
The Twice and Future President Revisited: Of Three-Term Presidents and Constitutional End Runs

Bruce G. Peabody[†]

On July 26, 2016, just a few hours after former Secretary of State Hillary Rodham Clinton had been formally chosen to be her party's presidential nominee, former President Bill Clinton made the case for his wife's qualifications for the office.¹ On the following evening, sitting President Barack Obama addressed the same Democratic National Convention and argued that "there has never been a man or a woman . . . more qualified than Hillary Clinton to serve as President of the United States of America."² Besides their common support for Secretary Clinton, an underlying constitutional presumption linked the appearances of these past and present Presidents: whatever the future held for Mr. Clinton and Mr. Obama, it would surely not include additional terms as President of the United States.

In fact, Secretary Clinton had previously commented that while the notion of choosing her husband to be Vice President had "crossed [her] mind," her understanding that he could never "succeed to the position" of President made such a choice infeasible.³ "He would be good" as Vice President, Secretary Clinton stated, "but he's not eligible, under the Constitution."⁴

[†] Professor of Political Science, Fairleigh Dickinson University. The author thanks Sandy Levinson, David Rosen, Tori Rosen, Seth Barrett Tillman, and especially Brian Kalt and John Schiemann for their close readings of earlier drafts of this manuscript and their many helpful comments. The author also credits Scott E. Gant for the initial idea of twice and future Presidents, and for much of the research and analysis in the original 1999 piece, which he co-authored. Copyright © 2016 by Bruce G. Peabody.

1. Patrick Healy & Jonathan Martin, *Democrats Make Hillary Clinton a Historic Nominee*, N.Y. TIMES (July 26, 2016), http://www.nytimes.com/2016/07/27/us/politics/dnc-speakers-sanders-clinton.html?_r=0.

2. *U.S. President, President Obama Addresses the Democratic Convention* (CNN Live Event/Special July 27, 2016), <http://transcripts.cnn.com/TRANSCRIPTS/160727/se.05.html>.

3. Tom LoBianco, *Hillary Clinton: Bill as VP Has "Crossed Her Mind,"* CNN (Sept. 15, 2015), <http://www.cnn.com/2015/09/14/politics/hillary-clinton>

In turn, after President Obama's DNC remarks, *CNN* correspondent Jake Tapper stated that the gathered audience was "emotional and sad about the fact" that the incumbent President would be leaving office in 2017. Indeed, Tapper noted that someone in the Convention shouted "four more years" in the midst of President Obama's remarks, expressing a widespread wish among Democrats "even though, of course, that would be, constitutionally, against the law."⁵

Hillary Clinton and Jake Tapper's respective conclusions that neither Bill Clinton nor Barack Obama were constitutionally permitted to serve again in the office of the President is shared by many pundits and scholars.⁶ The primary legal basis for this judgment is found in the U.S. Constitution's Twenty-Second Amendment, which stipulates that "[n]o person shall be elected to the office of the President more than twice."⁷

But this position is not obviously correct. In 1999, when President Bill Clinton's second term was drawing to a close, the *Minnesota Law Review* published "The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment."⁸ In that article, I anticipated the possibility of

-bill-clinton-vice-president; see also Sally Bedell Smith, *Two Presidents in the White House?*, WALL ST. J. (May 18, 2016), <http://www.wsj.com/articles/two-presidents-in-the-white-house-1463570533> (discussing the close working relationship of the two Clintons).

4. LoBianco, *supra* note 3.

5. *President Obama Addresses the National Convention* (CNN Live Event/Special July 27, 2016), <http://transcripts.cnn.com/TRANSCRIPTS/1607/27/se.05.html>.

6. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 491 (1989) ("[T]he Twenty-Second Amendment forbade the President from seeking a third elected term in office."); Richard Albert, *The Constitutional Politics of Presidential Succession*, 39 HOFSTRA L. REV. 497, 565 (2011) ("[A] former two-term President is not eligible" to serve as Vice President); Matthew J. Franck, *Constitutional Sleight of Hand*, NAT'L REV. ONLINE (July 31, 2007), <http://www.nationalreview.com/bench-memos/51444/constitutional-sleight-hand-matthew-j-franck> (arguing that President Clinton cannot become Vice President under the Twelfth Amendment); Alexander Mallin, *Why President Obama Says He Wouldn't Want to Run for a Third Term*, ABC NEWS (Jan 24, 2016), <http://abcnews.go.com/Politics/president-obama-run-term/story?id=36488844> (discussing whether Obama would seek a third term if it wasn't "prohibited under the 22nd Amendment to the Constitution").

7. U.S. CONST. amend. XXII, § 1.

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

twice-elected Presidents serving as Vice President or filling other roles that might allow them to serve again in the office of President.⁹ I concluded that these scenarios were neither constitutionally prohibited nor politically fanciful.

The issues posed by the original article are ripe for reexamination today. To begin with, media and political speculation about Bill Clinton's role in a possible Hillary Clinton White House¹⁰ is widespread, ongoing, and relevant: no previous U.S. administration has faced the extraordinary prospect of having a former President returning to the White House in a non-presidential capacity. Moreover, since the end of his second term, media and other commenters have mused about Bill Clinton's political future and whether he could serve as President again despite existing constitutional restrictions.¹¹

In the case of President Obama, these issues are arguably even more pertinent since he is fifteen years younger than Bill Clinton while remaining popular in his party. Although President Obama has said he wouldn't run for a third term even if he could,¹² questions about his continuing public service and potential role in subsequent administrations will surely surface in the years ahead.¹³

9. Throughout this essay, "twice-elected" will generally refer to both Presidents elected twice and President's elected once who also serve "more than two years of a term to which some other person was elected President" (which the Twenty-Second Amendment equates to an election). The original *Twice and Future President* article was co-authored with Scott E. Gant, but for purposes of consistency and simplicity I shall use first person pronouns in referencing authorship of both the original article and this current essay.

10. Maeve Reston & Sunlen Serfaty, *Bill Clinton Embraces Role of Political Spouse*, CNN (July 27, 2016), <http://www.cnn.com/2016/07/26/politics/bill-clinton-democratic-convention-speech>.

11. Tom Curry, *Could Bill Clinton Be Vice President?*, MSNBC (Feb. 20, 2008), <http://www.msnbc.com/id/23254868>; Jack Shafer, *Vice President Bill Clinton? Take 3*, SLATE (Sept. 7, 2000), <http://slate.msn.com/toolbar.aspx?action=print&id=1006013>; Tony Mauro, *Would the Constitution Prevent a Gore-Clinton Ticket?*, LEGAL INTELLIGENCER, July 21, 2000, at 7; see also Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 857 (2005) (discussing media interest in Clinton as Vice President).

12. Mallin, *supra* note 6.

13. Since 1951 (when the Twenty-Second Amendment was ratified), almost every twice-elected President has generated some chatter about their suitability for a third term; Richard Nixon is one obvious exception. Twice-elected President George W. Bush left office with relatively low public approval, and has not been linked to the vice presidency, but recent polling indicates that his popularity is on the rise (although still substantially below Bill Clinton's). See Philip Bump, *George W. Bush Now Polls Better than Hillary Clinton and Obama*, WASH. POST (June 3, 2015), <https://www>

“The Twice and Future President” was the first sustained and systematic examination of the application of the Twenty-Second Amendment to twice-elected Presidents who might again assume the presidency. Since the publication of that pioneering piece, however, a number of scholars have subsequently considered, challenged, and added to its basic claims and arguments.¹⁴ As Richard Albert puts it, since the start of the twenty-first century, “lawyers, scholars, and lay persons alike have debated whether the Constitution permits—and, if it does, whether it should permit—the vice presidency to serve as a vehicle through which a two-term President might ascend to the Presidency for a third term.”¹⁵ While one might think such a basic constitutional question could be readily addressed, instead it has prompted a “simmering disagreement” among the attorneys, judges, academicians, and political figures who have considered this matter.¹⁶

This updated essay reexamines the basic claims in the “Twice and Future President” article, drawing on subsequent scholarship and criticism, some of which has explicitly engaged the original argument. “The Twice and Future President Revisited” highlights important fault lines in the ongoing debate about the scope and application of the Twenty-Second Amendment, considers the most serious challenges to the view that a President can serve in three (or more) terms, and discusses the wider significance of these ideas.

More specifically, this essay proceeds in five major parts. First, Part I reviews the most important claims in the original “Twice and Future President” article which identified different scenarios through which a twice-elected President might again serve as President. Next, Part II examines the most essential scholarly counter-arguments that the 1999 piece anticipated, especially critical claims against the position that a person

.washingtonpost.com/news/the-fix/wp/2015/06/03/it-may-be-a-bit-early-for-republicans-to-celebrate-the-george-w-bush-popularity-boom.

14. See Michael C. Dorf, *The Case for a Gore-Clinton Ticket*, FINDLAW (July 31, 2000), <http://writ.news.findlaw.com/dorf/20000731.html>; Stephen Gillers, *The Next Best Thing to Being President*, N.Y. TIMES (Mar. 3, 2004), http://www.nytimes.com/2004/03/03/opinion/the-next-best-thing-to-being-president.html?_r=0; Joshua Spivak, *Bill Clinton for Vice President? Forget It.*, HIST. NEWS NETWORK (Mar. 22, 2004), <http://hnn.us/articles/4165.html>.

15. Albert, *supra* note 11, at 857.

16. Peter Baker, *VP Bill? Depends on Meaning of “Elected,”* WASH. POST (Oct. 20, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/19/AR2006101901572.html>.

could indeed serve as President in more than two terms. Part III of this essay considers substantial, new, unanticipated arguments that have been advanced in recent years. Part IV reflects on the broader significance of this debate, contending that the prospect of a “twice and future president” is more than an academic abstraction or “parlor game,”¹⁷ but instead has important political and policy implications. In the fifth and final part, this essay concludes by offering several reflections on whether the U.S. Constitution might simply be amended to address the problems raised by three-term Presidents, and introduces the related concept of “constitutional end runs.”

I. THE ORIGINAL ARGUMENT: THE TWICE AND FUTURE PRESIDENT

To a significant degree, the original argument was based on the Constitution’s text. As I argued in 1999, the language of the Twenty-Second Amendment:

[R]estricts only reelection of an already twice-elected President. 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.¹⁸

These observations are significant given that the Constitution explicitly anticipates numerous means through which a person might become President or “act” as President even without being elected to that office. Succession to the office of President through the vice presidency is perhaps the most obvious, but overall, the original article identified six basic scenarios through which a twice-elected President could again become Commander in Chief.¹⁹ Scenarios 1 and 2 involved twice-elected Presidents serving as Vice Presidents who then either became or acted as President following the removal, death, resignation, impeachment, or disability of the elected President. Scenarios 3 and 4 considered circumstances where a Vice President-elect might become or act as President if the President-elect died before assuming office or if a President-elect was not ultimately chosen or deemed qualified for the office. Scenario 5 focused on statutory succession laws which might name a former, twice-elected President to serve as President, and Scenario 6 concerned a House selection of a

17. *Id.* (discussing constitutional “parlor games” involving Bill Clinton’s role in a Hillary Clinton administration).

18. Peabody & Gant, *supra* note 8, at 613 (citations omitted).

19. *Id.* at 568–69.

twice-elected President under the terms of the Twelfth Amendment under circumstances where no person was able to secure a majority of electoral college votes.

As a corroboration of the textual case for these six scenarios, I extensively probed the legislative history of the Twenty-Second Amendment (including discussions of early versions of the amendment, congressional arguments about how to interpret the final, adopted language, and the sparse ratification debates). While I found no clear-cut evidence that the amendment's authors and supporters consciously wished to leave open a three-term President "loophole," many lawmakers clearly understood that their final language restricting persons "elected to the office of the President" did not foreclose other mechanisms for filling the presidency.

II. ANTICIPATED OBJECTIONS BY CRITICS AND RESPONSES

The original "Twice and Future President" article anticipated objections to these basic textual, historical, and structural arguments—objections that have since been raised and refined by legal scholars and other commentators.

A. THE TWELFTH AMENDMENT

The Twelfth Amendment has been perhaps the most important and recurring source of criticism of the original *Minnesota Law Review* argument. This amendment states that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."²⁰ Scholars have offered three different readings of this "Ineligibility Clause" in order to make sense of how it applies to the Twenty-Second Amendment generally, and the problem of presidential succession specifically.²¹

20. U.S. CONST. amend XII. The Presidential Succession Act of 1947 identifies the line of succession after the Vice President but stipulates that it only applies "to such officers as are eligible to the office of President under the Constitution." 3 U.S.C. § 19. Even though scholars have raised questions about the constitutionality of the law, for the purposes of this essay, one can treat this "eligibility" language as raising the same issues as those posed by the Twelfth Amendment.

21. See Dan T. Coenen, *Two-Time Presidents and the Vice-Presidency*, 56 B.C. L. Rev. 1287, 1293–1331 (2015) (discussing various ways to construe the Twelfth Amendment and its "ineligibility" provision). Coenen's analysis of third-term Presidents is the most thorough and nuanced scholarship on the issue to date.

In the first view, the “constitutionally ineligible” language of the Twelfth Amendment refers to any constitutional restrictions that prevent a person from serving as President through any means. Thus, the Twelfth Amendment’s language surely encompasses the “eligibility” provisions of Article II, Section 1, Clause 5, which are the minimum qualifications needed to serve as President; these include being a “natural born citizen,” at least thirty-five years old, and a U.S. resident for fourteen or more years. Under this reading, a thirty-four year old, no matter how distinguished, charismatic, or worldly, would clearly be barred from the vice presidency under the terms of the Twelfth Amendment and Article II.²² Such a view of the Twelfth Amendment is supported by noting that “because presidential and vice presidential candidates were not formally distinguished” before ratification of the amendment, “anyone elected Vice President was also qualified to be President.”²³ Once the Twelfth Amendment became law, however, these individuals were selected through different electoral procedures and the need to ensure their simultaneous qualification for the office of President became necessary.

Drawing on this interpretation, one might contend that the Twenty-Second Amendment effectively added to the Ineligibility Clause by putting restrictions on twice-elected Presidents.²⁴ Stated differently, perhaps the Twenty-Second Amendment expanded our understanding of who is ineligible to the vice presidency by adding twice-elected Presidents to this prohibited category.

The original “Twice and Future President” rejected this argument on the grounds that the Twenty-Second Amendment eschews the Twelfth Amendment’s general language of ineligibility in favor of focusing specifically on restricting

22. Another attribute that seems applicable to the Twelfth Amendment’s Ineligibility Clause is impeachment. It appears reasonable to stipulate that a President who is impeached and removed from office is ineligible to the office of President (at least for the impacted term) and is also, therefore, ineligible to be Vice President.

23. Peabody & Gant, *supra* note 8, at 618.

24. After all, the Fourteenth Amendment arguably supplemented the Article II restrictions by barring individuals from serving in “any office, civil or military, under the United States” if they previously swore an official oath to support the Constitution but then engaged in “insurrection or rebellion against the same, or [gave] aid and comfort to the enemies thereof.” While this provision originally targeted officers in the states of the Confederacy it could, presumably, also apply to contemporary disloyal rebels and insurrectionaries.

elected Presidents.²⁵ A twice-elected President is surely ineligible, under the terms of the Twenty-Second Amendment, to be *elected* President again, but she is not obviously “ineligible” to *serve* as President through other means.²⁶ Conspicuous here is the parallel “eligible” language in the Twelfth Amendment and Article II—language that is not present in the Twenty-Second Amendment.²⁷

The 1999 “Twice and Future President” article drove this point home by drawing on the legislative history surrounding the Twenty-Second Amendment, demonstrating that the amendment’s authors considered more comprehensive language (that would have made twice-elected President *ineligible* for the presidency) which they subsequently and clearly rejected.²⁸ As the scholar Dan Coenen concludes:

It is strained in the extreme to say that the Twenty-Second Amendment established a rule of ineligibility for purposes of the Twelfth Amendment when Congress, in forging the final version of the Twenty-Second Amendment, chose to jettison the very language on which the argument for ineligibility based on the Twelfth Amendment hinges.²⁹

Notwithstanding this view, some scholars advance an alternate, second reading of the Twelfth Amendment and its relationship to the Twenty-Second Amendment. In this conception, the word “eligible” refers implicitly to *elections*. In other words, under this approach, the Twenty-Second Amendment should be understood to say, in effect, that “no person unelectable to the office of President shall be elected to the office of Vice-President of the United States.”

Two proponents of this point of view are the scholars Akhil Amar and Eugene Volokh. Amar defends his position with an

25. Peabody & Gant, *supra* note 8, at 597.

26. See Dorf, *supra* note 14 (a twice-elected President “is not ineligible to the office of President He is only disqualified (by the Twenty-Second Amendment) from being elected to that office.” (emphasis omitted)).

27. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788 (1999) (discussing an intratextual interpretive approach in which we read “the words of the Constitution in a dramatically different order, placing textually nonadjoining clauses side by side for careful analysis”).

28. Peabody & Gant, *supra* note 8, at 597.

29. See Coenen *supra* note 21, at 1300. One of the “jettisoned” early versions of the Twenty-Second Amendment barred any person from being chosen or serving “as President of the United States for any term, or being 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.” Peabody & Gant, *supra* note 8, at 593.

etymological approach, noting “that the words ‘eligible’ and ‘electable’ spring from the same Latin root, and that standard dictionaries have long included ‘electable’ as one of the traditional definitions of eligible.”³⁰ Volokh’s analysis is similar, although perhaps more explicitly originalist insofar as he argues that eligible and electable were basically interchangeable terms as “understood in 1804,” when the Twelfth Amendment was ratified. As he sees it, since a twice-elected President has no “capacity to be elected” President again under the Twenty-Second amendment, this lack of electoral eligibility renders her unfit to be Vice President as well.³¹

One might begin by noting that such readings of the Twelfth Amendment, even if sound, only prohibit some scenarios though which a twice-elected President might again serve as President. Again, if we accept that eligibility subsumes the concept of election, then the Twenty-Second Amendment can be effectively rewritten to say that “no person unelectable to the office of President shall be elected to the office of Vice-President of the United States.” Even under this reading, however, a twice-elected President could still assume the vice presidency through non-electoral means (such as via nomination, which might occur if the regularly elected Vice President dies, resigns, or is impeached and removed), or could succeed to the presidency through a statute (as authorized by Article II of the Constitution and the Twentieth Amendment).³²

30. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 622 n.8 (2006).

31. See Eugene Volokh, *Bill Clinton for Vice-President?*, VOLOKH CONSPIRACY (June 19, 2006, 1:30 PM), <http://www.volokh.com/posts/1150738214.shtml>.

32. An originalist and historical orientation might contend that the Twelfth Amendment’s language about vice presidential eligibility implies that elections were the only basis for becoming Vice President. In this view, at the time the Twelfth Amendment was ratified, there was no basis for distinguishing between eligibility to be elected Vice President and eligibility to serve as Vice President (because election was the only mechanism for becoming Vice President—since the Twenty-Fifth Amendment, which covered vice presidential nominations, wouldn’t be ratified for another 163 years). Such an approach arguably ignores the provisions of Article II, Section 1 and the Twelfth Amendment which stipulate conditions under which the Senate shall *choose* a Vice President, circumstances that do not obviously equate with election. *But cf.* Brian C. Kalt, *Don’t Kill the Candidate: Remediating Congress’s Failure to Use Section 4 of the Twentieth Amendment*, HARV. J. LEG. (forthcoming 2016). In any event, whatever the framers of the Twelfth Amendment understood about the mechanisms for vice presidential selection,

Moreover, there are several shortcomings with the “eligible means election” approach.³³ To begin with, proponents of this view must presumably understand Vice Presidential eligibility under the Twelfth Amendment to also include the qualification requirements of Article II, Section I, Clause 5 (Presidents must be a natural-born citizen, thirty-five years old, and have fourteen years of U.S. residency). Otherwise, this interpretation of the Twelfth would seem to leave open the odd possibility that one could assume the presidency through non-electoral means without being bound by this qualification language.³⁴ But once we “fold in” the qualification requirements, the Twelfth Amendment becomes something like this: “[T]o be eligible to be Vice President a person must be electable as President.”

But such a move muddies the waters, and detracts from the basic claim that eligibility and electability should be understood as being roughly the same. Moreover, this construction is somewhat odd and even strained given the parallel (ineligible-eligible) language in the Twelfth Amendment. Why would the President’s “ineligibility” refer just to the qualification language of Article II, Section 1, Clause 5,³⁵ while the “eligibility” of the Vice President would refer to

such expectations were clearly modified by the Twenty-Fifth Amendment which provided for nominations to resolve vacancies in the office of the Vice President.

33. See Coenen, *supra* note 21, at 1318–20 (discussing what he calls the “electoral-ineligibility interpretation”).

34. Of course, in other contexts the Constitution imposes requirements for filling an office that apply only at the time of election. See U.S. CONST. art. I, § 3, cl. 3 (“No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, *when elected*, be an Inhabitant of that State in which he shall be chosen.” (emphasis added)). Thus, some constitutional requirements only apply at the time of election, while other requirements go directly to the question of eligibility to be elected or to take or hold office. See Brian Kalt, *Can the Senate Refuse to Seat Blagojevich’s Appointee?*, CONCURRING OPINIONS (Dec. 30, 2008), https://concurringopinions.com/archives/2008/12/can_the_senate.html. A strong case can be made that “eligibility” extends at least to “eligibility to be elected, if not also to holding the office.” See generally Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BRIT. J. AM. LEGAL STUD. 95, 9771 n.1 (2016) (discussing the theoretical difference between “qualifications” and “eligibility requirements”).

35. Presidential constitutional “ineligibility” under the Twelfth Amendment can’t prohibit non-electoral means to the office since that would prevent Vice Presidents from becoming or acting as President. Therefore, the “eligible means election” approach seems to apply the (in)eligibility language

these provisions *plus* the requirement that a Vice President be electable to the presidency?³⁶

In addition, it seems pertinent that the “constitutional ineligibility” language of the Twelfth Amendment occurs at the very end of the amendment, immediately after a discussion of the procedure through which the Senate will “choose the Vice-President,” in circumstances where the presumptive Vice President is unable to secure a majority in the electoral college. If the Twelfth Amendment’s reference to constitutional eligibility was really focused on electability, its syntactic placement (in the same clause discussing a non-electoral procedure) seems peculiar at best.³⁷ Finally, one should note the obvious: the constitutional text references “elections” and “eligibility” as distinct words, and in ways that are not obviously fungible.³⁸

A third and final interpretation of the Twenty-Second Amendment in light of the Twelfth Amendment adopts the view that any twice-elected President is wholly ineligible to be President, and, therefore such a person is also ineligible to be Vice President under the terms of the Twelfth.³⁹ As Matthew Franck puts it:

Since the ordinary path to the presidency contemplated by the Constitution is via the ballots of . . . electors, then by any ordinary

differently for Presidents and Vice Presidents.

36. The best response is probably to argue that the framers of the Twelfth Amendment understood that election covered all means through which a Vice President assumed the office of Vice President, but, as discussed above, this hardly resolves the matter. *See supra* note 32 and accompanying text.

37. The specific, concluding language of the Twelfth Amendment is this:

The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. CONST. art. XII, cl. 1. Arguably, the “[b]ut no” phrasing implies that the eligibility restrictions are pertinent to the Senate’s *choice* of Vice President, a linkage which would seem to weaken the Posner-Volokh “eligibility as election” understanding.

38. *See* Coenen, *supra* note 21, at 1318 (arguing that the “electoral-ineligibility interpretation . . . stretches the text of the Twelfth Amendment beyond the breaking point”).

39. *See* LoBianco, *supra* note 3 (discussing Hillary Clinton making a similar argument about her husband’s vice presidential eligibility).

mode of legal reasoning, the 22nd Amendment changed the answer to the question—who is “constitutionally ineligible to the office of President”? . . . Now the class includes aliens, immigrants, citizens under 35, others failing the residency requirement, and persons previously elected twice (or having served one term elected and more than half of another’s term after succeeding from the vice presidency—another requirement of the 22nd Amendment).⁴⁰

Such a view is probably best defended through a kind of functional analysis. Elections are the ordinary means through which we select Presidents, and serve, in turn, as a pivotal basis for their political and institutional power. Under the terms of the Twenty-Second Amendment, a twice-elected President is barred from accessing this signature means to the presidency. A twice-elected President, therefore, might be understood as ineligible for both the presidency and vice presidency, because the main attribute of a Vice President is her capacity to serve as President of the United States through elections. As Franck summarizes, because a twice-elected President is constitutionally ineligible “to be elected president” he or she is also “ineligible to *become* president by another route. He is, in short, ineligible to *be* president, and therefore ineligible to become vice president under the 12th amendment.”⁴¹

But adopting this position appears to depend on circular logic or miss the broader point: people can become President through electoral as well as non-electoral means. Even if they are prohibited by the Twenty-Second Amendment from assuming the presidency through the former process, it is not obvious why they are precluded from the latter. And, therefore, the Twelfth Amendment’s broad talk of “constitutionally ineligible” Vice Presidents seems largely irrelevant to twice-elected Presidents.⁴²

One might again counter that since elections serve as the most important (and ordinary) means through which people become President, it is reasonable to include other,

40. See Franck, *supra* note 6.

41. *Id.*; see also Albert, *supra* note 6, at 565 (indicating that the vice presidency “is an office for which a former two-term President is not eligible”); Volokh, *supra* note 31 (“[I]t would seem that a two-term incumbent is ‘ineligible’ to the Presidency . . . precisely because he is made *unelectable* to that office.”).

42. Of course, if my judgment is wrong, that is, if twice-elected Presidents are barred under the Twenty-Second Amendment from serving in the office of President, then they are also prohibited from being eligible for the vice presidency under the terms of the Twelfth Amendment.

presumptively less important, non-electoral mechanisms within the prohibitions of the Twenty-Second and Twelfth Amendments. But this idea, that a primary constitutional mechanism subsumes secondary mechanisms, is not an obvious rule of legal construction. Indeed “secondary mechanisms” (such as, say, the recess appointment power) are set out as independent alternatives precisely because they *aren’t* implicit in existing powers.⁴³

B. CONSTITUTIONAL PURPOSES

In addition to the Twelfth Amendment’s Ineligibility Clause, claims about the purposes underlying the Twenty-Second Amendment (and other constitutional provisions) have provided another major line of attack for those skeptical that twice-elected Presidents can again serve in the office of President.⁴⁴

More than thirty-five years ago, John Hart Ely famously criticized “clause bound-interpretivism” in which “judges deciding constitutional issues . . . confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution,” often by focusing on passages in isolation.⁴⁵ Scholars like Franck have decried a similar, narrow, literal tack in construing the Twenty-Second Amendment.⁴⁶ In

43. Moreover, non-electoral presidential succession is not always “secondary” to presidential election as a political matter. When William Henry Harrison died in only his thirty-second day in office, Article II, Section 1, Clause 6 provided that Vice President John Tyler would succeed him, although the exact nature of this transfer of authority was contested. See BRIAN C. KALT, *CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES* 65 (2012). But surely in 1841, this non-electoral basis for power was ultimately more important in filling the office of President (and shaping the course of American history) than the mechanisms of the electoral college.

44. *Id.* at 144 (“The notion that a constitutional provision should be interpreted in a way that vindicates its intended purpose is a powerful one in American law.”); see also Coenen, *supra* note 21, at 1308–14 (considering a “purpose-based analysis” of the Constitution’s application to twice-elected Presidents). See generally Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgments Within Both*, 99 *CORNELL L. REV.* 685, 718 (2014) (discussing the theory of purposivism in statutory interpretation).

45. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1980).

46. Franck, *supra* note 6 (objecting to treating the words of the Constitution “in isolation from one another, rather than as parts of a whole

order to avoid lapsing to a mere academic diversion, in which professors “fiddle around with the text of the Constitution until we make readers believe it means the opposite of what it [actually] says,” Franck proposes that we adopt an understanding of the Twenty-Second Amendment (and Twelfth Amendment) that treats these provisions “as parts of a whole that has an integrated meaning and purpose.”⁴⁷

Among other advantages, such a purposive (and structural) approach enables constitutional interpreters to circumvent crabbed or overly formal readings of the text that, while logically consistent, yield purportedly troubling outcomes.⁴⁸ As Brian Kalt explains, some “constitutional interpreters often prefer a ‘second-best’ reading of the text that vindicates a provision’s purpose, over a reading that parses the text perfectly while missing the point of the provision.”⁴⁹

Applying this sort of a purposive orientation to the Twenty-Second Amendment might lead us to conclude that the “amendment’s drafters [simply] wanted to send presidents home after two terms.”⁵⁰ If we subsequently parse the text and arrive at a legal conclusion with a different result, we run the risk of making “the amendment accomplish the exact opposite of what it was supposed to.”⁵¹ In a related vein, Bruce Ackerman cautions that instead of pursuing “ingenious constructions” of the Twenty-Second Amendment that allow twice-elected Presidents to once again serve as Chief Executives, we should return to the widely understood goals driving its proposal and ratification.⁵²

So what are these objectives, and how do we glean them? The original “Twice and Future President” answered these questions by focusing on the legislative history and intent

that has an integrated meaning and purpose”); *see also* Albert, *supra* note 11, at 857–59 (arguing against narrow clause-bound textualist analysis).

47. Franck, *supra* note 6.

48. *See* Albert, *supra* note 11, at 857–59 (arguing against a “myopic” interpretation of the Constitution in favor of a “proper, holistic reading” that would bar “a two-term President” from again becoming President).

49. KALT, *supra* note 43, at 144.

50. *Id.* at 6.

51. *Id.* at 143.

52. BRUCE A. ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 204 n.34 (2006); *see also* KALT, *supra* note 43, at 144 (arguing that we need to focus on the purpose or “point” of the Twenty-Second Amendment). Kalt does not privilege what I am calling constitutional purposivism, but does give the modality a fair and nuanced application to the Twenty-Second Amendment.

behind the Twenty-Second Amendment and by considering whether a three-term President would somehow violate the “spirit” of the amendment or the Constitution as a whole.⁵³ Scholars have subsequently offered what amount to three specific approaches to construing the purposes of the Twenty-Second Amendment.

First, one might try to define the goals of the amendment⁵⁴ by focusing on the immediate political and historical concerns that spurred its proposal and ratification, namely, preventing another FDR. President Franklin Delano Roosevelt was elected to an unprecedented four consecutive terms, and there is little doubt that this accomplishment alarmed many of the officials and commentators who advocated for a post-FDR limit to presidential service. As Coenen puts it, Roosevelt clearly “framed the thinking of every political representative who was called on to consider the Twenty-Second Amendment.”⁵⁵

This pragmatic recognition of the actual impetus behind the amendment is somewhat appealing, but raises a number of problems. To begin with, seeing the Twenty-Second Amendment as largely an anti-Roosevelt initiative doesn’t clearly delimit what part of his legacy was offensive. Was it the President’s violation of an alleged, informal two-term tradition?⁵⁶ Was it the fact that he served for four *consecutive* terms? Or was it something broader, such as a more thoroughgoing abuse of executive power? The Republican Party Platform of 1948 seemed to endorse this last view, as it congratulated Congress for battling against a “trend of extravagant and ill-advised Executive action” and imposing a

53. Peabody & Gant, *supra* note 8, at 614–17, 627–33.

54. Identifying the “goals of the amendment” might involve at least two intertwined tasks: identifying what the authors and supporters of the amendment intended to *say* (that is what did they think the legal language would accomplish) and examining what they intended to *accomplish* (what broader political and institutional changes they thought would occur as a result of this language). While, obviously, it can be difficult to distinguish these two strands, for those purposivists who insist that some portion of legal language doesn’t really mean what it says (or, at least, isn’t self-evident in its meaning) focusing on what the legal drafters intended to accomplish may help us determine what they intended to say. Thanks to Brian Kalt for this distinction.

55. Coenen, *supra* note 21, at 1307.

56. See Bruce G. Peabody, *George Washington, Presidential Term Limits, and the Problem of Reluctant Political Leadership*, 31 *PRES. STUD. Q.* 439, 440 (2001) (“Conventional popular and even scholarly accounts of the two-term tradition confuse . . . the historical contours of this practice . . .”).

“limitation of Presidential tenure to two terms.”⁵⁷ One suspects that there was no obvious contemporary consensus about what, precisely, was core to Roosevelt’s alleged electoral and political misdeeds.

In any event, interpreting the Twenty-Second Amendment through the perspective of contemporaneous critics of the four-term President, doesn’t really address whether twice-elected Presidents might someday assume office through non-electoral means. As Coenen points out, no advocates for the Twenty-Second Amendment fretted “about electing a former President as Vice-President” because “[t]his possibility was far removed from the sort of overreaching that reformers perceived in the actions of Franklin Roosevelt.”⁵⁸

Perhaps a more promising basis for discovering the true purposes of the Twenty-Second Amendment is to return to the specific discussions that accompanied its passage and ultimate approval. In other words, what objectives did the authors (and supporters) of the amendment express while crafting its language? As already noted, the original “Twice and Future President” analysis covered these issues extensively,⁵⁹ and other scholars have also returned to this history. Without rehashing the discussion in full, there are three pertinent conclusions we can draw from the proposal and ratification debates.

First, the congressional advocates of the Twenty-Second Amendment widely agreed on only generic goals. Many members of Congress who supported the amendment concurred with some variation of the notion that it was designed to

57. *Republican Party Platform of 1948*, AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25836> (last visited Nov. 2, 2016). The Twenty-Second Amendment was both formally proposed by Congress and sent to the states in 1947. It was ratified under the terms of Article V in 1951. See DAVID KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995* 331 (1996); Peabody & Gant *supra* note 8, at 598–99; see also Coenen, *supra* note 21, at 1310 (discussing the ambiguity of Ackerman’s conclusion that the Twenty-Second Amendment was intended to prevent a repeat of “Roosevelt’s lengthy stay in the White House”).

58. Coenen *supra* note 21, at 1307–08. Another objection one might make to a Roosevelt focused approach to understanding the amendment’s purposes is that this privileges the partisan animus that motivated many of the supporters of the Twenty Second-Amendment. See Carlos E. Gonzalez, 80 WASH. U. L.Q. 127, 206 (2002) (“[T]he Twenty-Second Amendment demonstrates how party politics can distort the ability of legislative bodies to embody We the People.”).

59. Peabody & Gant, *supra* note 8, at 599.

prevent anyone “from holding too long the office of Chief Executive” (out of fear that this would pave the road to entrenched and tyrannical rule).⁶⁰ Thus, the Senate Report that accompanied the amendment called the measure “a reasonable restriction on the possibility of an executive dynasty.”⁶¹

Second, and as noted earlier, it seems fair to conclude that nothing in the deliberations surrounding the Twenty-Second Amendment indicate Congress intended to open the door to a future three-term President. That said, there is ample evidence that legislators were aware of the constitutional differences between elections and other mechanisms for attaining the presidency. As Kalt argues, such distinctions were “not subtle” and were surely on the minds of many lawmakers. After all, the framers of the Twenty-Second Amendment contemplated and debated its contours while keenly aware that President Truman had entered the White House through non-electoral means.⁶²

Indeed, the third observation one should make about the debates that produced the Twenty-Second Amendment is that Congress initially considered quite different, and more comprehensive legal language, which it subsequently abandoned in favor of its ultimate focus on presidential elections.⁶³ The initial proposal approved by the full House, for

60. 93 CONG. REC. 1945 (statement of Sen. Revercomb); *see also* Peabody & Gant, *supra* note 8, at 614–17; KALT *supra* note 43, at 134–58.

61. S. REP. NO. 80-34, at 2 (1947). Of course, if one takes the “dynasty” view seriously, it suggests that a Clinton-Clinton ticket would be more reprehensible than, say, a Clinton-Obama ticket.

62. *See* KALT, *supra* note 43, at 139 (when the amendment was crafted “every generation in living memory had featured unelected presidents”). One can probably conclude that the framers of the Twenty-Second Amendment were, on the whole, aware that their language created “loopholes,” but their pragmatic judgment was that it was so unlikely these loopholes would be exploited that they thought the “simple” text ultimately adopted was worth this risk. *See* Peabody & Gant, *supra* note 8, at 595 n.145 (discussing Senator Warren Magnuson’s contention that the “simple” language of the amendment would help “the people of the United States . . . know what they are voting on when it is presented to the States”).

63. Some early versions of the Twenty-Second Amendment restricted how long a person could “hold the office of President,” perhaps not covering individuals who would simply “act” as President, while others unquestionably covered both those holding the office and acting as President. But, again, it remains difficult to know whether this legislative history points to the true concerns of the Twenty-Second Amendment’s authors, or confirms that the final language focusing on restricting elections was consciously and carefully chosen. KALT, *supra* note 43, at 140.

example, stipulated that “[a]ny 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.”⁶⁴ This approach would have precluded some if not all of the three-term President scenarios discussed in the original “Twice and Future President” article.⁶⁵ But Congress ultimately approved the more ambiguous and less comprehensive language we know today as the Twenty-Second Amendment.⁶⁶

Before leaving the purposive argument about the Twenty-Second Amendment, one might consider a third and final approach, one that transcends both a narrow political focus on FDR’s opponents as well as a sustained inquiry into the intentions of the specific congressional proponents of the law. Instead, we might look to *popular* understandings of the amendment. What were the expectations of “ordinary” Americans about what the measure was supposed to accomplish? This orientation may make particular sense in the context of a constitutional amendment, which is a broad-based change to a form of law that has a unique and privileged relationship with the American people.⁶⁷

64. H.R. REP. NO. 80-17, at 1 (1947). Coenen notes that one might argue that this early comprehensive language in the House signaled the true intentions of Congress, but given the ultimate approved language this argument appears strained. Coenen, *supra* note 21, at 1300 (dismissing the argument that “the repeated references to eligibility in early incarnations of the Amendment demonstrate that the phrase ‘[n]o person shall be elected’ was meant to carry forward, rather than to abandon, a principle of ineligibility”).

65. The indicated language is not necessarily comprehensive. One might argue, for example, that being “ineligible to hold the office of President” is different from being able to act as President, a distinction perhaps implied by the language of the Twenty-Fifth Amendment which distinguishes circumstances where Vice Presidents “become President” and those where a VP is “Acting President.” Thanks to Seth Barrett Tillman for this argument.

66. What is the explanation for Congress’s shift from the seemingly comprehensive language of the House to the election oriented language of the actual Twenty-Second Amendment? The legislative history provides no clear answer. Political compromise, and the belief of some that the Senate language was simpler seem to have been motivating factors. Coenen further makes the case that the shift reflected coalition building efforts including less encompassing language “was designed to respond to widespread concern about the scope of the then-pending draft’s displacement of the preexisting norm of voter autonomy in executive branch elections.” Coenen, *supra* note 21, at 1305.

67. SOTIROS A. BARBER, ON WHAT THE CONSTITUTION MEANS 50–57 (1986) (describing an “aspirational” understanding of American constitutionalism in which the “typical citizen” accepts the supremacy of the Constitution as binding on him or herself).

Trying to ascertain “the people’s” understanding of the Twenty-Second Amendment is at the heart of a number of analyses of the amendment’s purposes. Thus, Amar emphasizes that the amendment is an example of a “self-imposed” limit on Americans’ electoral choices, a restriction “resulting from a broadly inclusive democratic process featuring a series of extraordinary votes” designed “to prevent entrenchment in America’s most powerful office and to promote a healthy rotation.”⁶⁸ Similarly, Ackerman objects to the idea that a twice-elected President can serve as Vice President (or otherwise serve as President again) on the grounds that the Twenty-Second Amendment “represents a considered judgment by the American people, after Franklin Roosevelt’s lengthy stay in the White House” to limit the President to no more than “two elected terms.”⁶⁹

This “popular expectations” approach to constitutional purposes is not without its challenges. Most obviously, we cannot readily identify what the American people believed the Twenty-Second Amendment was supposed to accomplish. Polling from 1939–1949 indicates, at best, deeply divided public opinion on several variations of this question.⁷⁰ For example, in 1949, when the Twenty-Second Amendment was making its way through the states as part of the ratification process, forty-nine percent of the public opposed “adding a law to the U.S. Constitution to prevent any President of the United States from serving a third term” (while forty-three percent approved this language).⁷¹ It’s not clear how much of this opposition (or support) reflects a judgment that the Twenty-Second Amendment would prevent people from serving in a third term. But even if we stipulate that this *is* what the public believed,

68. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 37 (2000).

69. ACKERMAN *supra* note 52, at 204 n.34.

70. Among other problems, one should note that this public opinion data was measured in a period when reliable polling was still in its infancy. See generally BARBARA A. BARDES & ROBERT W. OLDENDICK, *PUBLIC OPINION: MEASURING THE AMERICAN MIND 18–19* (5th ed. 2016) (discussing the origins of the modern polling industry).

71. Kathleen Weldon, *The Public and the 22nd Amendment: Third Terms and Lame Ducks*, HUFFINGTON POST (Aug. 11, 2015), http://www.huffingtonpost.com/kathleen-weldon/the-public-and-the-22nd-a_b_7967538.html; see also Stephen W. Stathis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?*, 7 CONST. COMMENT. 61, 65 (1990) (discussing popular attitudes about the Twenty-Second Amendment in the years leading up to its proposal).

the polling data indicates a popular plurality *rejecting* this purpose.

The state ratification debates, which could be another promising source for information about popular beliefs about presidential term limits, don't furnish much help either. As one periodical summarized, the Twenty-Second 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."⁷²

In summary, what can we conclude about the intended purposes of the Twenty-Second Amendment? Does a purposive approach (whether informed by the amendment's proximate historical context, relevant legislative history, or popular understandings) allow us to circumvent or at least supplement a plain words reading of the amendment? If not, don't we run the risk of allowing "a president who is barred from an honest reelection to become president through some ponderous constitutional convolution?"⁷³

But instead of offering a choice between "common sense" understandings and the worst of academic casuistry, these questions point instead to a values dilemma: an irreducible tradeoff between our commitment to constitutional text and constitutional purposes. The decision to set aside a textual command in favor of purposes (assuming we can identify them) must be weighed on several scales, including measures of the clarity of the text, how confidently we can construe a purpose at odds with that language, and the legal and political consequences at stake in one interpretation versus another.⁷⁴ A purpose-based analysis may help a legal interpreter sift through multiple plausible readings of a law, or it may assist

72. *The Two-Term Limit*, NATION, Mar. 10, 1951, at 216–17; see also LOUIS W. KOENIG, THE CHIEF EXECUTIVE 65 (1964) (the Twenty-Second Amendment's "four-year journey through the state legislatures stirred a minimum of public discussion").

73. KALT, *supra* note 43, at 144.

74. See Peabody & Gant, *supra* note 8, at 614 (discussing problems in discerning the "legislative history" of a constitutional amendment). For a discussion of the relative merits and disadvantages of executive term limits, see generally Tom Ginsburg, James Melton, & Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807 (2011) (noting that sufficient popularity enables executives to ignore term limits by amending or replacing constitutional provisions imposing them).

us in deciding that our adherence to legal language needs to be set aside in favor of other trumping values. But deviations from text come with a cost. The purported advantages of textual analysis include accountability (that is, knowing something about who the authors of a law are), clarity of guidance, limiting judicial discretion, and stability.⁷⁵

It is beyond the scope of this essay to engage in a thoroughgoing analysis of the text-purpose tradeoff in general, or how we might reconcile it in the complicated case of the Twenty-Second Amendment specifically. Nevertheless, given the seeming lack of ambiguity in the amendment's language (a point conceded by several *defenders* of purposive readings of the Twenty-Second Amendment) and the comparatively equivocal and mixed goals of the amendment's contemporaneous supporters, it seems reasonable to put the burden on purpose-impelled skeptics to explain why a twice-elected President is ineligible to serve again.⁷⁶

III. MAJOR NEW OBJECTIONS BY CRITICS AND RESPONSES

As we have seen, the original "Twice and Future President" article anticipated some of the major lines of criticism that were raised after the piece was published. Specifically, these objections were based on the purported limiting effects of the Twelfth Amendment on the Twenty-Second Amendment, and various readings of the Twenty-Second Amendment's true purposes. But nothing in these claims seems sufficient to overturn the article's original conclusion: on balance, neither the Constitution's eligibility provisions nor the best efforts to ascertain the purposes and functions of the amendment bar a twice-elected President from again seeking the office through

75. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 25–38 (1982) (reviewing textual argument and some of its advantages); SUE DAVIS, *CORWIN AND PELTASON'S UNDERSTANDING THE CONSTITUTION* 31–38 (17th ed. 2007) (reviewing different approaches to constitutional interpretation including textualism); *see also* KALT, *supra* note 43, at 140 (arguing that the authors of the Twenty-Second Amendment were keenly aware of how, especially in the context of constitutional amendments, they would need to weigh and select every word carefully).

76. As Coenen notes, "the framers of the Twenty-Second Amendment" tried to strike a balance between their competing worries about entrenching the power of one figure through extended occupation of the presidency and "stripping away the longstanding prerogatives of the American electorate" to select their Chief Executive. Coenen, *supra* note 21, at 1311.

means other than presidential reelection. However, over the past decade or so, scholars have raised other and more novel objections, and these deserve to be taken seriously as well.

A. THE PRESIDENT IN WAITING RESTRICTION

We might begin with a somewhat truncated argument offered by judge and scholar Richard Posner. Posner has argued that “read literally, the Twenty-Second Amendment” allows former Presidents to serve as Vice Presidents.⁷⁷ But he also advances an alternate reading of the Twenty-Second Amendment in which its restrictions on persons “elected to the office of the President more than twice” apply to any person elected to the vice presidency who subsequently takes office as President, since such a person is elected to the vice presidency with the presumption of being able to serve in the office of President.⁷⁸ As Posner puts it, “Electing a vice president means electing a vice president and contingently electing him as president. That interpretation, though a little bold, would honor the intention behind the Twenty-Second Amendment.”⁷⁹ In other words, a twice-elected President could not serve as Vice President through election, because such a person would be elected to the vice presidency and *contingently* elected President at the same time (violating the provisions of the Twelfth and Twenty-Second Amendments).

Posner’s interpretation that a Vice President is elected as “President in Waiting” is characteristically creative, and reflects the important recognition that the Vice President and President are paired as the only two officials elected by the nation as a whole. It may also implicitly acknowledge that the office of Vice President has often been seen as somewhat politically and legally hollow, only truly meaningful if permanent or temporary succession to the presidency is required.

That said, the “President in Waiting” reading of the Twenty-Second Amendment’s application to the vice presidency suffers from several flaws. To begin with, one might note that the vice presidency is an official office to which a person is elected. Vice Presidents possess official and unofficial functions besides being able to take over as President. Most notably, the

77. Baker, *supra* note 16 (quoting an email message from Judge Posner).

78. *Id.*

79. *Id.*

Vice President serves as President of the Senate, breaking ties in that body.⁸⁰ Seen in this light, when voting for Vice President, the public doesn't just cast its ballots for a "President in Waiting," but for a particular constitutional officer. This point somewhat undermines Posner's contention that the Twenty-Second Amendment's prohibition of any person being "elected to the office of the President more than twice" includes both Presidents elected to the office and Vice Presidents elected to a separate office who subsequently become President or act as President.

Furthermore, the terms of the Constitution (and specifically the Twelfth, Twenty-Second, and Twenty-Fifth Amendments⁸¹) do nothing to suggest that a person who succeeds to the office of President as an elected Vice President has thereby been effectively "elected to the office of President." As Coenen points out, the constitutional text actually "makes it clear that such a person is *not* elected to the office of the President, but instead is elected to the office of the Vice-President, just as common usage would suggest."⁸²

Finally, one might note that Posner's "President in Waiting" interpretation of the vice presidency leaves other issues unresolved. For example, the argument only seems to cover circumstances where a person is *elected* to the office of Vice President as opposed to being nominated (under the terms of the Twenty-Fifth Amendment).⁸³

80. The participation of the Vice President is also required under the terms of the Twenty-Fifth Amendment for declaring that a sitting "President is unable to discharge the powers and duties of his office." U.S. CONST. amend. XXV, § 4; see also Sanford Levinson, *No Vice*, BOS. GLOBE, July 1, 2007, at D1 (discussing the "unprecedented influence" wielded by former Vice President Dick Cheney); Scott Shane, *Cheney in Dispute on Oversight of His Office*, N.Y. TIMES (June 22, 2007), <http://www.nytimes.com/2007/06/22/washington/22cnd-cheney.html> (former Vice President Cheney arguing that the office of VP is uniquely positioned between the legislative and executive branches).

81. For example, the Twelfth Amendment sets out separate procedures (including "distinct ballots") for selecting Presidents and Vice Presidents, and the Twenty-Second Amendment explicitly constrains the service of a Vice President who holds the office of President or acts as President during a term "to which some other person was elected President," language indicating that a President's conventional selection via election is qualitatively distinct from a Vice President's succession to the presidency.

82. Coenen, *supra* note 21, at 1321–23.

83. Also, it isn't clear how the Posner thesis would apply generally to Vice Presidents who succeed to the office of President, including Presidents elected to a *single* term who then serve as Vice President and, subsequently, President through succession. Presumably such persons are simply bound by

B. A REVERSE READING OF THE TWENTY-SECOND AMENDMENT

Besides Posner's approach, legal researchers have identified a second inventive objection to some kinds of three-term Presidents, based on what one might call a "reverse reading" of the Twenty-Second Amendment. We have already seen how some constitutional scholars have called for transcending supposedly cramped, acontextual, "clause-bound" analyses of presidential term limits, favoring, instead, a more purposive and structural approach. In a different context, Amar has advocated for a general "intratextual" orientation, in which we eschew reading "the words of the Constitution in order" in favor of a more "holistic" conception.⁸⁴

This modality for construing constitutional text sets the stage for an innovative, almost non-linear reading of the Twenty-Second Amendment, one that focuses on the language restricting those who have "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."⁸⁵ The reverse reading contends that under these terms, a twice-elected President is only eligible to become President or act as President through non-electoral means for two years or less in a given term begun by a different, elected President.

Read in a straightforward way, the language of the Twenty-Second Amendment anticipates that some who succeed to the presidency (through non-electoral means) will hold the office, or act as President for a time, but may still seek to gain the office again by election. Such persons are limited to one elected term if they held the presidency ("or acted as President") for "more than two years of a term to which some other person was elected."⁸⁶

But suppose that after two elected terms, a former President is subsequently elected Vice President. This person then becomes President after, say, the elected President dies, a

the "two year rule"—so long as they succeeded to the presidency for two years or less, they are eligible to be elected President a total of two times. But this view seems in some tension with the idea that a twice-elected President is barred from being elected as VP because doing so elects her as a President in Waiting. Why isn't a President elected to one term and subsequently elected VP also an elected President in Waiting (and therefore restricted under the Twenty-Second Amendment even if she serves as President through succession for only one day)?

84. Amar, *supra* note 27, at 788.

85. U.S. CONST. amend. XXII.

86. *Id.*

few months into the new term. Under these circumstances, can we sensibly claim that the Twenty-Second Amendment places a two-year cap on the successor President's service? After all, as soon as this individual serves for *more* than two years of a term to which some other person was elected, hasn't she violated the amendment's language that says such persons shall not "be elected to the office of the President more than once"?⁸⁷ Is this successor President, therefore, obliged to step down after two years?

Coenen offers two main reasons why this reverse reading of the Twenty-Second Amendment is troublesome. First, he notes that the different tenses in the Amendment imply that it applies to a President "who *has* [previously] *held* the office of President, *or acted* as President, for more than two years" of another's term who "*thereafter*" is elected to the Office.⁸⁸ In other words, the sequence of this language seems to go one way: governing only those who obtain the office through non-electoral means but *then* seek election.

Coenen's second point is that a reverse reading of the Twenty-Second Amendment can have strange policy and political implications. After all, it could require a "successor President to step down in the middle of a four-year term—indeed, in the middle of a four-year term during which one hand-off of the presidency had already occurred—thus thrusting a *third* President into a single, four-year period of service."⁸⁹ Such an outcome would be "disruptive of government operations, and so fraught with peril for the nation that the framers of the Twenty-Second Amendment could not have envisioned it."⁹⁰ We might add to Coenen's arguments by noting that this obligatory departure would be curious insofar as its closest analogies (mandatory intra-term removal of Presidents occurs only through impeachment, resignation, disability, or death) possess a much different character (since they deal with emergencies and unforeseen and unavoidable events).

87. See Coenen, *supra* note 21, at 1327–89 (discussing what he calls "the two-years-only-succession-right interpretation"). See generally Bruce G. Peabody, *Reversing Time's Arrow: Law's Reordering of Chronology, Causality, and History*, 40 AKRON L. REV. 587 (2007) (discussing problems with chronology and the law).

88. Coenen, *supra* note 21, at 1329 (emphasis in original).

89. *Id.* at 1330 (emphasis added).

90. *Id.* at 1330.

A final obvious objection is to note that “reverse readings” are not the standard ways of understanding sentence construction, and can lead to perverse (and clearly incorrect) outcomes in other contexts. The proposition that “[n]o one who commits a felony shall be allowed to vote” is a relatively straightforward legal rule, but its reverse reading (something like: “If you are allowed to vote, you shall not commit a felony”) is neither the intended purpose nor coherent. The reverse reading of the Twenty-Second Amendment seems open to a similar critique.

C. THE TRANSITIONS CLAUSE OBJECTION

In addition to both the “President in Waiting” argument and the “reverse” reading of the Twenty-Second Amendment’s restrictions, the amendment’s concluding “Transitions Clause” has been a source of imaginative new arguments against the possibility of three-term Presidents. Specifically, the transitions language of the Twenty Second Amendment holds that:

[T]his article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term.⁹¹

These provisions do two things: first, they effectively exempted the President sitting at the time the amendment was proposed (Harry Truman) from the law’s restrictions. More important for the purposes of this essay, the text’s subsequent and rather encompassing language (which references both individuals “holding” the office or “acting” as President) seems to anticipate various ways through which someone might assume the presidency, including through non-electoral means. In the judgment of scholars like Amar, such comprehensive language wouldn’t be necessary if the rest of the Twenty-Second Amendment only restricted presidential elections.⁹² Stated differently, why would the Transitions Clause give special protection to “acting” Presidents (which might include Vice Presidents who have temporarily taken over the duties of an elected President) if these figures weren’t otherwise restricted under the terms of the Twenty-Second Amendment?

91. U.S. CONST. amend. XXII, § 1.

92. AMAR, *supra* note 30, at 436 n.8.

As Coenen summarizes:

[T]here would be no reason to give a Vice-President-turned-President, who had twice before been elected President, special dispensation to serve ‘the remainder’ of the ratification term unless the operative terms of the Twelfth and Twenty-Second Amendments otherwise foreclosed such a person from becoming Vice-President and thereby assuming the rights and duties of that office, as a general rule.⁹³

At first blush, this seems like a substantial blow against the analysis and conclusions advanced in the original “Twice and Future President” piece. However, several points limit the damage done by this “transitions” argument. First, there are good reasons to think that the transitions language in the Twenty-Second Amendment is distinct and stands on its own from the rest of the text’s provisions.⁹⁴ Indeed, the language of the Twenty-Second Amendment seems to apply distinctly to three different groups of people. The first is comprised of the sitting President at the time the amendment was *proposed* (as noted, Truman is exempted from the Twenty-Second Amendment). The second group consists of anyone serving as President (through election or other means) during the presidential term when the amendment *goes into effect*. The individuals in this second group (the elected President at the time of ratification, or any person acting as President or who became President during this term) are allowed to finish their term even if the Twenty-Second Amendment would otherwise restrict them. And the third group, then, represents every other subsequent President.

This approach, based on understanding the “transitions” language as limited to the first and second groups of Presidents, sequesters the Transitions Clause from the rest of the Twenty-Second amendment. Such a construction is supported by both the explicit language of the amendment (which establishes unique rules for each group), as well as the sequence in which these words appear. In order for Amar’s “transitions” argument to apply, we would have to assume that “the drafters of the Twenty-Second Amendment somehow meant to set forth a [general,] functionally problematic restriction” in a transition clause at the very end of the Amendment, rather than at the outset, where the basic terms of the Amendment are presented.⁹⁵ One might plausibly

93. Coenen, *supra* note 21, at 1315.

94. *Id.* at 1326.

95. *Id.* at 1343.

criticize such a reading as one where the Transition Clause's "tail" wags the "dog" constituted by the rest of the amendment. As Coenen puts it, "transition clauses themselves do not establish operative rules" but only rules regarding "the transition period itself."⁹⁶ In contrast, Amar's approach to the Twenty-Second Amendment arguably privileges the Transition Clause at the expense of both the core language of the Twenty-Second Amendment and the drafting lawmakers' focus on limiting elected Presidents.

D. JURISPRUDENTIAL PRAGMATISM AND THREE-TERM PRESIDENTS

One can identify a final set of new arguments made against the basic conclusions of the original "Twice and Future President." While not consistently pursued, some analyses of the Twenty Second Amendment implicitly or briefly draw on variants of jurisprudential pragmatism in criticizing the three-term presidency thesis.⁹⁷ Such pragmatic approaches weigh heavily the legal and political implications of interpreting a law or favor consequentialist considerations in helping to select between several plausible readings of legal language. As Posner famously articulated, for a judicial pragmatist, "[I]f one possible interpretation of an ambiguous statement would entail absurd or terrible results, that is a good reason to reject it."⁹⁸

Pragmatic interpretations of the Twenty-Second Amendment might focus on the potential deleterious effects of permitting individuals to serve as President for more than two terms. These outcomes might include entrenching executive power and imbalancing the separation of powers. Further, if one believes that the Twenty-Second Amendment (and the

96. *Id.* at 1327, 1336.

97. *See, e.g.*, KALT, *supra* note 43, at 138 (discussing how "voters' policy preferences" and considerations of "political expedience" would matter a great deal in applying the Twenty-Second Amendment to the problem of three-term Presidents); Coenen, *supra* note 21, at 1326 (discussing the importance of "practical problems" in interpreting the Twenty-Second Amendment including concerns about "destabilizing uncertainty and political gamesmanship as to what person might come to occupy the highest office in the land").

98. RICHARD A. POSNER, *OVERCOMING LAW* 234 (1995). As we've already seen, Coenen relies on a pragmatist argument in opining that compelling a President to step down in the midst of a term (required under the "reverse reading" approach to the Twenty-Second Amendment) would be so "odd," so politically unsettling, and so perilous for the nation that it must be rejected. Coenen, *supra* note 21, at 1330.

Constitution as a whole) technically allows for a third-term President, one might still disfavor this interpretation on the grounds that much of the public and many political leaders would reject or question this viewpoint. This need not simply be a matter of “knuckling under” to public opinion, but a recognition that in our political order, the voices of “We The People” have always been powerful determinants in shaping the effective meaning of our highest law.⁹⁹ Even if a twice-elected President determines that the weight of all other evidence suggests she *can* serve as Vice President, she might conscientiously choose not to do so if convinced that most people hold a different view of not just the political wisdom but the constitutional propriety of such a move. Stated differently, the public’s views are likely to form an outer boundary of what our constitutional politics will permit.

In the face of such opposition, a legal pragmatist might be concerned that a nation facing a three-term President might also experience *de facto* uncertainty about who has authority to act as Commander in Chief or even some delegitimization to our political institutions and the rule of law (with opponents of the “twice and future President” argument dismissing it as a kind of lawyerly “trick” that runs against common sense).

These are serious concerns. Three factors, however, make the pragmatist argument difficult to apply to the circumstances considered in this essay. To begin with, a meaningful evaluation of the consequences of a third term presidency is likely to require case-specific analysis.¹⁰⁰ An unpopular former Chief Executive who is elevated to the presidency without widespread support and by “accident” (perhaps this person was

99. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 4 (2009) (discussing how “the American people came to understand and then to shape the role played by the justices, thus defining the terms of their own constitutional democracy”); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 29–34 (2004) (describing the American “customary” or “popular” view of constitutional law in which “constitutional interpretation and enforcement were left to the community”).

100. Judicial pragmatism can involve either general or specific legal judgments. We can say that the reference to “He” in Article II, Section 1, should not be understood to limit the presidency to men either because it would entail the ridiculous and impermissible result that women would be excluded from the presidency or in noting that such an interpretation would set aside the popular judgment of the people if they, say, elected Hillary Clinton as President.

named in a presidential succession statute) raises a substantially different pragmatist assessment than a scenario where a victorious President-elect dies, but only after selecting a respected twice-elected Vice President as running mate (a choice that is explicitly sanctioned by the public through, say, an electoral college landslide).

The second, related observation is that the “absurd or terrible” legal and political outcomes pragmatists seek to avoid can be difficult to measure, especially longitudinally. When initially announced, *Miranda v. Arizona* (1966)¹⁰¹ mandated unpopular constitutional rules that were broadly opposed by law enforcement personnel, lawmakers, a majority of the public, and even some judges.¹⁰² Some of these figures declared that the *Miranda* rules would hamper law enforcement efforts and lead to a dramatic rise in crime.¹⁰³ By 2000, however, public opinion overwhelmingly supported the ruling and it had famously “become embedded in routine police practice to the point where the warnings . . . [were] part of our national culture.”¹⁰⁴ Our abstract and acontextual assessments about the consequences of allowing a twice-elected President to serve again must recognize that even strongly held views about the legitimacy of laws (and their effects) can shift dramatically over time.

The third, closely related point is simply to observe that jurisprudential pragmatists, especially those making assessments from the relative isolation and insulation of the bench, should exhibit humility regarding their capacity for political and consequential judgment; this is an area where courts should generally defer to the views of elected officials,

101. *Miranda v. Arizona*, 384 U.S. 436 (1966).

102. MATHEW E. K. HALL, *THE NATURE OF SUPREME COURT POWER* 61–71 (2010) (reviewing reactions to *Miranda* and scholarship on its implementation and impact).

103. See, e.g., *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedure of the S. Comm. on the Judiciary*, 90th Cong. 1120 (1967) (statement of New York County District Attorney Frank Hogan).

104. *Dickerson v. United States*, 530 U.S. 428, 430 (2000); Bruce Peabody, *Fifty Years Later the Miranda Decision Hasn't Accomplished What the Supreme Court Intended*, WASH. POST: THE MONKEY CAGE (June 13, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/13/your-miranda-rights-are-50-years-old-today-heres-how-that-decision-has-aged-down...abundant-evidence-shows-that-over-the-years-the-basic-miranda-rules-were-accepted-by-society/> (contending that while the decision was “widely unpopular when first handed down . . . abundant evidence shows that over the years, the basic *Miranda* rules were accepted by society”).

policymakers, and voters. With respect to the issues considered in this essay, there's no reason to think that judicial and legal expertise make judges especially capable of weighing the long term outcomes of permitting or forbidding a person from serving as President in a third term. There surely are areas of law where judges are better positioned for these sorts of policy determinations. In evaluating the impact of the *Miranda* warnings, for example, judges had many iterative opportunities to ascertain the decision's effects and weigh these with standards and metrics courts were familiar and comfortable using (such as the rates at which confessions were thrown out). But *sui generis* judgments about what will happen if we allow, say, President Obama to serve as Vice President is not the kind of subject within the ken of most jurists, because it raises so many unfamiliar and speculative questions about political legitimacy and effectiveness.

IV. BROADER IMPLICATIONS OF THE THREE-TERM PRESIDENTS THESIS

Since 1999, a small but serious-minded group of researchers have considered whether twice-elected Presidents can once again serve as the nation's Chief Executive by pushing their way through various interstices in our supreme law.¹⁰⁵ These scholars have reviewed and engaged past debates on this question, and introduced new lines of inquiry, but have not achieved much agreement about the Constitution's strictures regarding presidential service.¹⁰⁶ This absence of consensus, together with the conclusions of prominent political figures (including both Clintons) that twice-elected Presidents *cannot* again serve in the office of President places a heavy burden on those arguing to the contrary.¹⁰⁷ Indeed, unsettled legal terrain

105. See Baker, *supra* note 16 (discussing how the prospect of Vice President Bill Clinton generates disagreement amongst scholars, judges, and lawyers); Spivak, *supra* note 14 (noting that scholars disagree about the application of the Constitution to a potential Clinton vice presidency).

106. See Baker, *supra* note 16 (discussing the "simmering disagreement on whether a president who has already served two terms can be vice president").

107. When prominent officials like the Clintons express doubts about the three-term presidency it creates something of a practical precedent that poses an additional challenge for future twice-elected Presidents who wish to serve again. As Kalt puts it, "The more that Congress and Presidents reinforce the constitutional impropriety of serving more than two terms, the more voters will be inclined to vote against a candidate trying to exploit the careless loophole left in the Twenty-Second Amendment, and thus the smaller that

is not a reassuring surface for someone who would consider taking a bold and dramatic step back to the White House. Nor is it comfortable footing for a nation that needs to have unstinting confidence in the authority, legitimacy, and power of its Commander in Chief.

So, stated somewhat differently, aren't the stakes simply too high to entertain seriously the arguments advanced in both the original "Twice and Future President" piece as well as this updated essay? And if that's the case, what's the broader purpose of this inquiry? What makes it something "more than an academic diversion?"¹⁰⁸

The first point to note in this regard is that however unlikely the circumstances outlined in this essay seem to be at the moment, politics, even constitutional politics, can be a dynamic and even fickle enterprise. The remarkable post-Civil War expansion of black voting power and civil rights was impelled by outright military surrender, the Reconstruction Amendments, and a vigilant and motivated Republican party.¹⁰⁹ In less than a generation, however, party interests shifted and much of this progress was undone.¹¹⁰ The jurisprudential gap between *Bowers v. Hardwick* (denying "a fundamental right upon homosexuals to engage in sodomy")¹¹¹ and *Obergefell v. Hodges* (extending Fourteenth Amendment protections to "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs")¹¹² seems vast, but is separated by less than 30 years. One can surely identify other instances of relatively rapid legal transformations.¹¹³

The potential for change in our future political and legal attitudes should, therefore, induce us to think carefully about what appear to be seemingly unlikely scenarios today. After all, one of the primary purposes of written law is to try to constrain imperfectly foreseen events through binding rules. In a similar

loophole will become." KALT, *supra* note 43, at 157.

108. Albert, *supra* note 11, at 857.

109. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 271-80, 314 (1988).

110. *Id.* at 601-02; WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879 48-55 (1979).

111. 478 U.S. 186, 190 (1986).

112. 135 S. Ct. 2584, 2597 (2015).

113. See, e.g., HALL, *supra* note 102, at 62 (the public's constitutional judgments about *Miranda* "change[d] dramatically in the thirty-four years" between the initial decision and its most serious challenge in *Dickerson*).

manner, one of the critical drivers of legal interpretation is to think through permutations of those rules even when these applications seem remote or even unlikely. In short, the constitutional problems considered in this essay and in related scholarship “could well become real-life problems at some point in the future” and, if they do, the nation will be better served by having a “thoroughgoing treatment of the legal issues prepared outside the maelstrom of an ongoing political crisis.”¹¹⁴ As Kalt points out, the most important constitutional problems posed by the secession of southern states in 1861, as well as the contested presidential elections of 1876 (and 2000) were foreseeable, but insufficiently considered by politicians, the courts, and the public.¹¹⁵ Surfacing such issues in advance is no panacea, but it helps support the rule of law and a political order based on “reflection and choice” rather than “accident and force.”¹¹⁶

In the case of the Twenty-Second Amendment, the prospects of a third-term President rising on a future political horizon is made somewhat more likely by a number of factors. Presidents twice-elected to White House are likely to embody some impressive combination of ambition, political skill, popularity, familiarity, and resourcefulness—traits that could incline these individuals to seek the office of President again through perceived constitutional loopholes. Moreover, in recent years, a number of these figures have been relatively young, further inviting speculation about how they might continue to serve their country in the years ahead.¹¹⁷

114. Coenen, *supra* note 21, at 1291–92. Cf. KALT, *supra* note 43, at 2 (“American history is full of . . . constitutional debacles and near misses . . .”).

115. KALT, *supra* note 43, at 155 (“[D]uring the 2000 election crisis, when it still looked like the dispute might not be resolved in time, a New York Times op-ed suggested that Congress provide for two-termer Bill Clinton to stay in power until the election could be properly resolved.”).

116. THE FEDERALIST NO. 1 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The suggestion that thorough and responsible constitutional interpretation requires some anticipation of future scenarios, even somewhat unlikely ones (from the perspective of the present) is in some admitted tension with my prior contention that we should be humble about the judiciary’s ability to engage in assessments of political consequences. But the two points are certainly not synonymous: a responsible judge should try to anticipate different scenarios or events that will make today’s interpretation or jurisprudential rule problematic. That point is not quite the same as giving a jurist wide latitude to assess the political stakes of one reading over another; the first is more of an act of legal imagination while the second involves more precise calculations of consequences.

117. See Coenen, *supra* note 21, at 1291 (“At least in the modern era, twice-

Finally, the rise of hyper-partisanship and with it, the ascension of what Mark Tushnet calls “constitutional hardball” (constitutionally valid practices that are nevertheless in tension with significant political norms and values) may also make a three-term President more likely in the twenty-first century.¹¹⁸ Future partisans might well seek to use the formal rules of the Constitution to advance their candidates and policies, even in ways that upset conventional and informal understandings of how the nation conducts its political business.¹¹⁹

In sum, future Presidents may well test the limits of the Twenty-Second Amendment, and scholarship like this essay will help us respond. But we can also frame the issue more positively and proactively: there are good policy reasons to explore the prospects of a three-term President. The most obvious application involves presidential succession, giving rise to questions about whether we should reform our existing laws governing who is to serve as Commander in Chief should both the sitting President and Vice President die or become disabled. In recent decades these questions have taken on some added urgency in light of ongoing concerns about terrorism and maintaining “continuity in government” during crises or attacks on our highest leaders.¹²⁰

serving Presidents have remained in the prime of life upon leaving office, while the forward march of medical science ensures that human lifespans will grow longer and longer.”). Both Bill Clinton and Barack Obama will have been 55 at the time they left office following their second term.

118. Mark V. Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 553 (2004) (describing constitutional hardball as “political claims and practices—legislative and executive initiatives—that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings”).

119. In the context of the Twenty-Second Amendment, one might note that the alleged “two term” tradition upon which the amendment is founded is much more tentative and uneven than usually presented. See Peabody, *supra* note 56.

120. See generally John C. Fortier & Norman J. Ornstein, *If Terrorists Attacked our Presidential Elections*, 3 ELECTION L.J. 597 (2004) (identifying potential terrorism targets during the American election cycle); Robert E. Gilbert, *The Contemporary Presidency: The Twenty-Fifth Amendment: Recommendations and Deliberations of the Working Group on Presidential Disability*, 33 PRESIDENTIAL STUD. Q. 877 (2003) (discussing the Clinton-era Working Group on Presidential Disability); James C. Ho, *Ensuring the Continuity of Government in Times of Crisis: An Analysis of the Ongoing Debate in Congress*, 53 CATH. U. L. REV. 1049 (2004) (discussing measures necessary to ensure a functioning Congress in the wake of a terrorist attack);

Under Article II and the Twentieth Amendment of the Constitution, after the Vice President, the order of presidential succession is determined by congressional statute. The current law, the Succession Act of 1947, stipulates that the Speaker of the House and President *pro tempore* are next in line, followed by various cabinet officers in the chronological order in which their departments were first established.¹²¹ Scholars have raised substantial concerns about the constitutionality of the Succession Act (on separation of powers and other grounds). But even if one sets these admittedly pressing issues aside, it should also trouble us that the first two figures named in the current statute have no guaranteed national security background or executive governing experience, not to mention broad public recognition or legitimacy. Is it really optimal to put these individuals in immediate proximity to the reins of executive authority—particularly since they would most likely be tapped under especially trying circumstances? In the aftermath of a horrific attack or catastrophic accident, orderly, confident, and experienced leadership should be at a premium, but these traits might not be supplied by the legislative specialists currently at the front of the succession queue. As Albert puts it:

The Speaker of the House and the Senate President *pro tempore* may be schooled in the science of legislation but both are inexpert in the art of popular leadership. Neither possesses the presidential timbre necessary to pilot the country in the aftermath of an attack nor enjoys the democratic legitimacy that only a national election can confer.¹²²

Paul Taylor, *Proposals to Prevent Discontinuity in Government and Preserve the Right to Elected Representation*, 54 SYRACUSE L. REV. 435 (2004) (discussing measures necessary to ensure a continuous government in the event of a terrorist attack).

121. 3 U.S.C. § 19 (2012).

122. Albert, *supra* note 6, at 498; *see also* John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993, 998 (2004) (“For both constitutional and policy reasons, we favor a return to a purely executive branch line of succession.”). Of course, a case can be made that either a Speaker or Senate Majority leader, who are likely to have significant governing experience and the support of a majority of at least one congressional chamber, would be superior presidential choices than, say, a person low down on the (current successor) list of executive department heads. *See generally* John Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141 (1995) (challenging the view that the Speaker is a poor succession choice). But my argument here is different: a recent, twice-elected President may be a superior choice to all of these figures—and should certainly be considered in the mix.

On the basis of these and other concerns, Albert proposes that we revise the succession law to privilege former Presidents (in reverse chronological order—that is, starting with whatever President was last in office) from the same party as the elected but unavailable President. These figures “are the only ones equipped with the proven competence, domestic repute, and foreign stature needed to pull the United States out of the depths of disaster.”¹²³

Albert specifically contends that twice-elected Presidents would not be eligible for his new succession law under the terms of the Twenty-Second and Twelfth Amendments. But as we have seen, this conclusion is quite likely mistaken on the grounds that the Twelfth Amendment’s reference to constitutional ineligibility does not obviously extend to twice-elected Presidents who assume the office of President through non-electoral means.¹²⁴ Indeed, such figures might possess just the right mix of relevant experience, political credibility, and limited personal ambition to help the nation best in a time of trial.

CONCLUSION: CONSTITUTIONAL END RUNS

Almost two decades after the publication of “The Twice and Future President,” the weight of legal, historical, and policy argument still falls on the side of permitting a twice-elected President to lead the executive branch once again. That said, there is certainly both scholarly and popular uncertainty about this conclusion, and good reasons to think we would benefit from greater clarity in this regard.

So why not just amend the Constitution to obtain closure on these issues? As a legal matter, simply changing the Twenty-Second Amendment to read “No Person shall serve or act as President in more than two terms” would probably suffice—regardless of whether this is, in fact, a good policy idea.¹²⁵

123. Albert, *supra* note 6, at 499.

124. Again, a twice-elected President might obtain the office of President not only through succession as Vice President, but also via some more presumably attractive position such as, say Secretary of State (through a succession statute).

125. In 2011, former President Bill Clinton argued that “the 22nd Amendment should probably be modified to say two consecutive terms instead of two terms for a lifetime because we’re all living longer.” *Live from the Headlines* (CNN television broadcast May 28, 2003), <http://transcripts.cnn>

The problem with this approach is that the U.S. Constitution is extraordinarily difficult to change.¹²⁶ This is true not only because the enduring formal rules of amendment require comparatively demanding supermajority thresholds, but also as a historical matter: it is harder to enact Article V constitutional changes in the twenty-first century.¹²⁷ While Darren Patrick Guerra notes that the Constitution has been amended on average once every 8.2 years, if one takes out the Twenty-Seventh Amendment (which was ratified over the course of more than two centuries), no amendment has been ratified for the past 44 years.¹²⁸ Again, some of this difficulty can be attributed to rising partisanship within government, and the resulting unwillingness of leaders and rank and file officials to identify the broadly shared ground needed for constitutional revision. Our current ideological and party divide is exacerbated by invariant features of American politics, such as our complex separation of powers system, which includes divisions between and within state and federal authority.¹²⁹

Of course, the difficulty of changing the American Constitution isn't automatically troubling. Indeed, for much of our history, the relative immutability of our supreme law was seen as a signature strength of our republic.¹³⁰ Among other

.com/TRANSCRIPTS/0305/28/se.12.html.

126. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 261 (Sanford Levinson ed. 1995) (presenting an Index of Difficulty which shows that the U.S. Constitution is the second hardest to change in a survey of 30 nations).

127. STEVEN L. TAYLOR, MATTHEW S. SHUGART, AREND LIJPHART, & BERNARD GROFMAN, *A DIFFERENT DEMOCRACY: THE US IN COMPARATIVE PERSPECTIVE* 79–80 (2014) (making the case that the U.S. Constitution's formal amendment process make it one of the most "rigid" amongst comparable democracies).

128. DARREN PATRICK GUERRA, *PERFECTING THE CONSTITUTION: THE CASE FOR THE ARTICLE V AMENDMENT PROCESS* (2013). For a discussion of the Twenty-Seventh Amendment, see Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT. 101 (1994) (discussing the amendment's "uncertain status").

129. See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS* 163 (2012) (discussing how our separation of powers system does not comport well with our current era of polarized parties but concluding that "major constitutional restructuring" is a "purely academic" fantasy); Bruce G. Peabody & John D. Nugent, *Towards a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 32 (2003) (discussing the "the fractured ways in which political authority is distributed between various institutions of governance").

130. See Larry Alexander & Frederick Schauer, *On Extrajudicial*

benefits, such a stable governing charter helps protect against political “overreaction to more immediate impulses of the moment.”¹³¹ Moreover, courts and other public officials have devised alternate, non-Article V mechanisms for effectively changing the meaning of the Constitution, with constitutional interpretation and reliance on case precedents as some of the most prominent of these mechanisms.¹³²

In more recent years, however, scholars from diverse substantive and ideological backgrounds have been making a different case. In the eyes of these thinkers, our constitutional stability has become a troubling stasis that undermines core values (like our commitment to democracy),¹³³ is “inadequate to the demands of twenty-first-century America,”¹³⁴ and at least partly impedes our capacity to address pressing policy issues of a national and international scope, such as climate change.¹³⁵ Sanford Levinson has gone so far as to call the Article V process for amending our supreme law the “worst single part” of an “imbecilic” Constitution, that contributes to a “dysfunctional, even pathological” politics.¹³⁶ Thomas Mann and

Constitutional Interpretation, 110 HARV. L. REV. 1359, 1371 (1997) (law’s primary purpose is “to settle authoritatively what is to be done” to foster social and political stability); Sonia Mittal and Barry R. Weingast, *Constitutional Stability and the Deferential Court*, 13 U. PENN. J. CONST. L. 337, 338 (2010) (describing U.S. constitutional stability as “unique in the world”).

131. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1198 (2009).

132. See Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed. 1995). As Brian Kalt points out, it is likely that the abundance of non-Article V changes to the Constitution have decreased the perceived urgency for formal constitutional amendment and, conversely, that the difficulty of formal legal change encourages experimentation with non-Article V mechanisms. E-mail from Brian C. Kalt, Professor of Law, Michigan State University College of Law to Bruce G. Peabody, Professor of Political Science, Fairleigh Dickinson University (Aug. 3, 2016, 17:41 EST) (on file with author).

133. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2008).

134. LARRY J. SABATO, *A MORE PERFECT CONSTITUTION: WHY THE CONSTITUTION MUST BE REVISED* 4 (2007).

135. See Lazarus, *supra* note 131; see also generally SOTIRIOS BARBER, *CONSTITUTIONAL FAILURE* (2014) (arguing that American political dysfunction indicates a failing constitution).

136. Sanford Levinson, *Our Imbecilic Constitution*, N.Y. TIMES CAMPAIGN STOPS (May 28, 2012, 8:36 PM), <http://campaignstops.blogs.nytimes.com/2012/>

Normal Ornstein emphasize, instead, a debilitating “mismatch between parliamentary-style political parties” and our enduring constitutional “separation-of-powers system that makes it extremely difficult for majorities to work their will.”¹³⁷ Overall, they lament, this combination results in a destructive loyalty to party over country, putting us “at risk because of an inability to govern effectively.”¹³⁸

Assuming these critics of constitutional inertia are right,¹³⁹ what is the way out of this tricky dilemma? How do we solve the puzzle of a nation facing pressing political problems while its constitutional order (both the constitutional text itself and the prevailing views about how it should be interpreted) represents a significant barrier to needed reforms and policy innovation?

This essay’s analysis of the Twenty-Second Amendment suggests a possible, difficult way forward. We might use the three-term President as a kind of case study of a wider phenomenon: constitutional end runs. These represent efforts to circumvent and even subvert widely accepted understandings of what the Constitution means in favor of more unconventional and even idiosyncratic readings, often by exploiting inconsistencies or interstices in the constitutional text.

One can think of a constitutional end run as a kind of variation of what Stephen L. Carter has identified as a constitutional “impropriety.”¹⁴⁰ According to Carter, a constitutional impropriety is a government act that is not forbidden by the Constitution (and the prevailing interpretations of that document) but which is nevertheless “contrary to the spirit of the document, as reflected in the document’s history and in its role in the constitutional story

05/28/our-imbecilic-constitution.

137. MANN & ORNSTEIN, *supra* note 129, at 102.

138. *Id.* at 101.

139. There is, of course, a group of scholars who push back against the constitutional dysfunction thesis, and either argue that our contemporary problems are less serious than depicted, or that their true source lies beyond the Constitution and its resistance to change. See generally *What Do We Talk About When We Talk About the Constitution?*, 91 TEXAS L. REV. 1119, 1132 (2013) (with Akhil Reed Amar) (concluding that we shouldn’t “blame the Constitution for most of our problems”).

140. Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357 (1990).

that We the People of the United States, tell about ourselves.”¹⁴¹ In a sense, a constitutional impropriety involves a legally valid act that is still regrettable from the perspective of our most cherished constitutional values.

In contrast, a constitutional end run involves a controversial constitutional interpretation, perhaps even an application that many (or most) would find troublesome, flawed, or even wrong. Unlike a constitutional impropriety, these constructions of our supreme law push the envelope of accepted understandings of how the Constitution works. At the same time, however, end runs (at least when they are defensible) advance important values immanent in our constitutional order, or help secure vital policy and political goals that are otherwise unattainable.

Arguably, the Twenty-Second Amendment¹⁴² could provide the opportunity for such an end run. Allowing a popular twice-elected President to run again for the White House (as, say, Vice President) would, obviously, serve democratic values insofar as the public would have an opportunity to select (or reject) a person otherwise blocked through traditional presidential election channels (under the terms of the Twenty-Second Amendment). We can also imagine more specific cases where a twice-elected President might be tapped through a vice presidential selection or even an amended succession statute to help stabilize an administration beset with scandal or at least serve as a trusted placeholder until the next election.¹⁴³ Something similar might occur if a presidential election is

141. *Id.* at 392.

142. There are surely other areas of constitutional politics where we can imagine such controversial (but arguably beneficial) end runs. *See, e.g.*, Bruce Peabody, Opinion, *Term Limits for Supreme Court Justices*, THE BERGEN RECORD (Feb. 21, 2016), (discussing how to impose “Supreme Court term limits” without a constitutional amendment through a “non-binding pledge” to retire).

143. Under this scenario, the President and Vice President might agree to resign (circumventing divisive and disruptive impeachment proceedings) on the condition that a twice-elected President of the same party be named to fill the remainder of the term. Conversely, if we believe that the three-term president argument advanced in this essay is likely to be widely perceived as legally valid, we might posit a quite different kind of end run based on blocking a twice-elected president on the grounds that this would pose a significant danger to our constitutional order. Such an analysis might say something to the effect of, “Yes, everyone knows the Twenty-Second Amendment permits a twice-elected President to serve as Vice President, but permitting this would damage the valuable principle of rotation in office and otherwise encourage a concentration of executive power.”

disputed (such as occurred in 2000), and the nation needs a trusted, experienced figure to serve as a stand in until the relevant legal and political questions are resolved.

It is well beyond the purview of this essay to explore fully the implications of identifying and promoting constitutional end runs. Surely some of these maneuvers could be dangerous and pose threats to the rule of law or to political institutions and constitutional practices we hold dear. But other end runs could help us address real problems and enact needed changes by effectively skirting constitutional constraints that seem ossified, unworkable, and resistant to formal change—beginning with the amendment process itself. If successful and ultimately supported, such end runs might even become widely accepted over time, generating a new norm of accepted constitutional practice.

A constitutional order refashioned with such legal bypasses should make us uncomfortable. It threatens to create a kind of constitutional Rube Goldberg machine, a construction that may break down, and is constantly in danger of inviting charges of illegitimacy and obfuscation. We the People probably deserve better. But in a nation wracked with party division, policy discord, and inherited “Tudor institutions,”¹⁴⁴ this may be the best way to balance our commitment to the traditional rule of constitutional law with new and pressing imperatives for change.

144. Samuel P. Huntington, *Political Modernization: America vs. Europe*, 18 *WORLD POL.* 378, 380 (1966) (“In America [unlike Europe] the political system did not undergo any revolutionary changes at all. Instead, the principal elements of the English sixteenth-century constitution were exported to the New World, took root there, and were given new life at precisely the time they were being abandoned in the home country. These Tudor institutions were still partially medieval in character.”).