President nearing the end of his or her second term and determined to stay in office might run as Vice President with the idea that the President-elect would step aside, allowing the already twice-elected President (and Vice President-elect) to serve a third term without running afoul of the Twenty-Second Amendment's bar on reelection.<sup>280</sup> Regardless of whether such a plan was pursued with the knowledge of the electorate, there would be inevitable conflict over its legality and wisdom.

But the possibility of an already twice-elected President reassuming that Office also presents opportunities of potential benefit to the polity. Consider the applicability of our scenarios to Congress's responsibility to provide for presidential succession after the Vice President. A number of commentators have charged that the Succession Act of 1947 may supply a chief executive of questionable popular legitimacy and with uncertain political prospects.<sup>281</sup> If these

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279. Presumably, there would also be non-constitutionally-inspired political and policy arguments against those trying to circumvent the Twenty-Second Amendment.

280. The twice-elected President might even choose a "running mate" who did not meet one or more of the presidential qualifications listed in Article II, thereby automatically triggering the provisions of Twentieth Amendment, section three, allowing the Vice President-elect to act as President through the process described in Scenario 4.

281. Allan Sindler has argued that a succession statute should provide "a rapid and stable process which will produce a successor considered legitimate and acceptable by the public." ALLAN P. SINDLER, *UNCHOSEN PRESIDENTS 10* (1976). Former President Harry S. Truman argued that "any man who stepped into the presidency should have at least some office to which he had

are legitimate concerns, one might begin to correct them by enacting a new succession statute that allows former Presidents, including previously twice-elected Presidents, to act as President during a crisis. Instead of providing, for example, that the Speaker of the House or the Secretary of Energy shall assume the Office of President should the need arise,<sup>282</sup> why not tap an ex-President as temporary presidential caretaker?<sup>283</sup> Such an individual would have a reservoir of experience and familiarity with demands of the Office, which could aid the nation in a crisis.<sup>284</sup>

Regardless of whether readers subscribe to our conclusions (or our views about the potential mischief and opportunities flowing from them) we hope our analysis has made clear that the Twenty-Second Amendment is less simple and clear than is presumed by many, and that it fails to provide definite answers about important questions. Given this, and in view of the fact that the Twenty-Second Amendment allows scenarios for continuing presidential service that were likely unimagined and surely unaddressed by those who drafted and ratified it, it is difficult for us to avoid the conclusion, suggested by our earlier discussions of the congressional debates,<sup>285</sup> that the Amendment was poorly written.

But we do not believe that the Twenty-Second Amendment should hastily be repealed or amended. Rather, we counsel a fuller exploration of the Amendment so that its implications may be better understood. There is inherent value in understanding even the Constitution's less frequently debated

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been elected by a vote of the people." See JOHN D. FEERICK, FROM FAILING HANDS 204 (1965) (quoting Harry S. Truman).

282. 3 U.S.C. § 19 (1994). We have noted in another article, see Gant & Peabody, *supra* note 8, that there is a compelling argument that the succession statute is unconstitutional. See generally Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995).

283. The succession legislation would need to specify how a choice would be made between a number of ex-Presidents.

284. If the measures we have described here sound implausible to even the most imaginative of readers, we submit that while they might never occur under "ordinary" political circumstances, they might be deemed as acceptable alternatives during emergencies, especially if it was felt that the leadership of a twice-elected incumbent was necessary in overcoming a crisis. Indeed, as we have seen, FDR and his supporters made something of this argument in supporting his candidacy in 1940 and 1944. See *supra* Part II.C.

285. See *supra* notes 135-65 and accompanying text.

and litigated provisions. Moreover, such an exploration has practical value because some set of circumstances may yet call into question the meaning of the Twenty-Second Amendment.<sup>286</sup>

Presumably, political and popular expectations would discourage the reassumption of Office, even temporarily, by an already twice-elected President. Yet, as with the "two-term tradition" that preceded the Twenty-Second Amendment, existing expectations and perceived customs do not always constrain future political behavior; whatever reluctance there is to sanctioning a reassumption of the presidency may someday be tested and ultimately overcome.

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286. Eisenhower's apparent consideration (however briefly) of running as Vice President suggests the plausibility of a set of circumstances that might test the meaning of the Twenty-Second Amendment. Moreover, when President Clinton's second term expires on January 20, 2001, he will be the youngest American President to have completed two terms. This will leave him with at least the opportunity for continuing his career in public service. Although seemingly implausible given Clinton's impeachment and trial before the Senate as this Article goes to print, were Clinton someday to be elected Vice President, or to serve in some other position putting him in line for presidential succession (*viz.*, certain positions in Congress or the Cabinet), the strictures of the Twenty-Second Amendment might well be put at issue.

