

# TWO-TIME PRESIDENTS AND THE VICE-PRESIDENCY

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**Abstract:** Does the Constitution limit the ability of a twice-before-elected President to serve as Vice-President? This question presents an intricate constitutional puzzle, the solution of which requires working through four separate sub-inquiries: Is a two-term President wholly ineligible for the vice-presidency? Is such a person barred from election to the vice-presidency even if that person remains appointable to that office? Is a twice-before-elected President, even if properly placed in the vice-presidency, incapable of succeeding to the presidency? And if such a succession occurs, must the resulting term of service as President expire after two years? This Article addresses each of these questions by exploring the implications of the decisive constitutional texts—Article II’s enumeration of presidential qualifications, the Twelfth Amendment’s treatment of qualifications for the vice-presidency, and the post-service limitations placed on two-term Presidents by the Twenty-Second Amendment. Some analysts have argued that the Constitution forecloses the possibility that a twice-before-elected President can hold (or at least secure election to) the vice-presidential office. However, the text and history of the relevant constitutional provisions point to the opposite conclusion: A twice-before-elected President may become Vice-President, either through appointment or through election, and thereafter succeed from that office to the presidency for the full remainder of the pending term.

## INTRODUCTION

Can a former two-term President seek and serve in the vice-presidency? Non-lawyers often assume that the answer is no, and prominent constitutional scholars agree.<sup>1</sup> The analysis of these experts begins with the Twelfth

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<sup>1</sup> E.g., BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK* 204 n.34 (2006); AKHIL REED AMAR, *AMERICA’S CONSTITUTION* 436 n.8 (2005); Richard Albert, *The Constitutional Politics of Presidential Succession*, 39 *HOFSTRA L. REV.* 497, 565 (2011); 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> [<http://perma.cc/TUT8-Y9ZV>] (citing Eugene Volokh and Bruce Ackerman as expressing the view that former President Bill Clinton cannot run for Vice-President); Eugene Volokh, *Bill Clinton for Vice-President?*, *VOLOKH CONSPIRACY*

Amendment, which provides that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”<sup>2</sup> In addition, the Twenty-Second Amendment prohibits any twice-elected President from again securing election to that office.<sup>3</sup> And because voters thus cannot put a twice-before-elected President back into the presidency, such a person is—these analysts conclude—“ineligible to the office of President” and therefore not “eligible to that of Vice-President” under the disqualifying terms of the Twelfth Amendment.

This argument has a surface appeal. But it masks subtleties in the law. The most significant complication arises because the Twelfth Amendment makes access to the vice-presidency hinge on whether the would-be candidate for that position is “*ineligible* to the office of the President.”<sup>4</sup> This choice of words matters because it interlocks the Twelfth Amendment not with the Twenty-Second Amendment, but with the preexisting terms of Article II, Section 1, Clause 5, which specifically address whether a person is “*eligible* to the Office of the President.”<sup>5</sup> What is more, the Article II clause imposes no term limit of any sort on presidential service. Instead, it requires only that a President be (1) a natural-born citizen, (2) at least thirty-five years of age, and (3) a resident of the United States for at least fourteen years.<sup>6</sup> Because twice-before-elected Presidents (such as George W. Bush or Bill Clinton) continue to meet each of these three (and only three) textually-specified eligibility requirements, such persons are—according to proponents of the they-can-run position—not “ineligible” to be President for purposes of the Twelfth Amendment. Therefore, they remain “eligible” to seek and to hold the vice-presidency.<sup>7</sup>

To be sure, the first sentence of the Twenty-Second Amendment specifies that “[n]o person shall be elected to the office of the President more than twice.”<sup>8</sup> But that clause, so the argument goes, does not address who is “ineligible” for the presidency; rather, it addresses only how many times an eligible person can be “elected” to that office. Therefore, so the argument continues, the Twenty-Second Amendment casts no light on who is “eligi-

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(June 19, 2006, 1:30 PM), <http://www.volokh.com/posts/1150738214.shtml> [<http://perma.cc/YL5F-BPVM>]; see also Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 570 (2015) (concluding that “[t]he stronger view may be that once a President has met the term limits of the 22nd Amendment, he is ineligible”).

<sup>2</sup> U.S. CONST. amend. XII.

<sup>3</sup> *Id.* at amend. XXII.

<sup>4</sup> *Id.* at amend. XII (emphasis added).

<sup>5</sup> *Id.* at art. II, § 1, cl. 5 (emphasis added).

<sup>6</sup> *Id.*

<sup>7</sup> See Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 613–14 (1999).

<sup>8</sup> U.S. CONST. amend. XXII.

ble” to be Vice-President under the Twelfth Amendment. And that is all the more the case because a person can become President either by way of election or through other means.<sup>9</sup>

In an article published in 1999, Bruce G. Peabody and Scott E. Gant navigated their way through this maze of clauses in advancing the claim that the Constitution permits election to the vice-presidency of a twice-before-chosen President.<sup>10</sup> The Peabody and Gant article does much useful work by mapping out the basic textual route to this conclusion. But its treatment of the subject leaves a great deal of the key legal ground uncovered. To begin with, the article does not consider new arguments and analyses that have cropped up in recent years, including pronouncements offered by such well-credentialed observers as Judge Richard Posner and even former two-term President Bill Clinton.<sup>11</sup> No less important, that treatment fails to distinguish carefully among four separate legal questions that are in the picture here—namely (1) whether a twice-before-elected President is wholly ineligible to become Vice-President; (2) whether a twice-before-elected President is partly ineligible to be Vice-President in the sense that such a person may be appointed—but not elected—to that office; (3) whether a twice-before-elected President, if properly placed in the vice-presidency, can thereafter succeed to the presidency; and (4) whether a twice-before-elected President who does succeed to the presidency from the vice-presidency faces any durational limit on the resulting term of presidential service.<sup>12</sup>

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<sup>9</sup> See *infra* note 44 and accompanying text.

<sup>10</sup> Peabody & Gant, *supra* note 7, at 633; see also Michael C. Dorf, *The Case for a Gore-Clinton Ticket*, FINDLAW (July 31, 2000), <http://writ.lp.findlaw.com/dorf/20000731.html> [<http://perma.cc/27KM-N4FM>] (advancing the same text-driven conclusion). Notably, the terms “twice-before-chosen President” and “twice-before-elected President” do not cover the full range of Presidents covered by the Twenty-Second Amendment. See *infra* note 33 and accompanying text. Apart from persons who have been twice-elected to the presidency, the Amendment renders ineligible for that office persons who have been elected President once and also have served as President for more than two years of another term. See *infra* note 33 and accompanying text.

<sup>11</sup> See *supra* note 1 and accompanying text (noting works on this topic authored by Professors Volokh and Akhil Reed Amar); *infra* notes 120, 167–168 and accompanying text (addressing the opinions of Bill Clinton and Judge Posner on the constitutionality of a twice-before-elected President serving as Vice-President). For purposes of simplicity and convenience, this Article does not specifically reference such exceptional cases every time it discusses the basic operation of the Twenty-Second Amendment. Instead, it focuses attention on “twice-before-elected” Presidents and therefore typically uses such terms.

<sup>12</sup> This is not to say that Peabody and Gant fail to disaggregate all these issues, particularly the first two. See Peabody & Gant, *supra* note 7. But they do not fully develop the difference between those two issues, give only passing attention to the third issue, and do not identify the fourth issue at all. No less important, the Peabody and Gant article does not consider the final sentence of Section 1 of the Twenty-Second Amendment, which deals with transitioning from a rule of potentially unlimited presidential service to the present-day regime in which the Twenty-Second Amendment operates with full force. This omission is striking because the transition clause envel-

This Article addresses each of these questions. Part I considers and rejects the argument that a twice-before-elected President is wholly ineligible to become Vice-President,<sup>13</sup> and Part II rebuts the alternative claim that such a President could be appointed, but not elected, to the vice-presidency.<sup>14</sup> Part III directs attention to whether a twice-before-chosen President can move from the vice-presidency into the presidency and, if so, for how long such a successor President can serve.<sup>15</sup> In particular, it explains why Vice-Presidents who previously have held the presidency face no special limitations along these lines, but instead enjoy the same rights of succession held by all other Vice-Presidents.

Part IV turns attention to the special problems raised by negative-implication arguments founded on the Twenty-Second Amendment's little-noticed transition clause.<sup>16</sup> Of particular importance, Professor Amar has suggested that the transition clause supports the conclusion that the Twelfth and Twenty-Second Amendments interact to bar twice-elected Presidents from securing election to the vice-presidency.<sup>17</sup> Part IV challenges this view by suggesting that the transition clause is best seen as dealing with only the transition period itself and not as creating any broad implications with respect to the post-transition period.<sup>18</sup>

Some observers might dismiss these matters as unworthy of attention. Why waste the ink on this paper, they might ask, when it is certain that no twice-before-elected President will ever seek the vice-presidency?<sup>19</sup>

In fact, there are many reasons why these questions merit careful scrutiny. To begin with, it is wrong to claim that a twice-elected President will never seek to become Vice-President. Indeed, the chance that such a run for

ops all four issues raised by the prospect of a vice-presidential run by a twice-before-elected President. As a result, any complete discussion of this subject must give that clause the sort of close attention it receives in this Article.

<sup>13</sup> See *infra* notes 31–150 and accompanying text.

<sup>14</sup> See *infra* notes 151–176 and accompanying text.

<sup>15</sup> See *infra* notes 177–210 and accompanying text.

<sup>16</sup> See *infra* notes 211–223 and accompanying text.

<sup>17</sup> See U.S. CONST. amend. XII; *id.* at amend. XXII; AMAR, *supra* note 1, at 436 n.8.

<sup>18</sup> See *infra* notes 211–223 and accompanying text.

<sup>19</sup> Of present day significance in this regard, the often-discussed idea of having Bill Clinton appear on the same ticket as Hillary Rodham Clinton faces a distinctive problem that exists wholly apart from the matters considered in this Article. This is the case because the Twelfth Amendment bars Electoral College members from casting votes for two candidates from their own state. This limitation would place presidential electors from New York in a major bind unless, for example, Bill Clinton reestablished residency in Arkansas, perhaps significantly in advance of the election. See Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. L. REV. 925, 932–36 (2001) (discussing potential unconstitutionality of the casting of votes by Texas Electoral College members in 2000 for both George W. Bush and Richard (Dick) Cheney on the theory that both were Texas residents). But such a move might itself turn off voters, especially in light of the marriage of the two candidates.

office will occur, and perhaps occur soon, is significant. History teaches that the sort of leader who successfully runs for the presidency may well aspire to remain in high-profile national service after that person's two stints as chief executive have come and gone.<sup>20</sup> Indeed, it was just such an occurrence that gave rise to the Twenty-Second Amendment, following Franklin Roosevelt's pursuit of both a third and a fourth term in the Presidency, in contravention of an already-well-established tradition.<sup>21</sup> In 1960, Dwight Eisenhower seems to have given thought to seeking the vice-presidency after serving two full terms as President;<sup>22</sup> there was talk again in 1964 about a possible Goldwater-Eisenhower ticket;<sup>23</sup> and pundits pushed for a Bill Clinton run for the vice-presidency in each of the four most recent presidential races.<sup>24</sup>

At least in the modern era, twice-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.<sup>25</sup> In addition, many voters—especially in times of crisis—may well deem it advisable to install in the nation's second-highest office someone who already has on-the-job training as its chief executive. The broader point is that the constitutional questions considered here could well become real-life problems at some point in the future. If and when those problems arise, they will trig-

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<sup>20</sup> See BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS 141 (2012) (noting a variety of federal offices held by former Presidents).

<sup>21</sup> See *infra* note 114 and accompanying text.

<sup>22</sup> See Peabody & Gant, *supra* note 7, at 603–06.

<sup>23</sup> See Volokh, *supra* note 1.

<sup>24</sup> See, e.g., Tony Mauro, *Would the Constitution Prevent a Gore-Clinton Ticket?*, LEGAL INTELLIGENCER, July 21, 2000, at 7; Scott E. Gant & Bruce G. Peabody, *How to Bring Back Bill*, CHRISTIAN SCIENCE MONITOR (June 13, 2006), <http://www.csmonitor.com/2006/0613/p09s02-coop.html> [<http://perma.cc/YXC4-CM4A>]; Stephen Gillers, Opinion, *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> [<http://perma.cc/5YQV-SC6L>]; Paul Goldman & Mark J. Rozell, *Obama-Bubba Ticket Could Be Winner*, POLITICO (Oct. 16, 2011, 9:05 PM), <http://www.politico.com/news/stories/1011/66096.html> [<http://perma.cc/U73H-V7BX>]; Andrew Malcolm, *Bradley Says "No" to Obama VP Job. What About Clinton? Not Her. Him!*, L.A. TIMES (July 29, 2008, 2:12 AM), <http://latimesblogs.latimes.com/washington/2008/07/obama-vp.html> [<http://perma.cc/U8J7-88VF>]; Jack Shafer, *Vice President Bill Clinton? Take 3*, SLATE (Sept. 7, 2000, 3:18 PM), <http://www.slate.com/id/1006013> [<http://perma.cc/MAV2-JU6D>]; Joshua Spivak, *Bill Clinton for Vice President? Forget It*, HIST. NEWS NETWORK (Mar. 22, 2004), <http://www.historynewsnetwork.org/article/4165> [<http://perma.cc/F6HC-VMMQ>]. Not surprisingly, attention recently has come to focus on the future status of our most recently twice-elected President, Barack Obama. See Brian Beutler, *A Modest Proposal: Barack Obama Should Be Hillary Clinton's Running Mate*, NEW REPUBLIC (Apr. 14, 2015), <http://www.newrepublic.com/article/121533/hillary-clinton-barack-obama-vice-president> [<http://perma.cc/87ZA-96X3>].

<sup>25</sup> See *The Youngest Presidents in U.S. History*, ABOUT.COM, <http://history1900s.about.com/od/worldleaders/a/youngpresidents.htm> [<http://perma.cc/7FZK-FJ86>] (noting that, when they took office, Presidents Clinton and Bush were forty-six and fifty-four respectively, while President Obama was forty-seven at the time of his inauguration).

ger a legal confrontation of singularly high-stakes significance—perhaps lending added value to a thoroughgoing treatment of the legal issues prepared outside the maelstrom of an ongoing political crisis. It is true that the trading of ideas on whether a two-time President can become Vice-President “has become a recurring parlor game among political observers.”<sup>26</sup> But this question has far more than a parlor game’s importance. It is a question of ongoing legal and practical significance, especially under a constitutional system designed to “endure for ages to come.”<sup>27</sup>

Another reason to look hard at the questions considered here stems from the post-ratification history of the Twenty-Second Amendment. In fact, efforts to undo the Amendment have recurred over the past sixty years,<sup>28</sup> pushed forward by leaders from both sides of the political aisle, including President Ronald Reagan.<sup>29</sup> This history suggests that similar reform efforts could well take hold again in future years. In that event, any proper rethinking of the Twenty-Second Amendment will need to take into account all of its flaws, ambiguities, gaps, and unintended consequences. Critical in this regard is the mystery that surrounds that Amendment’s treatment of the vice-presidency. This Article thus sets the stage for an enriched discussion about whether to retain, repeal, or revise the Twenty-Second Amendment. It does so by laying bare the full—and troublingly expansive—range of interpretive conundrums that the Amendment has spawned.

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<sup>26</sup> Albert, *supra* note 1, at 565.

<sup>27</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

<sup>28</sup> See THOMAS H. NEALE, CONG. RESEARCH SERV., R40864, PRESIDENTIAL TERMS AND TENURE: PERSPECTIVES AND PROPOSALS FOR CHANGE 24, 26 (2009) (noting fifty-four proposals for repeal of the Twenty-Second Amendment since 1956).

<sup>29</sup> *Id.* Other patrons of change (at least at some point in their careers) have included Presidents Truman, Eisenhower, Clinton, and Nixon. See Dwight D. Eisenhower, *The President’s News Conference of October 5, 1956*, in PUBLIC PAPERS OF THE PRESIDENTS: DWIGHT D. EISENHOWER 850 (David C. Eberhart ed., 1958); Paul B. Davis, *The Results and Implications of the Enactment of the Twenty-Second Amendment*, 9 PRESIDENTIAL STUD. Q. 289, 290, 301 (1979) (noting President Truman’s opposition to the Amendment and President Nixon’s encouragement of outside efforts to repeal it); Peabody & Gant, *supra* note 7, at 601 (“At a number of points both Eisenhower and Reagan spoke out against the Amendment, and an effort to repeal it developed following Nixon’s reelection . . .”); Baker, *supra* note 1 (noting Bill Clinton’s endorsement of a more limited ban on only “two consecutive terms” because “people are living much longer”). Many other prominent Americans have expressed the same view, including former Senator and presidential candidate Eugene McCarthy, Judge (and former White House Counsel) Abner Mikva, and former first lady Nancy Reagan. See *Hat Trick*, WASHINGTONIAN, Mar. 1997, at 34; Eugene J. McCarthy, *Give Bush Another 100 Days*, N.Y. TIMES (Mar. 3, 1989), <http://www.nytimes.com/1989/03/03/opinion/give-bush-another-100-days.html> [<http://perma.cc/2U4Y-F8PA>]; Elizabeth Mehren, *Says She Lost Freedom of Speech as First Lady: Nancy Reagan’s Room at the Top: ‘Attic,’* L.A. TIMES (June 4, 1989), [http://articles.latimes.com/1989-06-04/news/mn-2659\\_1\\_first-lady-nancy-reagan-mrs-reagan-raisa-gorbachev](http://articles.latimes.com/1989-06-04/news/mn-2659_1_first-lady-nancy-reagan-mrs-reagan-raisa-gorbachev) [<http://perma.cc/DXB3-H2VC>]. Moreover, a survey by Representative Stewart Udall, even though conducted within a decade of the Amendment’s ratification, indicated that historians and political scientists also broadly favored repeal. Peabody & Gant, *supra* note 7, at 602 n.173 (citing 103 CONG. REC. 843 (1957)).

Finally, the questions considered here are worthy of attention because of the broader lessons they offer for all who consider with thoughtfulness the nature of our legal system. The question, “Can a twice-elected President become Vice-President?” has attracted wide and recurring attention in the news media.<sup>30</sup> This attention stems in part from the role of celebrity in American life. But it also reflects something more—the deep and serious interest that Americans rightly share in the presidential office and those who might come to occupy it. Inquisitiveness about such matters flows, as well, from the fascination that the ever-churning interaction of our law and our politics inspires in a large segment of the American public. For many of us, a core question presses for an answer: How can it be that ongoing interpretive disagreements swirl around even the most basic matters of constitutional organization? This Article tells the remarkable story of how—in the midst of a fast-moving and divisive political drama—the drafters of the Twenty-Second Amendment could and did fail to address in a direct way key questions about vice-presidential service. The telling of this story not only shines a light on the limited reach of the Twenty-Second Amendment; it also offers lessons for future leaders about the risks and complexities of undertaking the hard work of constitutional reform.

### I. THE TOTAL-INELIGIBILITY APPROACH

Assume that it is late August 2016, just hours after the conclusion of the Democratic National Convention. Over the past three days, the following headlines have appeared in the *New York Times*: (1) “Dems Set to Nominate President Clinton as Vice-President;” (2) “Bill Clinton Pushes Value of Past Service in Accepting VP Nomination;” and (3) “Lawyers Prepare To Challenge Democrats’ Choice for Vice-President.” As the final headline reports, Republicans are about to let loose a flood of litigation in which they will claim that the Constitution prohibits Bill Clinton’s name from appearing on the ballot. Who has the stronger position in this dispute—would-be Vice-President Bill Clinton or his political and legal adversaries?

Answering this question requires close examination of three constitutional provisions. Article II, Section 1, Clause 5—a part of the original Constitution, which was ratified in 1788—provides in relevant part:

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<sup>30</sup> See, e.g., Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 857 n.314 (2005) (noting the publication of five separate pieces in such sources as Findlaw, *Slate Magazine*, and the *Washington Times*, over a period of less than ten months, that took conflicting views on the issue); Baker, *supra* note 1; Tom Curry, *Could Bill Clinton Be Vice President?*, MSNBC (Feb. 20, 2008, 2:05 PM), <http://www.msnbc.com/id/23254868/> [<http://perma.cc/6LWH-FV8K>]. See also NEALE, *supra* note 28, at 16 (noting that this “question . . . has been frequently asked over the years”).

No person except a natural born Citizen, or a Citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.<sup>31</sup>

The final sentence of the Twelfth Amendment, which was added to the Constitution in 1804, reads as follows:

[N]o person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.<sup>32</sup>

And the first sentence of Section 1 of the Twenty-Second Amendment, which was ratified in 1951, states in its entirety:

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once.<sup>33</sup>

As indicated earlier, these three clauses have given rise to competing interpretations. On one view—which is defended here—the Twenty-Second Amendment did not dislodge the preexisting eligibility rules for the vice-presidency that were established by Article II and the Twelfth Amendment, so that twice-before-elected Presidents can secure and serve in that office. But prominent scholars have argued the other side.<sup>34</sup> The more far-reaching of their arguments posits that former two-term Presidents are entirely foreclosed from assuming the vice-presidency either by election or appointment.<sup>35</sup> On this view, the Twenty-Second and Twelfth Amendments operate in tandem to render such persons wholly “ineligible” to hold the presidency,

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<sup>31</sup> U.S. CONST. art. II, § 1, cl. 5.

<sup>32</sup> *Id.* at amend. XII.

<sup>33</sup> *Id.* at amend. XXII, § 1. The second sentence of Section 1—the so-called transition clause—provides as follows:

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

*Id.*

<sup>34</sup> See *supra* note 1 and accompanying text.

<sup>35</sup> See *infra* note 38 and accompanying text.



and thus similarly ineligible to become Vice-President.<sup>36</sup> The following analysis demonstrates, however, that this contention is at odds with both the text of the relevant clauses and the history and purposes of the Twenty-Second Amendment.

### A. Constitutional Text

Some advocates of the two-time-Presidents-cannot-run-for-VP position invoke the canon of constitutional interpretation that focuses on the primacy of ordinary meaning.<sup>37</sup> According to this argument, a prior-two-term President is “ineligible to the office of President”—and thus not “eligible” to be Vice-President under the Twelfth Amendment—because common usage indicates that someone who cannot be elected to an office is ineligible for it. Professor Amar, for example, emphasizes “the facts that the words ‘eligible’ and ‘electable’ spring from the same Latin root, and that standard dictionaries have long included ‘electable’ as one of the standard definitions of eligible.”<sup>38</sup> Other commentators agree with this view.<sup>39</sup> They urge that, because “eligibility” and “electability” are essentially synonymous terms, it makes no difference that the Twelfth Amendment speaks of the former, while the Twenty-Second Amendment speaks of the latter. As Professor Amar has put the point: “[I]t would seem that a two term incumbent is ‘ineligible’ to the Presidency (within the meaning of the Twelfth Amendment) precisely because he is made *unelectable* to that office (by the Twenty-second) . . . .”<sup>40</sup> And so it follows for Professor Amar that such a person is “barred (by the Twelfth) from being elected to the vice presidency in the first place.”<sup>41</sup>

The initial problem with this argument is that no dictionary can or does indicate that “eligible” and “electable” are interchangeable terms. We might

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<sup>36</sup> U.S. CONST. amend. XII; *id.* at amend. XXII, § 1.

<sup>37</sup> *See, e.g.*, *District of Columbia v. Heller*, 544 U.S. 570, 576 (2008) (“The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

<sup>38</sup> AMAR, *supra* note 1, at 436 n.8. In similar fashion, Professor Volokh notes that a dictionary published within decades after ratification of the Twelfth Amendment defined the term “eligibility” to mean “capacity to be elected.” Volokh, *supra* note 1.

<sup>39</sup> *See, e.g.*, Baker, *supra* note 1 (collecting earlier assertions of this position); *see also* Albert, *supra* note 1, at 565 (indicating that the vice-presidency “is an office for which a former two-term President is not eligible”).

<sup>40</sup> AMAR, *supra* note 1, at 436 n.8.

<sup>41</sup> *Id.*; *accord* Mathew J. Franck, *Constitutional Sleight of Hand*, NAT’L REV. ONLINE (July 31, 2007, 9:02 AM), <http://www.nationalreview.com/bench-memos/51444/constitutional-sleight-hand-matthew-j-franck> [<http://perma.cc/XQ84-AWDZ>] (“It follows from the 22nd Amendment that Bill Clinton, being ‘constitutionally ineligible’ to be *elected* president, is 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.”).

say, for example, that healthy, eighteen-year-old males are eligible for the draft. But we would never say that such persons are electable for the draft.<sup>42</sup> No less relevant is the basic distinction between the whole (which in this case might be eligibility) and the part (which in this case might be electability).<sup>43</sup> We can safely conclude, for example, that every sophomore is a student; but that hardly means that every student is a sophomore. Likewise, it might be that every ineligible person is (for that reason) unelectable, but it would not follow that every unelectable person is ineligible—at least when, as here, the relevant office is attainable either by way of election or through other means.<sup>44</sup>

In any event, whatever new or old dictionaries might say, the controlling texts of the Constitution itself signal that there is a critical difference between who is “eligible” to serve as President and who can be “elected” to that office. The Supreme Court has recognized two closely related principles of interpretation that powerfully support this conclusion.<sup>45</sup> First, the “normal rule” is that “identical words used in different parts of the same act

<sup>42</sup> Professor Amar’s observation that “eligible” and “electable” have a shared Latin root is particularly unhelpful in this regard. The words “centipede” and “centenarian” have a shared Latin root. See *Cent, Hundred*, MEMBEAN, <http://membean.com/wrotlds/cent-hundred> [<http://perma.cc/AT8Y-9ZLS>] (noting that both words come from the latin root “cent,” meaning one hundred). But that fact hardly means that a bug and an old person are the same thing.

<sup>43</sup> *But see infra* note 166 and accompanying text (suggesting inaccuracy of this supposition because of possible electability of a candidate who is ineligible for the presidency).

<sup>44</sup> These “other means” entail succession to the presidency from the vice-presidency or other offices, including wholly non-electoral offices such as cabinet positions, according to the statutorily established line of succession. See U.S. CONST. art. II, § 1, cl. 6; *id.* at amend. XX, § 4; *id.* at amend. XXV, § 1; 3 U.S.C. § 19 (2012) (creating a line of succession that begins, in order, with the Speaker of the House, the President pro tempore of the Senate, the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, and the Attorney General). Depending on how one defines the term “election,” these other means might also include selection for the presidency by the House (pursuant to a majority vote on a state-by-state basis) in the event of an Electoral College deadlock. See Peabody & Gant, *supra* note 7, at 569 n.18, 571 n.29, 590 n.120 (discussing this scenario). Notably, many Americans may misunderstand the interaction of the Twelfth and Twenty-Second Amendments because they simply assume that the Twenty-Second wholly bars any further presidential service after two elections to that office. See *id.* at 565 (noting what “appears” to be a “commonly held view” to this effect). Indeed, even persons trained and experienced in the law sometimes incorrectly suggest that this is the case. See, e.g., *Bates v. Jones*, 131 F.3d 843, 846 (9th Cir. 1997) (describing the Twenty-Second Amendment as creating a “lifetime ban on the office of the President”); *Halperin v. Kissinger*, 434 F. Supp. 1193, 1195 (D.D.C. 1977), *rev’d*, 606 F.2d 1192 (D.C. Cir. 1979), *aff’d in part, cert. dismissed in part*, 452 U.S. 713 (1981) (claiming that the Amendment creates a “prohibition” on “regaining the Office of President”). The key point is that pronouncements of this kind are wrong because the Twenty-Second Amendment inhibits only being “elected” to the presidency, and there are means other than election by which a person—including a former two-term President—may ascend to that office.

<sup>45</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61–67 (2006); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

are intended to have the same meaning.”<sup>46</sup> Second, the Court “presumes that, where words differ, . . . [the drafter] has acted intentionally and purposefully.”<sup>47</sup>

Here, the parallel word choices that appear in Article II and the Twelfth Amendment, both of which specifically address who is “eligible” for office, contrast sharply with the different word choice that appears in the Twenty-Second Amendment (which does not speak of eligibility, but instead speaks only of who “shall be elected”).<sup>48</sup> Moreover, when Congress used the term “elected” in the Twenty-Second Amendment, it had squarely before it the preexisting language of Article II and the Twelfth Amendment.<sup>49</sup> With these passages in plain view, the drafters easily could have written the Twenty-Second Amendment to say “[n]o person shall be eligible” rather than “[n]o person shall be elected.”<sup>50</sup> Indeed, there was no reason for them not to do so if they wished to impose an ineligibility rule. The framers of the Twenty-Second Amendment, however, chose *not* to draft its text that way.<sup>51</sup> For this simple reason, the Twenty-Second Amendment should be read to have a different effect than Article II, Section 1, Clause 5 with respect to the Twelfth Amendment.<sup>52</sup> Thus, “eligibility” for purposes of the Twelfth Amendment is rightly seen as being different from—rather than the same as—“electability” for purposes of the Twenty-Second Amendment.<sup>53</sup>

Proponents of the two-time-Presidents-cannot-run position might challenge this line of analysis as unduly nitpicky. It is, they could say, “a *constitution* we are expounding,”<sup>54</sup> so that less attention should be given to precise word choices than might be the case with an integrated, and more readily revisable, statutory code. Any claim that interpreters should look with a different eye on constitutional and statutory word choices is dubious to say the least.<sup>55</sup> But even if this claim might have merit in other contexts, there is no reason to apply it when the constitutional drafters specifically considered and then repudiated the ready alternative of parallel word usage. Here, the finalized text of the Twenty-Second Amendment did not spring

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<sup>46</sup> *Gustafson*, 513 U.S. at 570 (quoting *Dep’t of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). It is worth noting in this regard that “[t]he rules applicable to the construction of a statute also apply to the construction of a Constitution.” See *Edwards v. Carter*, 580 F.2d 1055, 1080 n.16 (D.C. Cir. 1978) (citing *Badger v. Hoidale*, 88 F.2d 208, 211 (8th Cir. 1937)).

<sup>47</sup> *Burlington*, 548 U.S. at 54.

<sup>48</sup> U.S. CONST. art. II, § 1, cl. 5; *id.* at amend. XII; *id.* at amend. XXII, § 1; see *supra* notes 2–5 and accompanying text (setting forth relevant constitutional provisions).

<sup>49</sup> See *supra* notes 2–5 and accompanying text (discussing relevant constitutional provisions)

<sup>50</sup> U.S. CONST. amend. XXII, § 1.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* at art. II, § 1, cl. 5; *id.* at amend. XII; *id.* at amend. XXII, § 1.

<sup>53</sup> *Id.* at amend. XII; *id.* at amend. XXII, § 1.

<sup>54</sup> *McCulloch*, 17 U.S. at 407.

<sup>55</sup> See *supra* note 46 (citing authority on this point).

out of thin air. It came into being only after a series of prior Twenty-Second Amendment drafts were put forward. And each of those earlier drafts specifically and tellingly used the term “eligible” or “ineligible,” in contrast to the final draft in which the word “elected” was substituted.<sup>56</sup>

The journey that resulted in ratification of the Twenty-Second Amendment began with the submission of proposed House Resolution 27.<sup>57</sup> This Resolution specified that:

No person shall be chosen or serve as President of the United States for any term, or be *eligible* to hold the office of President during any term, if such person shall have heretofore served as President during the whole or any part of each of any two separate terms.<sup>58</sup>

The House Judiciary Committee tinkered with this text to come up with an alternative formulation that provided instead: “Any person who has served as President of the United States during all or portions of any two terms, shall thereafter be *ineligible* to hold the office of President.”<sup>59</sup> This version of the Amendment passed the House and was then sent to the upper chamber.<sup>60</sup> The Senate Judiciary Committee, however, again altered the operative text, so as to provide that: “A person who has held the office of President, or acted as President, on 365 calendar days or more in each of two terms shall not be *eligible* to hold the Office of President or to act as President for any part of another term . . . .”<sup>61</sup> This Senate Judiciary Committee version—with its “shall not be eligible to hold the Office” language front and center—was the focal point of debate on the Senate floor.<sup>62</sup>

As it turned out, the floor debate in the Senate produced much controversy, which in turn triggered a late-stage move by reform advocates to placate objectors. Of critical importance, that move included substituting for the thrice-before-used rhetoric of “eligibility” the contrasting and now-operative “[n]o person shall be elected” language.<sup>63</sup> In due course, this Article will explain why the political give-and-take that led to this new phrasing undermines the effort to read the Constitution to preclude a twice-before-elected President from seeking the vice-presidency.<sup>64</sup> But even on its face,

<sup>56</sup> See *infra* notes 57–62 and accompanying text (discussing earlier formulations of what became the Twenty-Second Amendment).

<sup>57</sup> See 93 CONG. REC. 841 (1947) (setting forth the initial proposal).

<sup>58</sup> *Id.* at 849 (emphasis added).

<sup>59</sup> *Id.* at 863 (emphasis added).

<sup>60</sup> *Id.* at 872.

<sup>61</sup> *Id.* at 1680 (emphasis added).

<sup>62</sup> See *id.* at 1680–81, 1770–81.

<sup>63</sup> See *supra* notes 57–62 and accompanying text.

<sup>64</sup> See *infra* notes 71–114 and accompanying text (Part I, section B).

this shift in wording signaled a shift in meaning. Well-settled principles dictate, after all, that courts “will not assume that Congress intended ‘to enact statutory language that it has earlier discarded in favor of other language.’”<sup>65</sup> And there is no sound reason for concluding that this same principle of contrasting word usage should not apply to the congressional choice of terms incorporated into constitutional amendments.<sup>66</sup>

Indeed, two specialized considerations strongly bolster the case for applying this principle here. First, Congress did not merely displace the phrase “shall not be eligible” with the phrase “shall [not] be elected.” Rather, it embraced the latter phrasing only after proposals that focused on eligibility had been put forward not once, not twice, but three separate times, at earlier critical stages of the drafting process.<sup>67</sup> Second, this change in word choice took hold in a context where the previously proposed eligibility-focused terminology did not simply stand on its own; instead, that language directly tracked the eligibility-focused terminology already set forth in Article II, Section 1 and in the Twelfth Amendment.<sup>68</sup> It bears repeating that the textualist argument for excluding two-time Presidents from the vice-presidency

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<sup>65</sup> *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (quoting *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392–93 (1980))); *accord, e.g.*, *Russello v. United States*, 464 U.S. 16, 23–24 (1983) (“Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.”). The transformation from the initial version of the Twenty-Second Amendment to its finalized and ratified text is particularly telling in this regard. Taking care to cover all bases, that initial proposal began with the words “[n]o person shall be chosen or serve as President . . . or be eligible to hold the office of President.” (emphasis added). In contrast, the finalized Amendment stated only that “[n]o person shall be elected.” U.S. CONST. amend. XXII. This contrast in phrasing indicates with clarity that the ultimately adopted Twenty-Second Amendment addressed only (to use the language of the original proposal) who “shall be chosen”—that is, elected—as President. Accordingly, it did *not* establish a rule about the separate subject of who is “eligible to hold the office of the President.”

<sup>66</sup> See *supra* note 46 and accompanying text (discussing rules of construction).

<sup>67</sup> See *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1053 (7th Cir. 2013) (noting contrasting language in “earlier, un-enacted drafts” of the relevant law). Notably, other proposed versions of the Amendment identified in the legislative discussions also deployed the language of eligibility. A substitute Amendment offered by Representative Cellar, for example, began with the phrase “[n]o person shall be eligible.” 93 CONG. REC. 863; see, e.g., *id.* at H849 (statement of Rep. Jenkins) (advocating text that provided “[n]o person shall be chosen or serve as President of the United States for any term, or be eligible to hold the office of President during any term” (emphasis added)). In addition, Congressman Howard Robison noted that he and others had previously put forward proposals “making *ineligible* any person who has served as President for a whole or part of two separate terms.” *Id.* at 849 (statement of Rep. Robison) (emphasis added). The contrast between the final Amendment and all of these formulations—like the contrast between the final Amendment and the three earlier versions that were formally submitted to the House and the Senate—reveals the sharp change in textual direction marked by text of the final, and ultimately ratified, Twenty-Second Amendment.

<sup>68</sup> See *supra* notes 31–32 and accompanying text (quoting eligibility-centered terms of Article II, Section 1, Clause 5 and the Twelfth Amendment).

ultimately rests on the Twelfth Amendment's declaration that "[n]o person constitutionally ineligible to the office of President shall be eligible to that of Vice-President." Thus, precisely because earlier drafts of the Twenty-Second Amendment used the language of eligibility, they would have (if properly ratified) rendered twice-elected Presidents "ineligible to the office of the President" and thus not "eligible" for the vice-presidency in light of the Twelfth Amendment's constitutional command. But in the final version of the Twenty-Second Amendment, Congress abandoned the very language of eligibility on which operation of the Twelfth Amendment depends with regard to its treatment of vice-presidential service. The key point is plain to see: 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.<sup>69</sup>

In sum, there are many reasons why the final choice of phrasing of the Twenty-Second Amendment signals that twice-before-elected Presidents remain "eligible" to serve as Vice-President. But the key reason appears on the face of the relevant texts themselves: the Twenty-Second Amendment—in striking contrast to the Twelfth Amendment and Article II, Section 1, Clause 5—does not use the language of eligibility, but instead uses the starkly different language of electability.<sup>70</sup>

### B. *The Confirmatory Legislative History*

Proponents of the position that two-term Presidents are ineligible for the vice-presidency might try to draw a different inference from Congress's textual change of direction. Indeed, they might seek to stand the contrasting-usage argument on its head by asserting that the sequence of legislative events supports equating the final version of the Twenty-Second Amendment with its draft-stage progenitors. On this view, 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. At the least—so the argument goes—this conclusion should win the day because there is no good

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<sup>69</sup> Put another way, the argument that a twice-elected President cannot become a Vice-President hinges on the last sentence of the Twelfth Amendment, which specifies that "no person constitutionally ineligible to the office of President *shall be eligible* to that of Vice-President of the United States." U.S. CONST. amend. XII (emphasis added). Yet, the emphasized language is the very language that the architects of the Twenty-Second Amendment initially planned to use, but then specifically abandoned.

<sup>70</sup> Compare *id.* at amend. XXII, § 1, with *id.* at art. II, § 1, cl. 5, and *id.* at amend. XII.

reason to believe that this eleventh-hour change in phrasing resulted from anything more than an unthinking slip of the scrivener's pen.

This argument is unavailing. To begin with, as we already have seen, it flouts the accepted rule of interpretation that views a shift in word usage as signifying a change in (rather than a retention of) preexisting textual meaning.<sup>71</sup> Another problem is that the not-electable-really-means-not-eligible interpretation would reward and encourage particularly sloppy legislative draftsmanship.<sup>72</sup> One more problem is that this claim of unchanged intent rests on precious little more than pure speculation about Congress's line of thinking.<sup>73</sup> The deepest flaw in this approach, however, lies in the erroneous-ness of its underlying premise—namely, that a mere lapse of attentiveness best explains the shift in word choice, from terms of eligibility to terms of electability, in the final stage of crafting the Twenty-Second Amendment. In fact, this shift in word choice was not an unintended slip-up or anything close to it. Instead, the switch in wording was a purposeful drafting move

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<sup>71</sup> See *supra* notes 46–47 and accompanying text.

<sup>72</sup> See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2506 (2015) (Scalia, J., dissenting) (rejecting proposition that courts can interpret a text to have a meaning inconsistent with what the words themselves indicate because doing so, among other things, “encourages congressional lassitude”); see also Goldman & Rozell, *supra* note 24 (indicating that if proponents of presidential term limits wanted to establish a rule of ineligibility, as opposed to a rule of non-electability, they “made a rookie legal mistake”). Moreover, it would be especially inappropriate to accept a sloppiness-rewarding result in this context because members of Congress were well aware of the need for special care in drafting a new provision of the Constitution. As Representative Earl Michener noted during debate in the House:

[T]he language of a constitutional amendment is most important, more so than in the case of ordinary legislation. Every comma, every semi-colon, every capital letter, every word means something in a constitutional amendment, and under these circumstances we should not lightly adopt language in a constitutional amendment that has not been thoroughly weighed.

93 CONG. REC. 870.

<sup>73</sup> Two facts are of particular salience in this regard. First, throughout the legislative discussions, virtually no attention was given to the effect of the proposed Amendment on the vice-presidency. Second, to the extent that some treatment of the subject can be squeezed out of the legislative materials, it provides a basis for concluding that Congress did not mean to inhibit election to that office. In particular, Senator Wilbert Lee O’Daniel formally submitted a proposal that (in contrast to the President-centric versions of the Amendment that consistently occupied legislators’ attention) specified that “no person who shall have served as President or Vice President shall be eligible for election to the office of President or the office of Vice President.” 93 CONG. REC. 1794 (statement of Sen. O’Daniel) (emphasis added). Congress, however, never latched onto this sort of Vice-President-limiting phraseology. See *id.* at 1963 (noting that Senator O’Daniel’s proposal was rejected by a vote of one to eighty-two). As to legislative discussions, Senator O’Daniel indicated that the Twenty-Second Amendment placed a limitation on only the presidency, as opposed to any other office. See *id.* (“We are now considering placing a limitation on the Presidency. Why should we apply a limitation on only one Federal office[?]”). And no one at any time objected to this description of the Amendment’s effect.

made in the context of an inter-party showdown that rendered the modification rife with significance.

The critical events occurred in the Senate.<sup>74</sup> On March 5, 1947, members of the upper chamber started in on a lengthy discussion of the Senate Judiciary Committee's "shall not be eligible" proposal.<sup>75</sup> The lines of engagement were clearly drawn. Senate Republicans overwhelmingly, if not unanimously, supported the Committee proposal.<sup>76</sup> But the two-thirds-vote requirement for promulgating constitutional amendments forced them to build a coalition with Democratic colleagues. Doing so proved to be no easy task. Many Democrats saw this proposal as a slap in the face of their recently deceased standard-bearer, Franklin Roosevelt.<sup>77</sup> Also in the air were claims that the reform would do away with an electoral prerogative wisely endorsed by the framers themselves.<sup>78</sup> Picking up on the writings of Alexander Hamilton, for example, some Democratic Senators argued that imposing a presidential term limit would tie the hands of voters, in a coun-

<sup>74</sup> See generally *Parker v. District of Columbia*, 478 F.3d 370, 390 (D.C. Cir. 2007) (noting that "when interpreting the text of a constitutional amendment it is common for courts to look for guidance in the proceedings of the Congress that authored the provision").

<sup>75</sup> 93 CONG. REC. 1680.

<sup>76</sup> Indeed, when the final vote in the Senate occurred, all forty-three Republicans present and voting were joined by sixteen mostly southern and border-state Democratic Senators to achieve the necessary two-thirds majority. NEALE, *supra* note 28, at 15.

<sup>77</sup> See, e.g., 93 CONG. REC. 1947 (statement of Sen. Kilgore) ("Why has this question been raised again, Mr. President? The people are not crying out for a two-term limitation. Then why has the issue been raised again? Of course, the reason is that some Members of Congress are anxious to do everything possible to discredit one of the most progressive Presidents this Nation has ever known."); *id.* at 1866 (statement of Sen. Hatch) ("Nothing could be more evident from the debate this afternoon than that the Republican Party, the majority party, is still looking backward. It is still the party of fear. What do they fear? They are afraid, Mr. President, of the voice of a ghost, of the only man who was ever reelected President 3 times. They are afraid of him, and they are now endeavoring to legislate against Franklin D. Roosevelt."); *id.* at 1776 (statement of Sen. Hill) ("There are legitimate reasons why one might support this resolution; but surely there are some who would support it in an effort to repudiate the memory, the work, and the immortal services of Franklin D. Roosevelt."); *id.* at 842 (statement of Rep. Sabath) ("What hurts most, and what I strongly resent, are statements made by several Republican Members that they 'must vote for this anti-Roosevelt resolution.' . . . It was a God-send . . . to the world that we had Franklin D. Roosevelt, whom the people freely chose four times to direct our Government and our destinies . . ."); see also ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY*, at xv (2004) (calling the Twenty-Second Amendment an act of "posthumous revenge" against President Roosevelt); NEALE, *supra* note 28, at 14 (citing concerns about "retroactive vindictiveness").

<sup>78</sup> See, e.g., 93 CONG. REC. 844 (statement of Rep. Halleck) (noting that the Constitution was ratified "without a specific limitation on Presidential tenure" despite a proposal for one); *id.* at 842 (statement of Rep. Sabath) ("Anyone familiar with the history of the formation of the Union . . . knows that it was not the purpose of the delegates . . . to [the Philadelphia] convention, nor of any of those who agreed to the language of the Constitution, to restrict the right of the people to choose their President freely, nor to limit the terms which a President could serve."). See generally *THE FEDERALIST* NO. 69 (Alexander Hamilton) (offering detailed argument as to why the President "is to be re-eligible as often as the people of the United States shall think him worthy of their confidence").



ter-republican fashion, even when conditions of emergency might well lead them to want to keep a battle-tested Commander in Chief at the helm.<sup>79</sup> Not all Democrats were dead set against reform.<sup>80</sup> But even those Democrats who saw value in some type of term limit tended to view the pending Republican proposal as reaching too far.<sup>81</sup> That proposal, as we have seen, provided that any person who had served “365 calendar days or more in each of two terms” would thereafter not be “eligible” for the presidency.<sup>82</sup>

As the risk of impasse grew, one key spokesman for each party stepped forward: Democratic Senator Warren Magnuson of Washington and Republican Senator Robert Taft of Ohio. Magnuson assailed the then-pending version of the Amendment. He argued that it could limit a President to an overall tenure that was far too short, and indeed sometimes deny the public “the right to endorse him” for even a single full term although he already had “done a good job.”<sup>83</sup> Magnuson therefore offered a “substitute amendment,” which broke sharply away from earlier submissions. This proposal stated simply that “[n]o person shall be *elected* to the Office of President more than twice.”<sup>84</sup> A string of Democrats spoke in favor of this new approach, while not a single party member voiced support for the contrasting, eligibility-limiting Republican measure.<sup>85</sup> Meanwhile, other Democrats objected to any form of constitutional tinkering. Senator J. Lister Hill, for example, ad-

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<sup>79</sup> See, e.g., 93 CONG. REC. 1970 (statement of Sen. Pepper) (“I am saying only this, that what is proposed here is to limit the right and the power of the American people in a moment of great crisis . . . to elect a man . . . whom they deem best fitted to lead them through the crucial time.”); *id.* at 1948 (statement of Sen. Kilgore) (arguing “the number of Presidential terms should not be limited, because we might deprive the American people of the services of the best man in any emergency, the man who knew the most about it, who had the inside facts, who was conversant with the situation”); see also *id.* at 1941 (statement of Sen. Holland) (“I should hate to have the Nation put in the position that such a person could not be called back to the Presidency.”); *id.* at 1778 (statement of Sen. Lucas) (“It is in violation of a fundamental principle of human rights. I consider the proposal dangerous to our liberties.”); *id.* at 1771 (statement of Sen. Hill) (“[T]he pending amendment to the Constitution would place the wisdom of the people in a straight-jacket. It would be a limitation on their right of free election.”).

<sup>80</sup> See *infra* note 91 and accompanying text (discussing statement of Senator Millard Tydings).

<sup>81</sup> See *infra* note 86 and accompanying text (discussing Democrat support for a later, more voter-friendly proposal).

<sup>82</sup> See *supra* note 61 and accompanying text (discussing Senate Judiciary Committee proposal).

<sup>83</sup> 93 CONG. REC. 1865 (statement of Sen. Magnuson). The most basic difficulty was that, according to the terms of the pending proposal, a person who served as President by way of succession for only 730 days—that is, two stints via succession of 365 days—could never be elected to serve as President at all.

<sup>84</sup> *Id.* at 1863 (emphasis added).

<sup>85</sup> See, e.g., *id.* at 1864 (statement of Sen. Connally) (“It seems to me that opposition to such a provision is not tenable.”); *id.* (statement of Sen. Tydings) (“I think the amendment is a good one.”); *id.* at 1863 (statement of Sen. McClellan) (noting that he “very much favor[ed] the Senator’s amendment”). Of significance, these expressions of support came from southern and border-state Senators, with whom Republicans had to build a coalition to secure supermajority adoption of the Amendment. See *supra* note 76 (discussing the final vote).

vanced the position that “the question of who should be elected President and how long he should serve should remain where it has been for the past 150 years, that is, in the sound judgment and the wisdom of the people of the United States.”<sup>86</sup>

On the Republican side, Senator Taft now assumed the starring role. He expressed his own view that the Magnuson proposal was too lax because it would permit a Vice-President-turned-President to serve almost all of an initial term and then serve two more full terms based on direct election to the presidential office.<sup>87</sup> Even so, Taft extended an olive branch. He encouraged fellow Republicans to seek a middle ground with Magnuson, because “[w]e cannot adopt the amendment unless the Democrats, or a large number of them, join in voting for it.”<sup>88</sup> In response to this overture, Magnuson showed no sign of letting up. Taft, however, sensed an opening for compromise. He therefore moved for a recess, and the full Senate went along with the suggestion.<sup>89</sup>

For the next two days, Taft threw himself into finding a way to break through the legislative stalemate. His effort centered on collaborating with Maryland Democrat Millard Tydings,<sup>90</sup> who had expressed support for the Magnuson formulation but also signaled a willingness to bargain.<sup>91</sup> The result was a new version of the Twenty-Second Amendment—the so-called Taft-Tydings proposal—which was ultimately approved by Congress and ratified by the states.

The Taft-Tydings proposal did two main things. First, it left in place the “[n]o person shall be elected to the office of the President” verbiage of the Magnuson substitute amendment, thus scuttling the earlier “shall not be eligible” language endorsed by the Senate Judiciary Committee and predecessor drafts that had surfaced in the House.<sup>92</sup> Second, the compromise formulation loosened the Amendment’s application to Vice-Presidents-turned-President by embracing a new approach to past presidential service. Under this revised rule, the ban on two elections as President would kick in

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<sup>86</sup> 93 CONG. REC. 1865 (statement of Sen. Hill).

<sup>87</sup> See *id.* (statement of Sen. Taft) (“I think it would be a great mistake to say that after a man had been President for 3 years, he should then be eligible for two more terms, serving a total of 11 years.”).

<sup>88</sup> *Id.* at 1867.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1938 (statement of Sen. Wiley) (noting the key role of Senator Tydings in forging the final version compromise with Senator Taft).

<sup>91</sup> *Id.* at 1863 (statement of Sen. Tydings) (describing the committee draft as “a little stringent” and expressing the view, even while supporting the Magnuson proposal, that “there may be good reasons why the committee amendment is preferable”; also focusing on the need to craft a text that created “a better chance of adoption” in the state legislatures).

<sup>92</sup> *Id.* at 1938 (setting forth the Taft-Tydings proposal); see also *supra* notes 57–62 and accompanying text (describing earlier versions).

only after a candidate had previously served “more than two years of a term to which some other person was elected President,” and no person would be foreclosed from running for President at least once.<sup>93</sup> This reworked text thus abandoned the Senate Judiciary Committee’s approach of equating “more than 365 days” spent in the presidential office to a full electoral term, while also doing away with the idea that some Vice-Presidents-turned-President might never be able to present themselves to the voters for election to the presidency at all.<sup>94</sup> In sum, the thrust of the Taft-Tydings revision was to expand voter choice in keeping with the preferences of Senator Magnuson and his Democratic colleagues.<sup>95</sup>

No Senator discussed with specificity the legal significance of the new “[n]o person shall be elected” language during the floor debates that followed submission of the Taft-Tydings proposal. But anyone who was paying attention knew these things: (1) this new and obviously altered election-focused language had been put forward initially by Senator Magnuson;<sup>96</sup> (2) the Magnuson proposal, including its “[n]o person shall be elected” 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;<sup>97</sup> (3) Senate Republicans, now led by Taft, were prepared to respond to these concerns of their Democratic colleagues in a meaningful way;<sup>98</sup> (4) one mechanism for doing so was to accept Magnuson’s shift from focusing on presidential eligibility (which, under the Twelfth Amendment, affected vice-presidential eligibility, in a direct, text-specific way) to focusing on presidential electability (which, under the Twelfth Amendment, did not);<sup>99</sup> and (5) this shift in phrasing, together with substitution of the new and liberalizing two-year-prior service rule, produced the text that a two-thirds majority could and did vote to accept.<sup>100</sup>

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<sup>93</sup> See *supra* note 33 and accompanying text (discussing language of the Twenty-Second Amendment as ratified).

<sup>94</sup> See *supra* note 83 (discussing Senator Magnuson’s critique of the proposed language).

<sup>95</sup> In addition, the Taft-Tydings formulation altered the Amendment’s transition clause in a way that expanded voter autonomy with respect to future elections involving then-sitting President Truman. See *infra* note 141 and accompanying text.

<sup>96</sup> See *supra* notes 83–84 and accompanying text (statement of Senator Magnuson).

<sup>97</sup> See *supra* notes 78–86 and accompanying text (discussing concerns about voter autonomy); see also, e.g., 93 CONG. REC. 1865 (statement of Sen. Magnuson).

<sup>98</sup> See *supra* notes 88–89 and accompanying text (discussing Republican response).

<sup>99</sup> See *supra* note 92 and accompanying text (discussing Taft-Tydings proposal).

<sup>100</sup> Later events in the amendment-framing process confirmed the seriousness of the objections of Senator Magnuson and other Democrats to the restrictions imposed by the then-draft of the Twenty-Second Amendment. This is so because after negotiations produced the final version of the Amendment, Senator Magnuson moved to an even *more* pro-voter-freedom-driven position, which would have barred voters only from electing a President “for more than two successive terms.” 93 CONG. REC. 1938. Although this position was rejected, it illustrates the context in

To be sure, there was no explicit discussion in the legislative proceedings about how the refocusing of the Amendment from presidential eligibility to presidential electability would affect later runs for the vice-presidency. But every legislator understood that the baseline norm against which they were operating—a baseline norm put in place by the framers themselves—was one of wide-open voter freedom. Moreover, with regard to the future selection of Vice-Presidents, the final textual revisions of the Twenty-Second Amendment were highly consequential. Predecessor drafts—precisely because they spoke of presidential eligibility—had clearly brought the last sentence of the Twelfth Amendment into play. Unlike these earlier drafts, however, the final version of the Twenty-Second Amendment did not map onto the eligibility-focused language of the Twelfth Amendment.<sup>101</sup> Thus, it did not displace the background norm of free voter choice for Vice-Presidents as a textual matter—far less displace it with anything approaching the measure of clarity one would expect if Congress were seeking to cut back on the long-settled and fundamental rule of republican self-governance.<sup>102</sup>

The critical point is this: It was only the Magnuson-inspired final text of the Twenty-Second Amendment that generated the requisite supermajority approval in the Senate and the House. No prior proposals generated such support. And from all appearances, none of them would have.<sup>103</sup> Yet it was only those prior proposals that purported to create an eligibility rule.<sup>104</sup>

Thoughtful scholars have rightly noted that the final phrasing of the Twenty-Second Amendment was the result of a cross-party compromise.<sup>105</sup> But they have failed to communicate the full importance of this compro-

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which final negotiations occurred, which included continuing pressure to loosen the Amendment's restrictions on free voter choice.

<sup>101</sup> Compare U.S. CONST. amend. XXII, § 1, with *id.* at amend. XII.

<sup>102</sup> See *infra* notes 131–137 and accompanying text (discussing the longstanding rule of self-governance).

<sup>103</sup> See *supra* notes 74–89 and accompanying text (discussing debate surrounding prior proposals).

<sup>104</sup> Put another way, it is simply impossible to know what would have happened if Senator Taft had insisted on retaining the Senate Judiciary Committee's "not eligible" phrasing. And this is especially true because opposition to the then-pending draft appeared to be mounting at the time, pushed forward in particular by concerns that the committee draft too greatly inhibited the rights of voters. If Senator Taft had eschewed the phrasing offered by Senator Magnuson, would fence-sitting Democrats have seen the change back as a slap in the face? Would detailed discussions have ensued about the difference between the eligibility and the electability of Presidents? Would follow-up questions about vice-presidential succession rights and durational limits on presidential service have attracted attention and concern? Would resulting discord have triggered a new wave of Democrat intransigence? And might that discord have resulted in scotching the amendment project altogether? We cannot know the answers to these questions for one critical reason: Senator Taft and his fellow Republicans chose to go along with Senator Magnuson's operative "[n]o person shall be elected" language.

<sup>105</sup> Peabody & Gant, *supra* note 7, at 598–99.

mise because they have not highlighted its most noteworthy features. In effect, Democrats were given the last word on whether the Amendment should include the term “eligible” or the term “elected.” In addition, they were given this choice in a setting where the difference mattered precisely because the latter phrasing was tied to a narrowing of the Amendment’s effect and thus to expanding the range of voter autonomy in keeping with the wishes of a large number of federal lawmakers.<sup>106</sup> In these circumstances, to dismiss the change in phrasing as inconsequential is to blink reality. And that is all the more the case because the change concerned the provision’s basic operative effect,<sup>107</sup> was caught up with preexisting terms of the Constitution itself,<sup>108</sup> was put forward at the decisive moment in the legislative process,<sup>109</sup> was part of carefully planned Republican effort to mollify doubting Democrats,<sup>110</sup> and was endorsed in a setting where those Republicans had far “bigger fish to fry.”<sup>111</sup>

Looking at the events of 1947 from a broader angle helps to bring the key point into focus. It was the presidency of Franklin Roosevelt that framed the thinking of every political representative who was called on to consider the Twenty-Second Amendment.<sup>112</sup> Moreover, the case of FDR involved the seeking of *reelection as President* by an already long-serving President. Building on this idea, Senator Taft and others expressed worries about reelecting for a third stint of presidential service someone who (due to succession) had already served more, and perhaps significantly more, than six years as President.<sup>113</sup> Neither Senator Taft nor any other House or Senate member, however, expressed any concern about electing a former President as Vice-President, and the reason why is apparent: This possibility was far removed from the sort of overreaching that reformers perceived in the

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<sup>106</sup> See *supra* notes 79–86 and accompanying text (noting discussions of voter autonomy).

<sup>107</sup> This is so because the inhibition-imposing language of the ultimately adopted Amendment was “[n]o person shall be elected.” It was, in other words, this phrase that specifically focused on and defined the operative legal impact of being twice before elected President—in contrast to the prior (and rejected) inhibition-imposing language that “[n]o person shall be eligible.”

<sup>108</sup> See *supra* notes 46–54 and accompanying text (discussing rules of constitutional construction).

<sup>109</sup> See *supra* notes 83–100 and accompanying text (discussing the Taft-Tydings proposal).

<sup>110</sup> See *supra* notes 88–92 and accompanying text (discussing Taft’s strategy).

<sup>111</sup> See *infra* notes 112–114 and accompanying text (discussing concerns about an individual holding the presidency for more than two terms).

<sup>112</sup> The best evidence of this point is that, time after time, legislators referenced the departure by President Roosevelt from the longstanding two-term tradition initiated by President George Washington. See 93 CONG. REC. 1956 (noting that Roosevelt’s decision to break the two-term precedent served as the impetus for constitutional reform).

<sup>113</sup> See *infra* notes 115–116, 122 and accompanying text (discussing congressional concern about an individual holding the presidency for too long).

actions of Franklin Roosevelt.<sup>114</sup> Put simply, when the Magnuson revision cropped up, Senator Taft and his Republican colleagues kept their eyes on the prize. They recognized that the phrasing of either the Senate Judiciary Committee draft or the Magnuson proposal would block self-perpetuating reelections by a single person to the presidency itself. That was the crux of the reformers' agenda. That was what they sought. That is what they got. But they got nothing more. They got nothing more because the language they accepted from the Magnuson revision took them only that far.

### C. *The Argument from Constitutional Purpose and Spirit*

Critics of this text-and-history-driven analysis may claim that it misses the forest for the trees. It is wrong, they might say, to give attention to the details of how the text of the Twenty-Second Amendment took shape in the churning vortex of legislative politics. More important in their view are the broad, thematic objectives of the Amendment. These analysts might assert that the Twenty-Second Amendment was designed to fend off any presidential tenure that is "too long"<sup>115</sup> or of "undue length."<sup>116</sup> In particular, there are passages in the legislative record indicative of a design to keep future

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<sup>114</sup> See, e.g., 93 CONG. REC. 1956 (statement of Sen. Lucas) ("No matter how any Member of the Senate may vote . . . truthful men know that the breaking of the two-term precedent by Franklin D. Roosevelt in 1940 and the further shattering of the precedent by his reelection in 1944 are the basic reasons for seeking this constitutional amendment."); *id.* at 869 (statement of Rep. Smith) ("We ought to face the facts behind the resolution. As Republicans . . . we do not want to impose upon our country again one-man government such as we have had for the past 14 years, be he a Republican or a Democrat, be it Roosevelt or somebody else."); *id.* at 848–49 (statement of Rep. Jenkins) ("The two-term rule for the position of President is an American tradition which was established by Washington, ratified by Jefferson in forceful and unambiguous language and likewise ratified expressly or impliedly by every other President until the day of Franklin D. Roosevelt. The tenure of Franklin D. Roosevelt proved that Washington and Jefferson were wise."); see also Peabody & Gant, *supra* note 7, at 570 (noting that "much of the proximate impetus for adopting the Twenty-Second Amendment seems to have derived from partisan opposition to the policies and legacies associated with Franklin Delano Roosevelt and his unprecedented four terms of presidential service").

<sup>115</sup> 93 CONG. REC. 1865 (statement of Sen. Taft); *accord id.* at 1945 (statement of Sen. Revercomb) ("The real heart of the amendment is to prevent any individual from holding too long the office of Chief Executive."); see also *id.* at 1680 (statement of Sen. Wiley) ("Too-long occupancy of the Presidential office and too-long continuance of the same administration always make for danger of dictatorship.").

<sup>116</sup> 93 CONG. REC. 1946 (statement of Sen. Revercomb); see also *id.* at 1939 ("It seems to me that the principal purpose is to preserve government and protect it against extended tenure of office."); *id.* at 865 (statement of Rep. Keating) (asserting that "some restraint upon the tenure of the President is desirable"). More relevant than isolated comments by individual legislators might be the official Senate Report, which spoke of establishing "a reasonable restriction on the possibility of an executive dynasty." S. REP. NO. 80-34, at 2 (1947). But what constitutes a "reasonable restriction" and an "executive dynasty" are inherently open questions. And the argument seems particularly strong that an opportunity to serve as Vice President—as opposed to President—presents little risk of creating a "dynasty" in the executive branch.

Presidents from serving more than a total of ten years.<sup>117</sup> Permitting an already-eight-year President to become Vice-President, so the argument goes, would clash with these objectives because it could produce a period of total presidential service in excess of what the Amendment's framers had in mind—for example, if an elected Vice-President was called on to assume a third term as President either on or shortly after inauguration day.

This argument merits a close look because it builds on the uncontroversial notion that interpreters should consider a text's underlying purpose in resolving any ambiguities that it presents.<sup>118</sup> Moreover, this line of argument has found favor with well-credentialed observers.<sup>119</sup> Indeed, its most prominent proponent may be former two-term President Bill Clinton himself, who expressed the view in early 2014 that a run by him for the vice-presidency “would undermine the spirit of the Constitution.”<sup>120</sup> What is one to make of President Clinton's purposive analysis? Would it in fact offend the “spirit of the Constitution” in general—and the underlying aim of the Twenty-Second Amendment in particular—to permit a vice-presidential run by a twice-before-elected President? The far better answer is no.

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<sup>117</sup> 93 CONG. REC. 2389–90 (statement of Rep. Michener) (noting “[i]t would be conceivable that a President might serve 10 years,” and adding that “[t]he important thing is a definite limitation of terms”); *id.* at 1956 (statement of Sen. Taft) (asserting that “if he [a successor President] has held office less than 2 years, he may be reelected twice and may serve a total of 10 years minus 1 day”); *id.* at 1945 (statement of Sen. Revercomb) (noting that the Amendment provides “a minimum limitation of 6 years and a maximum of 10”); *id.* at 1940 (statement of Sen. Taft) (“They will know that if the President lives for 2 years and then dies, they may possibly be President for 10 years if they are reelected twice.”); *id.* at 1938 (statement of Sen. Wiley) (“The suggested amendment . . . proposes that if the person occupying the office had not held it for more than 2 years of the term of his predecessor he would be eligible to two elective terms and thus in effect could remain in the office for practically 10 years.”).

<sup>118</sup> See 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). See generally Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 *B.C. L. Rev.* 1613 (2014) (discussing textualist and purposivist theories of statutory interpretation).

<sup>119</sup> See, e.g., KALT, *supra* note 20, at 144 (noting argument that “[t]he point of the Twenty-Second Amendment is clearly to limit presidential service, and it should be interpreted that way” lest it “allow a president who is barred from a straightforward reelection to become president through ponderous constitutional convolutions”); Albert, *supra* note 30, at 857–59 (arguing against adherence to “myopic” and “narrow clause-bound textualist analysis” because it is more “constitutionally faithful” to embrace a “proper, holistic reading” of the Constitution under which “a two-term President may not again become President by serving as Vice President” and “fears of an imperial Vice Presidency” are negated).

<sup>120</sup> In particular, in an interview with talk show host Jimmy Kimmel in April of 2014, when asked whether he would run for Vice-President, President Clinton replied, “I don’t believe I could do that. It would undermine the spirit of the Constitution.” Emily Heil, *Bill Clinton on Jimmy Kimmel: ‘Most Days, I Don’t Miss’ White House*, WASH. POST (Apr. 3, 2014), <http://www.washingtonpost.com/blogs/reliable-source/wp/2014/04/03/bill-clinton-on-jimmy-kimmel-most-days-i-dont-miss-white-house/> [http://perma.cc/3AZT-Y3Q8].

Consider, for example, the argument of Professor Bruce Ackerman, who agrees with Professors Amar and Volokh that a twice-before-elected President cannot run for Vice-President. In defending this position, Professor Ackerman has written: “[T]he principle announced by the Twenty-Second Amendment, limiting the president to two elected terms, represents a considered judgment by the American people, after Franklin Roosevelt’s lengthy stay in the White House, which deserves continuing respect.”<sup>121</sup> This purpose-based analysis, however, is laced with difficulties. Concern about “Franklin Roosevelt’s lengthy stay in the White House,” for example, does not carry over easily to a two-term President’s run for the vice-presidency because the case of Franklin Roosevelt involved neither election to nor service in the vice-presidency, as opposed to the presidency itself.<sup>122</sup> Professor Ackerman suggests that electing a twice-before-elected President as Vice-President would subvert the Twenty-Second Amendment’s goal of “limiting the president to two elected terms.”<sup>123</sup> A future run for the vice-presidency, however, would not give a twice-before-elected President more than “two elected terms” to the presidency itself.<sup>124</sup> And even on its face, the Twenty-Second Amendment does not “limit[] the President to two elected terms”; rather, it envisions that a President can serve for two elected terms following one or more part-terms of service, so long as each of those part-terms does not last “more than two years.”<sup>125</sup>

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<sup>121</sup> BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK* 204 n.34 (2006).

<sup>122</sup> *See supra* notes 90–95 and accompanying text (discussing the Taft-Tydings proposal). To be sure, Senator Taft stated that: “I think it is a great mistake to say that a man may serve for 11 years. I think that is too long.” 93 CONG. REC. 1865. But, in context, that assertion simply did not deal with whether a two-term President could run for Vice-President, especially in the absence of any effort to perpetuate one’s self in the presidency. In any event, even if Senator Taft would have preferred to install an under-any-circumstances ten-year limit on total presidential service, he simply did not write that limit into the Twenty-Second Amendment. And his choice in this regard was entirely sensible in light of his broader goal of getting his compromise redraft approved in the face of rising Democratic support for the Magnuson substitute amendment. *See supra* notes 75–90 and accompanying text (discussing debate in the Senate following the initial proposal).

<sup>123</sup> ACKERMAN, *supra* note 121, at 204 n.34.

<sup>124</sup> *See infra* notes 151–170 and accompanying text (Part II, section B, explaining in detail why election as Vice-President is not fairly characterized as election as President).

<sup>125</sup> *See* U.S. CONST. amend. XXII. This is the case, as we have seen, because the Amendment’s limit on electability, based on past service as a successor President, comes into play only if the successor President has so served “for more than two years of a term.” *Id.* Indeed, the “two years of a term” language blows away any purpose-based argument based on loose discussions in the legislative debates about a supposed limit of ten years on presidential service. This is so because this language on its face created the possibility that someone could occupy the presidency for more than ten years—that is, when a person is elected to and serves as President for two full terms after previously succeeding to the presidency more than once (say, for one and a half years on two separate occasions). To be sure, such a result is unlikely. But so is a scenario under which a person would serve two full terms as President; would later be elected as Vice President; would still be in that position when a vacancy in the presidency occurs; would then be able to succeed to the presidency in a situation where the vacancy in that office arose less than halfway through the



The broader point is that Professor Ackerman's purpose-based argument hinges, as is often true in law, on the level of generality at which one characterizes the purpose of the relevant legal text. To be sure, some Senators expressed the view that Presidents should not serve for "too long."<sup>126</sup> But what does "too long" mean? Does it mean eight years? Does it mean ten years? And if it is ten years, why should it bar a vice-presidential run by someone who so far has served only eight years as President? Should the purpose of preventing presidential service that is "too long" reach so far as to impose a prophylactic ban on the election of a Vice-President who probably will not succeed to the presidency at all and only rarely could succeed to that office for more than two years? And why in particular should anyone answer this question "yes" when the focal point of concern of the Amendment's drafters was an FDR-like third-term run for the presidency itself?<sup>127</sup> None of these questions answers itself.

No less important, Professor Ackerman's analysis does not take adequate account of the full purpose of the framers of the Twenty-Second Amendment. That purpose, as the legislative history makes clear, was to strike a balance. On one side of the balance rested concerns about creating quasi-monarchy-like conditions through the repeated seeking and securing of multiple presidential terms.<sup>128</sup> On the other side lay worries about stripping away the longstanding prerogatives of the American electorate to too great an extent.<sup>129</sup> To focus on only the first side of this balance is to misapprehend the

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four-year term; and thereafter would serve the full remainder of the term in uninterrupted fashion. Yet that is the scenario that is said to necessitate adoption, on purpose-based grounds, of the total-ineligibility interpretation.

<sup>126</sup> See *supra* notes 115, 122 and accompanying text (quoting Congressmen who expressed concern about Presidents serving for too long).

<sup>127</sup> See *supra* notes 112–114 and accompanying text (discussing congressional concerns about another Roosevelt-like situation).

<sup>128</sup> See, e.g., 93 CONG. REC. 1945 (statement of Sen. Revercomb) (urging that extending "power to any one man would be a definite step in the direction of autocracy, regardless of the name given the office, whether it be president, king, dictator, emperor, or whatever title the office may carry"); *id.* at 1780 (statement of Sen. O'Connor) (worrying that "some self-seeking leader may gain the Presidency and make use of the powers and privileges of that office to entrench himself therein"); *id.* at 1775 (statement of Sen. Overton) (expressing concern about repeated reelection of the President because of the "tremendous power which he has" and about the resulting risk that "we might drift into a dynasty"); *id.* at 860 (statement of Rep. Dolliver) (agreeing that the Amendment would counter "this tendency toward dictatorial government"); *id.* at 856 (statement of Rep. McCowen) (viewing the Amendment as "a great step toward preventing a dictatorship or some totalitarian form of government from arising"); *id.* at 852 (statement of Rep. Jennings) (favoring the Amendment because "[o]nly by its adoption can the people be assured that we shall never have a dictator in this land"); *id.* at 841 (statement of Rep. Allen) (attributing to George Washington a warning to citizens that they "might again be subject to the tyranny of monarchy if they permitted any individual to become too firmly entrenched as Chief Executive").

<sup>129</sup> See *supra* notes 78–86 and accompanying text (discussing concerns about voter autonomy).

underlying forces that brought the Twenty-Second Amendment into being. Indeed, this is especially true because (as we have seen) the concerns of pro-voter-choice advocates were accommodated, rather than thwarted, at the key last stage of the drafting process.<sup>130</sup>

An enriched understanding of the aim of the Twenty-Second Amendment invites the conclusion that its spirit—particularly when viewed in light of the spirit of the Constitution as a whole—supports, rather than undermines, the case for permitting two-time Presidents to seek the vice-presidency. A centerpiece of the republican theory that drove the entire constitutional project was identified by Alexander Hamilton at the New York Ratifying Convention: “[T]he true principle of a republic is, that the people should choose whom they please to govern them. . . . This great source of free government, popular election, should be perfectly pure and the most unbounded liberty allowed.”<sup>131</sup> The Supreme Court has noted that James Madison shared the view that self-rule “is undermined as much by limiting whom the people can select as by limiting the franchise itself.”<sup>132</sup> It is true that the Twenty-Second Amendment moved away from this basic structural choice to some degree. But it did so only by establishing a new limit with regard to being “elected” to “the office of President,”<sup>133</sup> while not otherwise purporting to negate the overarching background postulate of uninhibited voter freedom.<sup>134</sup> To the extent that the Twenty-Second Amendment dis-

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<sup>130</sup> See *supra* notes 83–100 and accompanying text (explaining how the Taft-Tydings proposal assuaged concerns about voter autonomy).

<sup>131</sup> 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (1876). At the same state ratifying convention, Robert Livingston agreed that “[t]he people are the best judges [of] who ought to represent them”; indeed, he went so far as to declare that “to tell them whom they shall not elect, is to abridge their natural rights.” *Id.* at 292–93.

<sup>132</sup> *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (characterizing Madison’s statements at the Constitutional Convention). This overarching principle of republican-based electoral autonomy was a deep-seated one in part because it grew out of the “bitter struggle for the right to freely choose representatives which had recently concluded in England” at the time the Constitution was framed. *Id.* at 542.

<sup>133</sup> U.S. CONST. amend. XXII.

<sup>134</sup> The Supreme Court has vindicated this basic norm in many cases, including by declaring that any “ambiguity” in the constitutional text, with regard to the analogous subject of congressional elections, should be resolved in keeping with “this fundamental principle of our representative democracy.” *Powell*, 395 U.S. at 543. It is true that our founding charter established important differences between the methods of electing House and Senate members and the method of electing executive branch officials. See U.S. CONST. art. II, § 1, cl. 2 (setting forth the Electoral College system); *id.* at amend. XXII (refining that system). *But cf.* *Bush v. Gore*, 531 U.S. 98, 104 (2000) (noting that, with regard to actual operation of the Electoral College, “[h]istory has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors”). The Court has never suggested, however, that different principles of republicanism govern the core rights of voters in these two contexts. See *Bush*, 531 U.S. at 103–05 (citing precedents with regard to legislator elections in the context of vindicating the rights of voters to secure equal treatment in voting for President and Vice-President). Indeed, the Court has found the need

placed this norm, it is controlling. But the “precious”<sup>135</sup> and “fundamental”<sup>136</sup> principle of free electoral choice—particularly with regard to the second highest office in the land—is not rightly brushed aside by way of a process of shadowy extrapolation, far less plain-text-defeating construction based on the supposed “spirit” of the Constitution.<sup>137</sup>

This last point about the centrality of the constitutional text is the most salient of all. The preceding discussion shows that no strong argument based on the purpose of the Twenty-Second Amendment, far less the purposes of the Constitution as a whole, supports rendering a twice-before-elected President constitutionally ineligible for the vice-presidency. Indeed, as we have seen, the spirit of the Constitution points the other way.<sup>138</sup> But

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to protect voter rights so important in the context of elections for President and Vice-President that it has indicated that Congress has an implied power to safeguard the “purity of presidential and vice presidential elections,” *Burroughs v. United States*, 290 U.S. 534, 544–45 (1934), and the “the free and uncorrupted choice of those who have the right to take part in that choice,” *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884). See also Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 887–90 (2002) (developing these points in detail). All of this powerfully indicates that there is no basis for identifying any “Vice-President exception” to the general principles of popular self-rule that lie at the heart of our constitutional system.

<sup>135</sup> *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

<sup>136</sup> *Powell*, 395 U.S. at 540–41.

<sup>137</sup> See *supra* note 73 and accompanying text (noting indications in the legislative history that no limit on pursuit of the vice-presidency was intended).

<sup>138</sup> There is a second purpose-based argument for excluding two-prior-term Presidents from the vice-presidency. According to this argument, if a former two-term President can run for Vice-President, the danger exists that a conspiracy between a sham presidential candidate and former-President vice-presidential candidate could take hold. Under this feared scenario, the election of such a ticket would trigger the prompt post-election resignation of the sham President and the immediate replacement of that person with the otherwise unelectable former-President Vice-President. And because such a power grab—whether pulled off with or without the previous knowledge of the national electorate—would violate the no-more-FDRs core aim of the Twenty-Second Amendment, this argument posits that it is right to read the Twelfth and Twenty-Second Amendments as barring the election of former two-term Presidents as Vice-President. See Peabody & Gant, *supra* note 7, at 622–24 (identifying this argument). One major problem with this contention is that it would throw out the baby with the bathwater by installing a textually unsupported, across-the-board prohibition to deal with an exceptionally extraordinary case. Assume, for example, a world in which Hillary Clinton is nominated for the presidency and chooses Bill Clinton as her running mate. Obviously, she would not make this choice because she was pursuing the presidency as a sham candidate. Nor has any presidential candidate in American history contemplated anything of the sort. Another difficulty with the argument is that it ignores the good judgment of the American people. It is farfetched to think that the nation’s voters would fail to detect a self-serving effort to pull a Twenty-Second-Amendment trick on them or to embrace with enthusiasm a presidential ticket openly designed to circumvent the Constitution’s strictures. (Moreover, if voters somehow chose to embrace such a ticket, it would almost surely be only because the most compelling circumstances confronted them—thus placing the value of voter autonomy at its very highest ebb.) For this reason, this argument runs up against the common-sense proposition that constitutional interpreters can and should consider the extent to which ordinary political processes will operate to fend off the worst-case scenarios that prophets of legal doom might concoct. See, e.g., *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447 (1978) (declining to apply dormant

even if a plausible purpose-based argument for the total-ineligibility interpretation did exist, it could not trump the Constitution's governing text. That text indicates that who cannot "be *elected* to the office of President"<sup>139</sup> and who is "*ineligible* to the office of President"<sup>140</sup> are two different things. Thus, the Twelfth Amendment's vice-presidential ineligibility rule—which hinges specifically on presidential ineligibility, rather than presidential non-electability—does not disqualify twice-before-elected Presidents from seeking, securing, or holding the vice-presidential office.

#### D. *The Beside-the-Point Transition Clause*

Advocates of the view that prior two-time Presidents are ineligible for the vice-presidency have one last argument. They might say that the transition clause of the Twenty-Second Amendment—which appears in the second sentence of the Amendment's Section 1—lends support to their position. The transition clause set forth two separate rules. The first, which was injected into the Amendment as part of the late-stage Taft-Tydings compromise, in effect gave then-sitting President Truman a lifetime pass from the Amendment's constraining effects.<sup>141</sup> The second part of the transition clause goes on to state that "this Article . . . 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."<sup>142</sup>

Professor Amar has argued that the phrase "acting as President" in this clause supports the view that twice-elected Presidents cannot become Vice-President. Noting that Vice-Presidents are the persons who ordinarily would serve as acting Presidents,<sup>143</sup> he suggests that the Amendment's framers would have had no reason to give a Vice-President-turned-President any special protection during the term of ratification (that is, "the term within which this article becomes operative") unless such a person had been rendered ineligible to serve as Vice-President (and thus foreclosed from suc-

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Commerce Clause where a "[s]tate's own political processes will act as a check on local regulations that unduly burden interstate commerce"). In any event, this end-run-avoiding, purpose-based argument rests on speculative premises, and it cannot be squared with the text of the Constitution, the value of free voter choice, and the evidenced intention of the Senate to protect that value at the final drafting stage.

<sup>139</sup> U.S. CONST. amend. XXII (emphasis added).

<sup>140</sup> *Id.* at amend. XII (emphasis added).

<sup>141</sup> 93 CONG. REC. 1938 (statement of Sen. Taft) (discussing the transition clause and noting that "it would except President Truman, in order that there may be no in personam legislation under the circumstances").

<sup>142</sup> U.S. CONST. amend. XXII, § 1.

<sup>143</sup> AMAR, *supra* note 1, at 436 n.8.

ceeding to the presidency) by the new Amendment's interaction with the Twelfth Amendment. Professor Amar puts the point this way:

The Twenty-Second's retroactivity rules would seem to confirm this reading of the Twelfth. These rules applied not only to a past incumbent who might in the future be 'elected' president but also to one who might thenceforth 'act[] as President'—paradigmatically, by being elected Vice-President and then moving back into the Oval Office via death, disability, or resignation.<sup>144</sup>

The underlying thought is that there 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.<sup>145</sup>

Part IV returns to this argument and demonstrates its failings. In particular, the analysis offered there shows that the most plausible interpretation of the transition clause (1) gives its reference to persons “acting as President” significant independent meaning and (2) achieves this result while focusing its effects solely on the transition period itself, thus precluding the extrapolation from it of any post-transition-period implications, including as to future ineligibility for the vice-presidency.<sup>146</sup>

But the deeper problem with the transition-clause-based extrapolation suggested by Professor Amar is that it clashes with the operative text, the history, and the purposes of the governing Amendments. Under his posited reading, after all, the Twenty-Second Amendment would operate to create a rule of presidential (and thus vice-presidential) ineligibility even though the text of that Amendment—in striking contrast to the preexisting and readily observable phrasings of the Twelfth Amendment and Article II, Section 1, Clause 5—embodied a purposeful congressional choice *not* to use the words

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<sup>144</sup> *Id.*

<sup>145</sup> *See id.*

<sup>146</sup> *See infra* notes 211–224 and accompanying text (Part IV) (discussing alternative interpretations of the transition clause that focus solely on its effect during the transition period). In addition, Parts II and III of this Article present modes of reading the Twelfth and Twenty-Second Amendments together in ways that do not go so far as to render former two-term Presidents wholly ineligible for the vice-presidency even while according significant effects to the Twenty-Second Amendment's transition clause. Even putting to one side the discussion in Part IV, there is much to be said for the view that these alternative reconciliations of the various constitutional clauses (and particularly the two-years-only-succession-right interpretation discussed in Part III, section B) embody better syntheses than the total-ineligibility interpretation considered and rejected in Part I.

“eligible” or “ineligible.”<sup>147</sup> Moreover, Professor Amar’s extrapolation would seem to dictate the bizarre, unfair, and antidemocratic result of forcibly defrocking an otherwise properly elected Vice-President during the term of ratification if that person (1) had previously been elected President twice and (2) had not yet succeeded to the presidency during the transition term before ratification occurred.<sup>148</sup> In any event, the simplest logic must give primacy to the Twenty-Second Amendment’s operative provision, rather than a short-fused, housekeeping transition clause even if some conflict between the two of them exists. And that is especially true when, as here, the transition-clause-based negative-implication-interpretation said to support the rule of total ineligibility was never touched on, even obliquely, at any time in the legislative proceedings.<sup>149</sup> In short, the transition clause fails to push forward the text-defeating proposition that the Twelfth and Twenty-Second Amendments operate together to render twice-before-elected Presidents wholly ineligible to serve as Vice-President.<sup>150</sup>

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<sup>147</sup> See *supra* notes 37–114 and accompanying text (discussing the constitutional text and legislative history).

<sup>148</sup> This result would logically follow because the total-ineligibility interpretation posits that no twice-before elected President can serve as Vice-President, and the transition clause on its face supplies no grandfathering protection to Vice-Presidents; rather, it provides “remainder of such term” protection only to “any person who may be holding the office of *President*, or acting as *President*” during the ratification term. U.S. CONST. amend. XXII, § 1 (emphasis added). Could it really be that the framers of the Twenty-Second Amendment meant to provide that an already-sitting Vice-President (unlike a Vice-President-turned-President) would have had to abandon that office during the ratification term? The more plausible view is that the drafters targeted the grandfathering protections supplied by the transition clause only at actual and acting Presidents because they understood the Twelfth and Twenty-Second Amendments not to say anything about Vice-Presidents qua Vice-Presidents at all—and, in particular, not to render someone ineligible for the vice-presidency based on that person’s prior service as President.

<sup>149</sup> See *generally infra* notes 211–224 and accompanying text (Part IV) (discussing two alternative interpretations of the transition clause that do not requiring drawing negative implications).

<sup>150</sup> One might also argue that the negative-implication approach suggested by Professor Amar is untenable because it would ascribe to the relevant portion of the transition clause no purpose except to address an entirely nonexistent problem—namely, the potential election of Herbert Hoover as Vice-President for the 1953–57 term following his earlier return to the presidency for at least two years during the 1949–53 term. This is the case because Section 2 of the Amendment specified a ratification period of seven years; because no persons other than Harry Truman and Herbert Hoover could possibly have ended up securing a third term (either as President or Vice-President) during that seven-year period; and because Harry Truman was dealt with in the first part of the transition clause, thus rendering the second part inapplicable to him. In 1947, however, it would have been difficult to imagine a later application of the Twenty-Second Amendment to the President who had presided over the stock market collapse of 1929, the onset of the Great Depression, and the erection of “Hooverville” shantytowns across the United States. (Additionally, if President Hoover had been elected Vice-President in 1952, he would have ended his service (as President or Vice-President) in 1957 at the age of eight-four—more than fifteen years beyond the last-term age of any prior President and eight years beyond the last-term age of any prior Vice-President.) As later discussion will show, this nuanced Herbert-Hoover-only critique of Professor Amar’s position does not provide a trump card argument against his claim that a prior-two-term President is foreclosed from running for Vice-President. See *infra* note 221 (developing this point

## II. THE ELECTORAL-INELIGIBILITY APPROACH

The foregoing discussion shows that the Twenty-Second Amendment does not render twice-before-elected Presidents wholly ineligible to become Vice-President under the Twelfth Amendment. Some proponents of the two-time-Presidents-cannot-run position, however, might be left unimpressed. The problem, they will say, is that Part I of this Article asks and answers the wrong question. On this view, the right rule is one under which a twice-before-elected President is not foreclosed altogether from serving as Vice-President. Such a person could, in particular, be appointed to that office pursuant to the Twenty-Fifth Amendment.<sup>151</sup> But the Constitution would still limit the twice-elected President's options—in particular, by prohibiting that person's *election* to the vice-presidency.

In fact, there are two separate analytical pathways that could lead to this conclusion. The first involves (as does the broader total-ineligibility interpretation) reading the Twelfth and Twenty-Second Amendments in *pari materia*. The second, in contrast, looks to the Twenty-Second Amendment standing alone. Neither of these routes, however, takes the proponent of the no-electoral-eligibility interpretation to that analytical traveler's desired destination.

### A. *The Argument from the Twelfth and Twenty-Second Amendments*

The first defense of the no-electoral-eligibility position rests on the joint operation of the Twelfth and Twenty-Second Amendments. The argument goes as follows: Under the express terms of the Twenty-Second Amendment, a twice-before-elected President cannot again be "elected" to the presidency.<sup>152</sup> Thus it is proper to say that such a person is "ineligible" to become President *by way of election*. And so, because the Twelfth Amendment applies the same eligibility rules to Presidents and Vice-Presidents,<sup>153</sup> it should follow that twice-before-elected Presidents are likewise not eligible to become Vice-President by way of election.

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in detail). Even so, this critique is yet another of many strikes against the total-ineligibility interpretation—thus pushing forward the need to look for an alternative interpretation that does not suffer from similar text-based and other difficulties. The best interpretations of the transition clause are set forth and defended in Part IV of this Article.

<sup>151</sup> Section 2 of that Amendment provides that: "Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress." U.S. CONST. amend. XXV, § 2.

<sup>152</sup> See *supra* note 8 and accompanying text (setting forth the Twenty-Second Amendment's "[n]o person shall be elected" language).

<sup>153</sup> See *supra* note 2 and accompanying text (setting forth the language of the Twelfth Amendment's final sentence).

In contrast to the proposed rule of total ineligibility for the vice-presidency, this alternative rule does not impede in any way the appointment of a twice-before-elected President to the vice-presidency.<sup>154</sup> Indeed, that is the critical point. According to the no-electoral-eligibility interpretation, twice-before-elected Presidents are ineligible for the vice-presidency only in the sense that they cannot be *elected* to the vice-presidency, even though they remain eligible to be *appointed* to that office.

This line of reasoning at least gives a grain of significance to the word “elected” as it is used in the Twenty-Second Amendment. Even so, the argument fails. To begin with, the electoral-ineligibility interpretation suffers from many of the same difficulties that mark the total-ineligibility interpretation. For example, there is no hint of such a plan in the legislative materials,<sup>155</sup> and this approach offends the background norm of free electoral choice.<sup>156</sup> Indeed, this interpretation clashes with that norm in the most palpable way—that is, by favoring with access to the highest office in the land those who are only appointed to the vice-presidency over those who would otherwise take on that office through a nationwide decision made at the polls. In addition, the purpose-based prevention-of-unduly-long-service argument for the total-ineligibility position<sup>157</sup>—which, as previously discussed, provides at best only a vanishing measure of support for that interpretive approach<sup>158</sup>—applies with equal force to the alternative electoral-ineligibility synthesis.

The main difficulty with this argument, however, is more fundamental. Once again, it stretches the text of the Twelfth Amendment beyond the breaking point. As we have seen, that Amendment states that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President.”<sup>159</sup> There is simply no hint here of a shifting, contextual, two-track, mode-of-selection-based conception of eligibility. The text indicates that would-be office-seekers are either “ineligible to the office of the President” or they are not; there is no indication that persons are half-eligible for the office—that is, eligible by way of appointment, but not by way of election. What is more, this either-you-are-eligible-or-you-are-not

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<sup>154</sup> In particular, this is a straightforward negative implication of the Twenty-Second Amendment precisely because its operative clause states only that twice-before-elected Presidents (or their legal equivalent) shall not be “elected.” See U.S. CONST. amend. XXII, § 1.

<sup>155</sup> See *supra* note 73 and accompanying text (discussing speculation about congressional intent).

<sup>156</sup> See *supra* notes 129–136 and accompanying text (discussing legislative concern about voter freedom). In addition, any Herbert-Hoover-only attack on the total-ineligibility interpretation, see *supra* note 150, would apply in equal measure to the electoral-ineligibility interpretation.

<sup>157</sup> See *supra* note 126 and accompanying text.

<sup>158</sup> See *supra* notes 127–130 and accompanying text.

<sup>159</sup> U.S. CONST. amend. XII.



approach was surely on the minds of the Twelfth Amendment's drafters and ratifiers. This is the case because that Amendment made obvious reference to the either-you-are-eligible-or-you-are-not set of qualifications (based on native-born citizenship, age, and residence) already set forth in Article II, Section 1, Clause 5.<sup>160</sup>

The electoral-ineligibility interpretation also puts the constitutional text on a collision course with itself. In effect, this interpretation posits that the drafters of the Twenty-Second Amendment meant to add to the list of eligibility requirements set forth in Article II, Section 1, Clause 5. It is worth thinking about how, when viewed in this way, the rule of exclusion posited by the electoral-ineligibility approach might be phrased. The most logical choice would involve adding to the rules regarding citizenship, age, and residency an additional restriction along these lines: "and no person shall be eligible for the office of President if that person, having twice before been elected President, is elected to a third term."<sup>161</sup> Once one thinks of the supposedly new eligibility rule this way, however, major problems come into view. After all, the textually-declared point of the Twenty-Second Amendment is that a twice-before-elected President cannot "be elected" President.<sup>162</sup> And it would be passing strange to say that someone is ineligible only "if . . . elected to a third term" when that person cannot be elected to a third term in the first place. All of this suggests that the electoral-ineligibility interpretation reflects at bottom the same confusion between electability and eligibility that renders the broader total-ineligibility interpretation a constitutional non-starter.

The text of the Twelfth Amendment creates yet another problem for the electoral-ineligibility approach. This is the case because the Amendment's treatment of Vice-Presidents hinges specifically, and only, on whether someone is "eligible to the office of President."<sup>163</sup> On its face, this language

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<sup>160</sup> See *supra* text accompanying note 6 (quoting this provision). Notably, the electoral-ineligibility interpretation both (1) purports to be based on the Twelfth and Twenty-Second Amendments and (2) simultaneously rests on a sharp distinction between the election and the appointment of Vice-Presidents. However, no constitutional text that provided for the appointment of Vice-Presidents existed at the time the Twelfth Amendment was adopted or, indeed, until a decade and a half after the Twenty-Second Amendment came into being. See U.S. CONST. amend. XXV (providing, in the first instance, for presidential appointments of Vice-Presidents to fill vacancies in that office).

<sup>161</sup> The reference to being "elected to a third term" is a critical element of this posited provision because it would be inconsistent with the electoral-ineligibility theory itself to say, without more, that a person is ineligible for the presidency simply because of being "twice before . . . elected President." After all, the whole point of the electoral-ineligibility theory is that, regardless of two earlier elections to the presidency, a person remains eligible to be President (that is, via succession) so long as that person is not "elected to a third term."

<sup>162</sup> See U.S. CONST. amend. XII.

<sup>163</sup> See *id.* (emphasis added).

cuts against drawing any distinction between the purportedly separate subjects of eligibility for election and eligibility for appointment. Rather, it straightforwardly indicates that the clause envisions a single set of qualifications that address eligibility “to the office” itself, regardless of how “the office” might be obtained. In this regard, the Twenty-Second Amendment joins other constitutional provisions in making clear that, even though a twice-before-elected President cannot again “be elected” to that office, such a person is fully able to succeed to that office from (for example) that person’s position as Speaker of the House or Secretary of State.<sup>164</sup> Given these circumstances, there is no easy linguistic way to conclude that a twice-before-elected President is not “eligible to the office of the President.” Such a person is eligible to that office, but simply cannot come to hold it by way of election. Put another way, being “eligible to the office” (which language *does* appear in the Twelfth Amendment) is not at all the same thing as being “eligible for election” (which language *does not* appear in the Twelfth Amendment).<sup>165</sup> Indeed, Section 3 of the Twentieth Amendment seems to drive this point home because it suggests there are instances in which a person might be elected to the presidency (so that the person is “eligible for election”), even though that person does not “qualify” to serve in that office (and thus is not “eligible to the office” until more time passes).<sup>166</sup>

The bottom line is that being “ineligible to the office of the President”—and thus to “that of Vice-President”—is not a quality that depends on how one assumes the office. To be sure, the drafters of the relevant provisions of the Constitution could have opted for such a rule. But in neither the Twelfth nor the Twenty-Second Amendment did they make this choice.

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<sup>164</sup> See *supra* note 44 and accompanying text (discussing the line of succession to the presidency); see also Peabody & Gant, *supra* note 7, at 612–13.

<sup>165</sup> See U.S. CONST. amend. XII.

<sup>166</sup> See *id.* at amend. XX, § 3 (providing that “if the President elect shall have failed to qualify then the Vice President elect shall act as President until a President shall have qualified”). Reflecting on this provision, Chief Judge Kozinski of the Ninth Circuit recently noted in *Lindsay v. Bowen* that an elected President’s “ineligibility may be discerned after the election,” thus requiring a “temporary succession to the Presidency by the Vice President” for the period—to use the Amendment’s terms—“until a President shall have qualified.” 750 F.3d 1061, 1065 (9th Cir. 2014). One point seems to be that a President who is not yet thirty-five years old or not yet a U.S. resident for fourteen years can be legally *elected* President, even though he or she is not yet *eligible* to serve in that office. That conclusion cuts sharply against the idea that whether one is “eligible to the office of the President” depends on whether one is electable to that office. See also JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1472–73 (1833) (calling the requirement that the President be thirty-five years old a “qualification of age” and discussing when being abroad for too long could “amount to a disqualification” under Article II’s residency requirements).

### B. The Single-Clause Alternative

The preceding discussion shows why the Twelfth and Twenty-Second Amendments do not operate together to render twice-chosen Presidents unelectable, but still appointable, to the vice-presidency. There might, however, be an alternative analytical route to that same result, and Judge Richard Posner has made the effort to map one. He contends that the Twenty-Second Amendment, wholly apart from the Twelfth, might well block the selection by election, but only by election, of would-be Vice-Presidents whom the electorate twice before has chosen to serve as President. His argument relies entirely on the opening words of the Twenty-Second Amendment: “No person shall be elected to the office of the President more than twice.”<sup>167</sup> According to Judge Posner: “[O]ne could argue that since the Vice-President is elected, . . . should he take office [as President,] he would be in effect elected president. Electing a Vice-President means electing a Vice-President and *contingently* electing him as president.”<sup>168</sup> In other words, if Americans were to elect a twice-before-elected President as Vice-President, that person would also be “elected to the office of the President” within the meaning of the Twenty-Second Amendment, even if only on a conditional basis; thus, the Twenty-Second Amendment standing alone bars a two-term President’s election as Vice-President because its core directive is that “no person” may be “elected to the office of the President more than twice.”

This argument, although imaginative, is not persuasive for several reasons.<sup>169</sup> The first reason is that it departs from normal usage of the English language to say that someone is “elected to the office of the President” when that person is elected only to the office of Vice-President at the time that voters actually cast their ballots. In addition, if election to the vice-presidency in and of itself qualifies as being “elected to the office of the President” (even if only conditionally), then the Twenty-Second Amendment would seem to bar a twice-before-elected Vice-President from running for the presidency. But no one has ever seriously suggested that persons such as Richard Nixon, George H. W. Bush, or Al Gore—each of whom had twice before served in the vice-presidency—acted illegally when they ran for President.

Judge Posner recognizes this complication and seeks to sidestep it by making clear that one is “elected to the office of President” by being elected Vice-President only if that person later succeeds to the presidency; otherwise, he suggests, an “election to the office of the President,” even of a

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<sup>167</sup> U.S. CONST. amend. XXII.

<sup>168</sup> Baker, *supra* note 1 (quoting an email from Judge Posner).

<sup>169</sup> Indeed, Judge Posner himself acknowledged that the contention is “a little bold.” *Id.*

conditional nature, has not yet occurred.<sup>170</sup> But this argument creates another serious difficulty. After all, if a two-term President were elected Vice-President, that person might refuse to succeed to the presidential office and thus—on Judge Posner’s own reasoning—not be conditionally elected as President. Indeed, even a present-day or previous President, such as George W. Bush or Bill Clinton, might establish well before election day that his selection as Vice-President would *not* be a conditional election to the presidency by solemnly pledging that he would never succeed to the presidency if the chance to do so arose. Put another way, Judge Posner’s conditional-election view of the Twenty-Second Amendment might be seen as logically dictating only that a twice-before-elected President cannot again assume the nation’s highest office from the vice-presidency. But the question of whether someone can succeed to the presidency is different from the question of whether someone can be elected to and serve in the office of Vice-President.<sup>171</sup>

Clever analysts might come up with plausible responses to these critiques.<sup>172</sup> But even if these critiques were to fall by the wayside, there remains a problem with Judge Posner’s interpretive approach that seems insuperable: His interpretation of the Twenty-Second Amendment contravenes its own controlling text. That Amendment, after all, states that “no person who has held the office of President, or acted as President, for more than two years of a term to which *some other person was elected President* shall be elected to the office of the President more than once.”<sup>173</sup> Indeed, this language appears in the very same sentence of the Twenty-Second Amendment that alone gives rise to Judge Posner’s contention. On its face, however, this language indicates that “*some other person was elected President*” in those instances when the Vice-President takes over as President. And so this language pushes hard against the claim that a Vice-President-turned-President is “elected to the office of President”—whether conditionally or unconditionally—for purposes of the Twenty-Second Amendment.

The other textual difficulty raised by Judge Posner’s interpretation is equally serious. The essential step of his argument is to assert that a person is “elected to the office of the President” for purposes of the Twenty-Second Amendment—conditionally elected, to be sure, but elected nonetheless—if that person is initially elected as Vice-President and thereafter succeeds to the

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<sup>170</sup> *Id.*

<sup>171</sup> See *infra* notes 177–190 and accompanying text (Part III, section A).

<sup>172</sup> One might argue, for example, that a Vice-President cannot opt out of succeeding to the presidency under Article II, Section 1. (For the text of the provision, see *infra* note 183 and accompanying text.) On this view, a sitting Vice-President automatically succeeds to the presidential office, even if that Vice-President refuses to serve or to take the presidential oath.

<sup>173</sup> U.S. CONST. amend. XXII (emphasis added).

presidency. That assertion, however, cannot be reconciled with the Amendment's express treatment of persons who previously served part of a presidential term. Assume, for example, that Vice-President Samuel Smurfoid must take over the presidency for the final ninety days of the 2021–25 term. It would follow, according to Judge Posner's extrapolation, that Smurfoid was conditionally elected President for that term because he was elected Vice-President and then moved from that office to the presidency. And so, according to the logic of Judge Posner, Smurfoid could thereafter be elected President for only one additional term because the Twenty-Second Amendment commands that "[n]o person shall be elected to the office of the President more than twice."<sup>174</sup> The Twenty-Second Amendment itself, however, precludes this outcome. This is so because the ensuing language of the Amendment states that Smurfoid *can* be elected President *two* more times because his initial stint in the Oval Office was not "for more than two years of a term."<sup>175</sup>

The bottom line is that Judge Posner's proposed reading of the Twenty-Second Amendment contravenes the text of the very Amendment on which he exclusively relies. Nothing in the Amendment indicates that someone who succeeds from the vice-presidency to the presidency is "elected to the office of the President."<sup>176</sup> To the contrary, the Amendment itself 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.

### III. POTENTIAL LIMITS ON VICE-PRESIDENTIAL SUCCESSION RIGHTS

Parts I and II of this Article show that the Twelfth and Twenty-Second Amendments do not exclude twice-elected Presidents from either appointment or election to the vice-presidential office. But perhaps ratification of the Twenty-Second Amendment had some other limiting effect on how the vice-presidency works. This Part considers that subject. Section A explores the possibility that the Twenty-Second Amendment blocks longtime Presidents who become Vice-President from moving into the presidency from the vice-presidential office. Section B addresses another possibility—namely, that such a Vice-President might be able to succeed to the presidency but not thereafter serve in that office for more than two years. These interpretive options—especially the second one—have more going for them than a first glance might suggest. In the end, however, neither stands up to close scrutiny.

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

### A. *The No-Succession Interpretation*

At the outset of this Article, an important conceptual distinction was introduced—namely, the distinction between whether a twice-elected President can be chosen to serve as Vice-President and whether a twice-elected President who is chosen for the vice-presidency can succeed from that office to the presidency. This distinction had received little attention in the post-Twenty-Second-Amendment world. In 1960, however, it bubbled up to the surface. There was talk at the time that President Eisenhower—who was then winding up his second full term—might sign on as the running mate for the Republican Party’s soon-to-be-named presidential nominee, Richard Nixon.<sup>177</sup> Exactly what President Eisenhower’s close advisors had to say on this subject has been lost in the mists of time. But one report indicates that then-Attorney General William Rogers counseled Eisenhower that, although the Twenty-Second Amendment would not block his election as Vice-President, it would preclude him from moving into the presidency from that office.<sup>178</sup>

Does this succession-right-limiting interpretation of the relevant constitutional provisions make sense? The argument that it does would seem to stem from the second portion of the Twenty-Second Amendment’s transition clause. That text, as we have seen, does not focus on whether someone can be elected (or otherwise selected) to be Vice-President.<sup>179</sup> Rather, it addresses whether someone who has been placed in that office can continue to “hold[] the office of President or act[] as President” for “the remainder” of the transition period term.<sup>180</sup> Perhaps this language signals a background assumption that has nothing to do with eligibility for the vice-presidency.<sup>181</sup> Rather, the assumption might be one that centers on presidential service—that is, one that addresses, as does the transition clause itself, the subject of

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<sup>177</sup> See *supra* note 22 and accompanying text (discussing Eisenhower rumors); see also *Vote for Eisenhower: Delegate Says He’ll Propose Him for Vice-Presidency*, N.Y. TIMES, July 22, 1960, at 8 (reporting on Representative James Fulton’s expressed intention to nominate Eisenhower as Vice-President at the Republican National Convention). Peabody and Gant speculate that, even though Eisenhower may have raised the possibility in jest, reported discussions within an “inner circle” suggest that he may have considered this option at some point in a serious way. Peabody & Gant, *supra* note 7, at 604 n.183.

<sup>178</sup> *Nixon and Eisenhower? Well, G.O.P. Can Hope*, N.Y. TIMES, Jan. 17, 1960, at 26. Notwithstanding the report to this effect in 1960, the former Attorney General indicated that he in fact never offered any such advice to President Eisenhower at the time. Peabody & Gant, *supra* note 7, at 604–05 n.185 (quoting Letter from William P. Rogers, Former U.S. Attorney Gen., to Theresa Ferrero (Nov. 12, 1997) (on file with Scott Gant)).

<sup>179</sup> See *supra* note 33 and accompanying text (quoting text of the Twenty-Second Amendment).

<sup>180</sup> U.S. CONT. amend. XXII.

<sup>181</sup> See *supra* notes 141–150 and accompanying text (discussing rationale for Professor Amar’s view that a prior two-time President is ineligible for the vice-presidency).

“holding,” or “acting” in, the presidential office for “the remainder of such term.” Moving from this starting point, a defender of the position attributed to Attorney General Rogers might say that the most logical conclusion is this: By specifying that a Vice-President, who twice before had been elected President, could serve as President during “the remainder” of the term in which ratification occurred, the transition clause indicates by negative implication that such a Vice-President *cannot* thus serve as President during “the remainder” of any later, post-ratification term. In other words, putting to one side the specialized one-shot rules that govern the transition term itself, a twice-before-elected President can become Vice-President but cannot succeed from that office to the presidency.<sup>182</sup>

One difficulty with this interpretation is that it creates significant tension with Article II, Section 1, Clause 6, which specifies that “[i]n Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same *shall* devolve on the Vice-President.”<sup>183</sup> This clause, however, does not say that an elected Vice-President will always take over the presidential office in the event that it becomes vacant. Indeed, Clause 6 goes on to vest Congress with authority to establish a line of succession in “the case of Removal, Death, Resignation or *Inability, both of the President and Vice-President.*”<sup>184</sup> And even if the framers envisioned the automatic ascension to the presidency by any Vice-President who did not possess an “inability” in the limited sense of a service-precluding physical or mental impairment, a later-adopted constitutional provision—here, the Twenty-Second Amendment—could go further in precluding succession by the Vice-President in additional cases.<sup>185</sup>

Thus the question is squarely posed: Does the Twenty-Second Amendment signal that a twice-before-elected President could be elected to the vice-presidency but then not be able to succeed from that office to the presidency? There are reasons of policy to conclude that it does not. To begin with, the idea of a Vice-President who cannot take over the presidency in the event of a vacancy in that office departs from conventional under-

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<sup>182</sup> It might also be said that this interpretation jibes with the root purpose of the Twenty-Second Amendment. Under this interpretation, so the argument goes, no one can get the sort of FDR-like long run in the presidency that lay at the heart of the Eightieth Congress’s concerns. At the same time, claimed rights of free voter choice in filling the vice-presidency remain fully protected. *See supra* notes 60–86, 112–114, 131–137 and accompanying text (discussing principles underlying the Twenty-Second Amendment).

<sup>183</sup> U.S. CONST. art. II, § 1, cl. 6 (emphasis added).

<sup>184</sup> *Id.* (emphasis added).

<sup>185</sup> *See, e.g.,* Fitzpatrick v. Bitzer, 427 U.S. 445, 454–55 (1976) (finding that later-ratified Fourteenth Amendment effectuated a “carv[ing] out” of state sovereign immunity protections put in place by the earlier-ratified Eleventh Amendment).

standing of the role of the Vice-President. Such a result, after all, would create the peculiar outcome that a person who was never elected to a national office (for example, the Secretary of State) could leapfrog a Vice-President, chosen by the national electorate, from lower in the line of succession to fill the presidential office.<sup>186</sup> Such a regime could also breed practical problems, in part because the prospect of this result could bring about destabilizing uncertainty and political gamesmanship as to what person might come to occupy the highest office in the land.<sup>187</sup> All of this, many observers will say, is not what the drafters of the Twenty-Second Amendment, or any other sensible persons, could have had in mind. And that is especially true because there exist contrary signals in the Amendment's legislative history.<sup>188</sup>

All of these critiques of the no-succession-right interpretation carry weight. But the biggest problem of all lies, once again, in the constitutional text. The difficulty is that even the most nimble interpreter of the Twenty-Second Amendment will struggle in vain to find any language in that provision's operative terms to which to hitch the wagon of this argument. There are simply no words in the Amendment's first, limitation-creating sentence that offer a basis for claiming that a properly selected Vice-President cannot succeed from that office to the presidency,<sup>189</sup> and there certainly are no words that purport to identify a new form of "inability" to succeed to the presidential office within the meaning of Article II, Section 1, Clause 6.<sup>190</sup> The critical point is that the first sentence of Section 1 of the Twenty-Second Amendment—which sets forth in full the operative rule of that Amendment—contains no text from which this limitation can be derived.<sup>191</sup> And the transition clause—precisely because it is only a transition clause—cannot on its own create freestanding substantive rules. That, however, is exactly the way in which the argument for the no-succession-right interpretation works. In effect, it seeks to extract from the transition clause, and

<sup>186</sup> See *supra* note 44 and accompanying text (discussing line of succession to the presidency).

<sup>187</sup> Peabody and Gant offer the added observation that, in such circumstances, the succession of a Vice-President who was twice-elected President might well have a salutary stabilizing effect during what could be a period of crisis. See Peabody & Gant, *supra* note 7, at 634.

<sup>188</sup> Notably, the Senate Judiciary Committee's draft of the Amendment specified that "[a] person who has held the office of President, or acted as President, on 365 calendar days or more in each of two terms shall not be eligible to hold the Office of President *or to act as President for any part of another term.*" 93 CONG REC. 1680 (emphasis added). Notably, the final eleven words of this version of the Amendment directly limited the ability of persons (wherever they might stand in the chain of succession) to succeed to the duties of the presidency. All such language about the possibility of succession, however, was removed from the final version of the Amendment that was approved by Congress. And precisely because the substantive terms of the final Amendment—in contrast to its immediate predecessor draft—did not purport to limit succession rights, there is reason to conclude that no such limit on succession rights was imposed.

<sup>189</sup> See *supra* text accompanying note 33 (providing the relevant text),

<sup>190</sup> Compare U.S. CONST. art. II, § 1, cl. 6, with *id.* at amend. XXII.

<sup>191</sup> *Id.* at art. II, § 1, cl. 6.



from nothing else, a new exception to the generally stated rule of vice-presidential succession rights established in Article II.

In sum, the no-succession-right argument has no basis in the constitutional text unless one draws a negative implication from the “remainder of such term” language that appears in the transition clause of the Twenty-Second Amendment. But transition clauses themselves do not establish operative rules. Rather, they merely clarify the effect of otherwise-established operative rules during the transition period. For this reason, the no-succession-right argument does not carry water. There is simply no support for it in any *operative* provision of the Constitution.

### B. *The Two-Years-Only-Succession-Right Interpretation*

Take a trip into the future to consider this hypothetical case. Priscilla Populopolous was elected President in both 2020 and 2024. Then, in 2028, she was elected Vice-President, but shortly thereafter the President-elect with whom she had run tragically passed away. As Parts I and II of this Article show, a vigorous debate exists about whether someone like Populopolous is eligible to serve as Vice-President.<sup>192</sup> And this uncertainty surely would have complicated any effort to nominate Populopolous for the vice-presidency and then to elect her to that office.

So how could it be that Populopolous was elected Vice-President in 2028? She secured that office because, in the run-up to the election, the Supreme Court issued a ruling—relying heavily on this Article—that rejected the idea that twice-before-elected Presidents are ineligible for the vice-presidency, either in general or by way of election.<sup>193</sup> In addition, the Court rejected the idea that Populopolous could not succeed from that office to the presidency, reasoning that there was no support in the operative terms of the Constitution for any such limitation.<sup>194</sup> The Court, however, embraced an alternative succession-limiting interpretation of the Twenty-Second Amendment that startled many constitutional scholars. It declared that, if Populopolous did succeed to the presidency, she could serve in that office for no more than two years.<sup>195</sup>

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<sup>192</sup> See *supra* notes 31–150 and accompanying text (Part I), 151–176 and accompanying text (Part II).

<sup>193</sup> Not surprisingly, the Court’s core reasoning was that Populopolous remained “eligible” to the office of Vice-President under the Twelfth Amendment despite her two earlier stints as President, even though she could not again be “elected to the office of President,” as opposed to Vice-President, under the Twenty-Second Amendment. See *supra* notes 31–33 and accompanying text (laying out eligibility and electability language).

<sup>194</sup> See *supra* notes 177–190 and accompanying text (discussing this issue).

<sup>195</sup> See Albert, *supra* note 1, at 564–65 (noting the possibility of this interpretation).

This approach, according to the Court, best captured the meaning of all the relevant constitutional clauses. To begin with, the Court explained, this interpretation jibed with the operative first sentence of the Twenty-Second Amendment on the theory that it indicates that “[n]o person” can serve “for more than two years” if “elected to the office of the President more than once.”<sup>196</sup> The Court also emphasized that this reading of the Amendment fit together well with those portions of the legislative history that suggested a congressional design to ensure that no person—at least within three terms—would serve as President for more than ten years.<sup>197</sup>

Finally, the Court relied on the transition clause. It reasoned that the no-eligibility, the no-electoral-eligibility, and the no-succession-right interpretive approaches all embodied unjustifiably strained efforts to derive a negative implication from that provision. The Court, however, viewed the two-years-only-succession-right interpretation as both linguistically plausible and uninfected by the maladies that afflicted each of those three alternative approaches. It reasoned that if Populopolous, after twice before having been elected President, had become a successor President during the term in which the Twenty-Second Amendment was ratified, the language of the transition clause would have ensured that she could have served out the full “remainder of such term.”<sup>198</sup> But Populopolous was elected Vice-President in 2028, so the transition clause afforded her no similar “remainder of such term” protection. Thus, the Court concluded that Populopolous could not serve out the “remainder of [the] term” that began in 2029; instead, during that post-ratification term, she could serve for only two years.

This interpretation took many legal scholars by surprise. Indeed, recently appointed Justice Donovan Disputer penned a stinging dissent that accused the majority of “rearranging the words of the Twenty-Second Amendment in a self-servingly wild and free-style way.”<sup>199</sup> Justice Disputer

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<sup>196</sup> The relevant portion of the clause, with the relevant words emphasized, is as follows: “[N]o person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.” U.S. CONST. amend. XXII, § 1 (emphasis added).

<sup>197</sup> In particular, as discussed earlier, there are some indications that Senator Taft and others anticipated that the finalized version of the Amendment would stop any one person from serving as President for more than ten years. See *supra* note 117 and accompanying text (discussing this point). In keeping with this notion, if Populopolous had succeeded to the presidency from the vice-presidency for two years during the 2017–21 term, she could still have been elected President in both 2020 and 2024—thus occupying the presidency for ten years. By symmetry of logic (so the Court reasoned in Populopolous’s case), she should likewise get ten years in the presidency—but not more than ten years—when the term of succession postdated service in the presidential office. And that is exactly the result that the two-years-only-succession-right interpretation produces.

<sup>198</sup> See U.S. CONST. amend. XXII.

<sup>199</sup> This “quoted” language from Justice Disputer’s “dissent” is simply make-believe, of course.

emphasized that the Amendment's treatment of part-term service in the presidency for more than two years is built around use of the past tense; in particular, the clause states that "no person who *has held* the office of President, *or acted* as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once."<sup>200</sup> This phrasing, Justice Disputer insisted, indicated that "shall be elected" means "shall *thereafter* be elected." "The majority," he urged, "seeks to transmute a limit on service triggered by a backward-looking condition that applies when someone already 'has held office' for two years into a new, forward-looking two-year limit on future service that the text in no way supports." "This move," Justice Disputer concluded, "qualifies as Presto-Chango magic no less marvelous than Harry Potter's finest work. But it also perverts the function of those who wear judicial robes in a way that is downright Voldemortian."<sup>201</sup>

This critique of the two-years-only-succession-right interpretation packs a serious punch. But our hypothetical Supreme Court majority at least purported to rely on the operative words of the Twenty-Second Amendment. It might be said in this regard that the Court read the Amendment's critical language—"shall be elected"—in a permissible way to mean "shall be elected, either in the past or the future." In addition, the majority made a fair point in suggesting that its interpretation finds some support in the Amendment's legislative history.<sup>202</sup> In short, because Priscilla Populopolous had been "elected to the office of the President more than once," she could not thereafter be put in a position whereby she "held the office of President, or acted as President, for more than two years." And so, Populopolous would have to step down from the presidency after two years of service dur-

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<sup>200</sup> U.S. CONST. amend. XXII (emphasis added).

<sup>201</sup> In a lengthy textual footnote, Justice Disputer went on to note that references to the two-year-rule in the legislative discussions reflected a clear understanding that it would work this way. By way of example, the Justice explained, Senator Taft indicated that the Amendment's treatment of service by a Vice-President-turned-President concerned the "first term" and thus dictated that "if he has held office less than two years, he may be *reelected* twice." See 93 CONG. REC. 1956 (emphasis added).

<sup>202</sup> In addition to producing an alignment with the ten-year-limit conception of the Amendment, this interpretation gains some support from the sequence of drafting. This is the case because the version of the Amendment initially considered by the House specifically used the term "shall *thereafter* be ineligible," but the term "thereafter" was dropped in the drafting process, and does not appear in the final version of the Amendment. See 93 CONG. REC. 863 (emphasis added); see also U.S. CONST. amend. XXII. In effect expressing the same idea as the version put before the House, the initial incarnation of H.R. 27 likewise prohibited any future form of presidential service if the would-be candidate had "*theretofore* served as President during the whole or part of each of any two separate terms." See *supra* notes 57–62 and accompanying text (setting forth these earlier drafts). The omission of such phraseology from the final Amendment gives some support to the idea that, contrary to Justice Disputer's hypothetical dissent, the term "no person shall be elected" does not mean "no person shall *thereafter* be elected."

ing the 2029–33 term. Then her own Vice-President, appointed and confirmed in Gerald Ford-like fashion pursuant to the Twenty-Fifth Amendment, would move into the Oval Office.<sup>203</sup>

The preceding discussion suggests that the two-years-only-succession-right interpretation of the Twenty-Second Amendment has more plausibility than first impressions might suggest. Even so, this interpretation carries with it a troublesome wrinkle that does not mark the alternatives: the total-ineligibility, the electoral-ineligibility, and the no-successor-right approaches. The wrinkle is that this interpretation could compel 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.<sup>204</sup> Critics are sure to say that this result is so odd, so 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.

This practical concern may have a role to play in the decisional calculus. But it does not rise to the level of an interpretive deal-breaker. In part this is the case because it is not likely that real-world conditions would come together in a way that would produce the troubling result.<sup>205</sup> Moreover, the Twenty-Fifth Amendment now provides helpful guidance as to the nature of succession rights when such a one-term three-step shift in the presidency must occur. Critics of the two-years-only-succession-right interpretation might respond that the dangers it raises are so grave that the law must be read to foreclose any risk that they might arise even if the odds of their doing so are small. But a rejoinder to this argument builds on the idea that the danger of such a mid-term presidential power transfer will arise only if the voters themselves decide that the risk is worth running.<sup>206</sup> Voters often choose to take chances, including the chance that a candidate will not remain in office for the full duration of the electoral term.<sup>207</sup> And that is as it

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<sup>203</sup> See *supra* note 151 and accompanying text (discussing the Twenty-Fifth Amendment).

<sup>204</sup> The earlier hand-off would result from the initial succession of the Vice-President to the presidency. The latter hand-off would occur when the Vice-President-turned-President would have to step down after the passage of two years.

<sup>205</sup> The full mix of necessary conditions would be: (1) the continued involvement in politics of someone who has already been twice elected President or who was elected once and served at least two years of another term by way of succession to the office; (2) that person's subsequent election as Vice-President; (3) that person's succession to the presidency from the vice-presidency; and (4) the occurrence of that succession prior to the expiration of two years of the relevant presidential term.

<sup>206</sup> See *supra* notes 131–137 and accompanying text (discussing centrality of free voter choice).

<sup>207</sup> The nation's voters, for example, reelected President Roosevelt in 1944 even though there was reason to believe that his health was flagging. See *Death of the President*, MILLER CTR., <http://millercenter.org/president/fdroosevelt/essays/biography/6> [<http://perma.cc/9LFV-AJAX>]. They

should be in a system that eschews paternalistic tinkering with free voter choice.<sup>208</sup> Put simply, if voters know that an election of a former President as Vice-President might later require a post-succession presidential power-transfer—but they elect that former President as Vice-President anyway—it is hard to say that something is amiss with our system of republican self-government.

Notwithstanding the preceding analysis, the two-years-only-succession-right interpretation is not sound. As for the language of the Constitution, the past-tense-centered critique put forward in the hypothesized opinion of Justice Disputer is strong, if not irrefutable.<sup>209</sup> As for conventional understandings, the idea of a mandatory mid-term step-down by a President who has already rightly succeeded to that office would seem far removed from the expectations of most citizens. As for policy, the prospect of a one-term merry-go-round of three or more Presidents is problematic on its face. But most importantly, the posited analysis of the Supreme Court of 2028 went down the wrong track insofar as it focused on a perceived need to draw a negative implication from the transition clause's "remainder of that term" language. It may well be that the two-years-only-succession-right extrapolation is the most appealing from among the negative-implication-supported interpretations we have encountered so far—far better, in particular, than the eligibility-squelching interpretations considered in Parts I and II of this Article. As the next Part shows, however, there is a sound and entirely sensible way to interpret the transition clause that causes it to operate only with respect to the transition period itself.<sup>210</sup> And because this approach reflects the most plausible interpretation of that clause, interpreters need not and should not strain to read it to give rise to any post-ratification-term negative implications at all.

#### IV. THE TRANSITION-CENTERED OPERATION OF THE TRANSITION CLAUSE

The preceding discussion identifies four possible substantive limits—the total-ineligibility limit, the electoral-ineligibility limit, the no-succession-right limit, and the two-year-only-succession-right limit—that

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also voted in 1972 for President Nixon despite preexisting concerns about the White House's involvement in the Watergate break-in. See Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aide Sabotaged Democrats*, WASH. POST (Oct. 10, 1972), <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/101072-1.htm> [<http://perma.cc/7YUE-K4CE>].

<sup>208</sup> See *supra* notes 78–79 and accompanying text (discussing legislative preference for free voter choice).

<sup>209</sup> See Albert, *supra* note 1, at 564–65 (rejecting two-years-only-succession-right approach because service for more than two years is relevant only in determining “the possibility of a *subsequent* election to the presidency”) (emphasis added).

<sup>210</sup> See *infra* notes 212–224 and accompanying text (Part IV).

the Twelfth and Twenty-Second Amendments might impose with regard to the vice-presidency in forever-operative fashion. Parts I, II, and III show that none of these interpretative approaches should prevail because the relevant constitutional texts establish no such substantive limits with regard to the vice-presidency.<sup>211</sup> A critic of this position—such as Professor Amar—might well respond that this view of things effectively reads key language of the transition clause out of the Constitution. That clause, after all, states that the Amendment “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.”<sup>212</sup> If the Twenty-Second Amendment created no new limits as to either vice-presidential eligibility or succession rights, so the argument from the transition clause goes, there would have been no reason to give any special transition-term protection to any “acting . . . President”—that is, to any Vice-President-turned-President. Put another way, the no-limits-at-all-on-Vice-Presidents interpretation of the Twelfth and Twenty-Second Amendments renders the special, sheltering treatment of a Vice-President-turned-Presidents in the transition clause “mere surplusage,” in violation of interpretive principles that reach back at least as far as *Marbury v. Madison*.<sup>213</sup>

What is the answer to this mere surplusage critique? The answer is that the transition clause—in particular, its allusion to an acting President—is susceptible to an interpretation that accords that clause significant meaning solely with regard to the operation of the transition period itself. And as a result, the terms of the transition clause create no need to derive from it by negative implication some otherwise-unstated, textually-untenable, and still-ongoing post-ratification-period limit on vice-presidential service. Indeed, the transition clause is subject to either of two separate interpretations that focus its effects squarely on the transition period itself. The first of those interpretations—that is, the “no-future-prejudice interpretation”—posits that the effect of the clause was to exempt any presidential service that occurred during the ratification term from counting toward the two-term limit on future runs for the presidency. The second and even more plausible interpretation—that is, the “clarity-for-all-past-Presidents interpretation”—posits that the clause spelled out precisely how all past holders of the presi-

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<sup>211</sup> See *supra* notes 31–150 and accompanying text (Part I), 151–176 and accompanying text (Part II), 177–209 and accompanying text (Part III).

<sup>212</sup> U.S. CONST. amend. XXII (emphasis added).

<sup>213</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (rejecting interpretation of Article III that would permit Congress to vest original jurisdiction in the Supreme Court because it would render the express allocation of original and appellate jurisdiction “mere surplusage” and “entirely without meaning”).

dential office would be treated during the transition period, with regard to both the reach and the limits of the transitional protections they would receive.

The key point is that each of these readings of the transition clause is far more plausible than any of the four text-distorting interpretations considered in Parts I through III. In addition, because both the no-future-prejudice interpretation and the clarity-for-all-past-Presidents interpretation accord all of the transition clause's terms independent meaning, they undermine any mere-surplusage argument said to support either the total-ineligibility, the electoral-ineligibility, the no-succession-right, or the two-years-only-succession-right interpretive approaches. The preceding analysis establishes that none of those interpretations reflects a sound synthesis of the operative texts of the Twelfth and Twenty-Second Amendments. And the analysis that follows confirms that conclusion by revealing that there is no reason whatsoever to embrace any one of those problematic syntheses based on the supposedly implicit commands of the Twenty-Second Amendment's transition clause.

#### *A. The No-Future-Prejudice Interpretation*

What was the aim of the Twenty-Second Amendment's transition clause? On one view, an important purpose of the clause was to protect anyone who succeeded to the presidency during the ratification term from suffering a near-term *future* disadvantage based on that period of service. The focal point of this argument is the "shall not prevent" language of the transition clause, which might be read to mean something like "shall not stand in the way of."<sup>214</sup> On this view, the transition clause operated to permit any Vice-President-turned-President to serve—rather than "prevent" that person from serving—for the full "remainder of [the transition] term" in a specialized sense. In particular, such ratification-term service would not compromise that person's ability to secure election to the presidency twice more thereafter, even if the "remainder of such term" service turned out to last more than two years.

This view of the transition clause is subject to challenge. Skeptics might say, for example, that it would have been easy for the drafters of the Twenty-Second Amendment to choose different words for the clause if they meant for it to embody this no-future-prejudice meaning. But spelling out this meaning, in terms well-suited for an economically phrased constitutional amendment (and, indeed, only a transition clause in that amendment), may not have been easy at all. The naysayers might add this point: If the drafters had meant for

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<sup>214</sup> *Prevent*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "prevent" as "[t]o stop from happening; hinder or impede").

the relevant clause to support this no-future-prejudice approach, they at least would have substituted a less ambiguous word for the verb “prevent,” such as “hinder” or “impede.”<sup>215</sup> This argument may prove too much, however, because the drafters no less easily could have substituted another term for the verb “prevent”—such as “prohibit” or “proscribe”—to lock down any intent to reject the no-future-prejudice interpretation.<sup>216</sup>

No matter what one might say about these matters, the no-future-prejudice interpretation gives independent meaning to the “acting . . . President” language of the transition clause without raising any of the serious textual problems engendered by the four substantive limits considered in Parts I through III. In any event, that interpretation does not stand alone. This is the case because, even if the transition clause is read not to look to the future at all, its reference to the “acting . . . President” performed an important function that negates any effort to cast it as mere surplusage.

### *B. The Clarity-for-All-Past-Presidents Interpretation*

This second way of viewing the transition clause focuses its effect wholly on the transition term itself. On this view, all of the would-be interpretations considered in Parts I through III, to the extent they depend on the

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<sup>215</sup> See *id.*

<sup>216</sup> One possible difficulty with the no-future-prejudice interpretation is that “the remainder of such term” language might be seen as strangely affording no help to the successor President who already served more than two years on the date of ratification, as opposed to the ratification-term successor President who had not yet served two years. However, this obscure problem (assuming it even is a problem) could have been avoided by endorsing a common-sense text-driven structural protection for such a person in keeping with principles the Supreme Court has recognized in the past. See, e.g., *Alden v. Maine*, 527 U.S. 706, 733–34 (1999) (relying largely on Eleventh Amendment’s textual protection of state sovereign immunity in federal court in concluding that a parallel non-textual principle of state sovereign immunity should apply no less in states’ own courts). The legislative history of the Twenty-Second Amendment also may create a problem for the no-future-prejudice interpretation because Congress’s focus, in crafting the transition clause, was on persons who would have served as President *prior* to the term of ratification, as was the case with President Truman. See *supra* note 93 and accompanying text (discussing Taft-Tydings proposal). But one might say in response that Senator Taft reshuffled the entire transition clause deck when he supplemented the preexisting “prevent” clause with a new, separate, and unlimited grandfathering clause that dealt solely with President Truman as part of the eleventh-hour effort to forge a workable cross-party compromise. See *supra* notes 87–100 and accompanying text (discussing Taft-Tydings proposal). All things considered, perhaps the best that can be said about the “shall not prevent” language is that it was meant in essence to ensure fair treatment to persons who happened to hold the presidential office during the transition period. And if that is true, it would be no stretch to conclude that one form of fair treatment involved not disadvantaging a Vice-President-turned-President with regard to future runs for the presidency based on ratification-term service that followed an election occurring before the day on which the Twenty-Second Amendment took effect.



transition clause, try to make far too much out of far too little.<sup>217</sup> In other words, all four of those interpretations—namely, the total-ineligibility, the electoral-ineligibility, the no-succession-right, and the two-years-only-succession-right approaches—try to extrapolate significant post-transition-period substantive limits from a clause that was meant to focus simply on the transition period itself. We have seen that each of these extrapolations clashes directly with the texts of the operative Amendments. In striking contrast, the clarity-for-all-past-Presidents interpretation creates no such textual tensions at all. And, in particular, it accords independent meaning to that clause’s treatment of an “acting . . . President,” even if the operative provisions of the Twelfth and Twenty-Second Amendments impose no limits whatsoever on would-be Vice-Presidents.

To see why, one must begin by recognizing that the substantive limits on presidential service imposed by the Twenty-Second Amendment were inextricably tied to time, including potentially differing periods of time over which past or present presidential service might occur. In turn, this feature of the Amendment created a complicated set of retroactivity problems for its framers to consider. This Article already has touched on some of those complexities. What was Congress to do, for example, with President Harry Truman, who was already well into a period of extended presidential service when the Amendment came under consideration? And what about Presidents other than Truman? Might the transition rules, for example, pay attention to—among other things—the difference between elected Presidents and non-elected Presidents during the ratification term, prior to the ratification term, or both? What about even the simplest case of a person who had served two elected terms as President prior to the four-year period during which ratification occurred? Should the new Amendment be deemed entirely inapplicable to such a person? Should it apply only *ex post* in the sense that no effect would be given to the two pre-ratification terms, but that later terms would count toward the operative two-term limit? Might Congress split the difference by deciding that one of those pre-ratification-period terms, but not both, should count for Twenty-Second Amendment purposes? Should Congress forge different rules depending on whether the earlier term was a fully-served electoral term or only a partially- or fully-served successor term?

The critical point is that, in crafting the transition clause of the Twenty-Second Amendment, Congress could have incorporated into it a rich

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<sup>217</sup> See *supra* notes 31–150 and accompanying text (Part I), 151–176 and accompanying text (Part II), 177–209 and accompanying text (Part III). See generally *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015) (“We have held that Congress ‘does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.’” (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001))).

blend of retroactivity-related rules. No less important, whatever retroactivity-related rules Congress did put in place were going to do two separate things at the same time: First, they would set forth some amount of non-retroactivity protection for persons who might otherwise come within the reach of the Amendment's substantive restrictions. Second, they also would establish the outer *limit* of non-retroactivity protections that such persons would receive.

With these points in view, it becomes easier to see that the second part of the transition clause, including its reference to any "acting . . . President," did useful work in establishing the rules with respect to (and only with respect to) the transition period itself. To begin with, the transition clause drew a distinction between the Amendment's treatment of President Truman and every other pre-ratification President.<sup>218</sup> Thus, the first part of the transition clause gave President Truman a lifetime Twenty-Second-Amendment pass. The second part of the clause, in contrast, declared that all other persons—whoever they might be—would receive a far less robust form of non-retroactivity protection. Of no small importance, the second part of the transition clause also established that all of these other persons—whether they previously had served one, two, or even three or four terms as President, or served part terms or full terms, or served by way of election or succession—would be treated the same way. No crazy quilt of retroactivity rules would be incorporated into the Amendment's text, and no court would have to struggle with any of the many anti-retroactivity problems that any particular former President might bring before it. Rather, all former Presidents other than President Truman would receive protection from being defrocked during the ratification term. And that was the *only* protection they would receive.

Assume, for example, that someone other than President Truman—say, Adlai Stevenson—had been elected President in 1948 and then again in 1952. Assume further that the Twenty-Second Amendment was not ratified until 1958; that in 1956 Stevenson had been elected Vice-President; and that he had become acting President in late 1957 due to the incapacitation of the President. Now make one final assumption—that the drafters of the Twenty-Second Amendment had failed to deal with the case of an "acting . . . President" in the transition clause.<sup>219</sup> One resulting problem leaps into view. Without such a treatment, a court might reason that the drafters of the Amendment meant to distinguish between elected Presidents and successor Presidents in such a way that only elected Presidents could serve "the re-

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<sup>218</sup> See 93 CONG. REC. 1940 (statement of Sen. Taft) ("I merely wish to invite the attention of the Senator to the difference between President Truman and any man who would occupy his office in the future.").

<sup>219</sup> See U.S. CONST. amend. XXII, § 1.

mainder” of the ratification term. In other words, the reference to the “acting . . . President” in the transition clause removed the possibility that a court might apply the transition clause—in a plausible, but congressionally unintended, way—to block our hypothesized version of Stevenson from serving out the full 1957–61 term. And for this reason, the transition clause’s treatment of an “acting . . . President” is not mere surplusage under the clarity-for-all-past-Presidents interpretation.

Also consider another hypothetical case—one in which Stevenson, in addition to rendering eight years of presidential service from 1949 to 1957, also served the 1957–61 term as acting President. Assume also, again, that there was no treatment of an “acting . . . President” in the Twenty-Second Amendment’s transition clause. Finally, assume that this case includes a new wrinkle—namely, that Stevenson wants to run for President again in 1960. Can he? With no treatment in the transition clause of an “acting . . . President,” we would not know the answer. Invoking the “presumption against retroactivity,”<sup>220</sup> some courts might say that such a candidate should have a shot at a third electoral term as President, at least where (as this hypothetical case posits) most of the officeholder’s presidential service predated ratification and no transition clause specifically barred that outcome. With the actual transition clause on the books, however, this result would be foreclosed. This is the case because the text of that clause provided a clear marker of the boundary of non-retroactivity protection given to someone in the circumstances confronted by the thus-hypothesized President Stevenson. He could serve out “the remainder” of the term of ratification—in this case, the 1957–61 term. But that was the full measure of the non-retroactivity protection he would receive, so that he could not secure election as President for another term in 1960. Again, the key point is that the treatment of an “acting . . . President” in the second part of the transition clause does not constitute mere surplusage if one embraces the clarity-for-all-past-Presidents interpretation. This is so because the “acting . . . President” language established not only that any President other than Harry Truman (whether that President took office by election or succession) would receive “remainder of the term” non-retroactivity protection during the four-year period of ratification, but also that any such President also would receive nothing more.

The broader point is that all of the words of the second part of the transition clause had much work to do even if the Twenty-Second Amendment did not disqualify otherwise eligible candidates from running for the vice-presidency, limit vice-presidential succession rights, or impose a generally applicable two-year limit on the period of post-succession service. The function of those words was to specify, in a comprehensive and unitary

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<sup>220</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 261 (2012).

fashion, the full extent of operative retroactivity-related rules that would apply to any person other than Harry Truman who might end up serving or acting as President during the single presidential term during which the Twenty-Second Amendment was ratified.<sup>221</sup>

The clarity-for-all-past-Presidents interpretation comports with the simple, common-sense notion that the subject matter of the transition clause most logically should be the period of transition itself. It also finds support in the legislative history of the transition clause in two respects. First, that history reveals that the clause in fact was designed to focus on ratification-term-specific difficulties presented by past Presidents, beginning with President Truman.<sup>222</sup> Second, that history shows that the clause's reference to an

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<sup>221</sup> One might challenge the clarity-for-all-past-Presidents interpretation on the ground that Congress could not have intended to embrace such a rule because it would have oddly affected only one person—namely, Herbert Hoover. As we have seen, this is the case because Section 2 of the Twenty-Second Amendment required that ratification occur within seven years of approval by Congress. U.S. CONST. amend. XXII, § 2; *see supra* note 150. On the better view, however, any argument along these lines for rejecting the clarity-for-all-past-Presidents view is misplaced. Indeed, many separate reasons converge to support this conclusion. First, while the legislative record includes a few references to the seven-year period, there is no indication that Congress ever reflected on its interaction with other provisions of the Amendment. Second, the Herbert-Hoover-will-be-the-only-person-affected peculiarity arose only because of an eleventh-hour, previously unexpected change to the transition clause that singled out President Truman for lifetime protection. (In other words, prior to this late-stage change, President Truman was the main target of the “remainder of such term” protection—not just President Hoover.) Third, Congress may well have drafted Section 1 of the Twenty-Second Amendment without paying heed to the seven-year ratification period, in light of the possibility that the Amendment, in its final drafted form, might be endorsed by Congress only in some later congressional session, perhaps well down the road; in that case, the transition clause could well have affected persons in addition to President Hoover. Fourth, Congress could have later sought to extend the seven-year ratification period (as later Congresses did with regard to the proposed Equal Rights Amendment, *see* H.R.J. Res. 638, 95th Cong. (1977)), thus expanding the coverage of the transition clause to a set of persons that ranged well beyond President Hoover. Finally, even if this Herbert-Hoover-only argument does cut against the clarity-for-all-past-Presidents interpretation, it also cuts against the negative-implication-based total-ineligibility, electoral-ineligibility, no-succession-right, and two-years-only-succession right interpretations. In the end, the only extrapolation from the transition clause that avoids this complication is the no-future-prejudice interpretation because only that interpretation provides protection to the Vice-President who becomes President during the ratification term without any reference to Herbert-Hoover-like past presidential service.

<sup>222</sup> In particular, the transition clause, in its initial form, afforded all potential officeholders “remainder of such term” non-retroactivity protection in a unitary, across-the-board way. The essential purpose of this draft clause, however, was to deal with President Truman because everyone knew that he had already served a major portion of the 1945–49 term and that he might well seek the presidency one or more times in the near future, including during what would turn out to be the term of ratification. It was only at the last stage of the drafting process that President Truman was afforded stand-alone lifetime protection by the first part of the transition clause. Congress nonetheless retained the original transition clause language as the clause's second part, apparently on the theory that someone other than President Truman could somehow end up within the Amendment's reach during the ratification term. The relevant point is that because the purpose of the transition clause was very narrow, it is an ambitious project to extract from it substantial ongoing substantive limitations on the freedoms of both candidates and voters. To be sure, the

“acting . . . President” made particularly good sense—in keeping with the clarity-for-all-past-Presidents interpretation—in light of how earlier versions of the Amendment’s substantive terms had dealt with Presidents who came into office by way of succession, rather than election.<sup>223</sup> In short, the transition clause—based on its text, its subject matter, and its history—best supports (by a wide measure) the clarity-for-all-past-Presidents interpretation. And that interpretation does not comport with, far less command, the recognition of otherwise nonexistent substantive rules that would impose significant limits on would-be Vice-Presidents in perpetuity. For this reason, the transition clause—when accorded its proper meaning—supports the conclusion that, going into the future, a twice-before-elected President can be elected Vice-President and then can succeed to the presidency from that office for the full duration of the unexpired term.<sup>224</sup>

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transition clause anticipated the possibility that a Vice-President-turned-President, who had twice before been elected President, might be serving as President during the term of ratification—just as was the case with our hypothesized version of President Stevenson. The clause also anticipated that someone might make the argument—however unfair and overreaching it might be—that such a person could not continue to hold the presidential office during the still-unfolding four-year term, in light of the Amendment’s recent ratification. The core purpose of the transition clause was to take the sting out of these arguments, exactly as the clarity-for-all-past-Presidents interpretation does.

<sup>223</sup> The key point here is that, prior to emergence of the Taft-Tydings compromise, the proposed text of the Twenty-Second Amendment’s substantive restraint provided as follows: “A person who has held the office of President, or acted as President, on 365 calendar days or more in each of two terms shall not be eligible to hold the office of President *or to act as President for any part of another term.*” See *supra* note 61 and accompanying text (emphasis added) (discussing Senate Judiciary Committee proposal). The “remainder of such term” transition clause was originally tethered to this substantive restraint. Moreover, with regard to this substantive restraint, the transition clause made obvious sense because it allowed an acting President to serve out “the remainder” of the ratification term even though such a person would “not be eligible . . . to act as President” during that term in the absence of some form of anti-retroactivity protection. Notably, the text of the transition clause—in this, its originally intended, context of use—carried with it no negative implication whatsoever; rather, it simply created an exemption with regard to the ratification term from the explicitly stated substantive restraint on service embodied in the proposed Amendment. When the Taft-Tydings proposal later came forward, this same “remainder of such term” language was simply carried over to it. Moreover, this carry-over occurred with no indication of any kind that the transition clause was somehow being re-conceptualized so as to cause it to assume a new and critical role in generating an otherwise nonexistent, text-straining, voter-restricting, for-all-time negative implication with regard to the Amendment’s operative substantive reach. Especially against this backdrop, there is every reason to endorse the clarity-for-all-past-Presidents interpretation. This is so because that interpretation ascribes to the transition clause exactly the same form of ratification-term-specific, non-retroactivity protection that that same clause had provided prior to the legislative tinkering that produced the final Taft-Tydings revision. See *King*, 135 S. Ct. at 2492 (declining to give rigid, program-altering reading to a discrete portion of the statutory text when there are signals that it “does not reflect the type of care and deliberation that one might expect”).

<sup>224</sup> See *United Sav. Ass’n of Tex. v. Timbers of Inward Forest Assocs.*, 484 U.S. 365, 371 (1988) (noting that “[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a

## V. IN CONCLUSION: BRINGING IT ALL BACK HOME

On *Maggie's Farm*, the third track of Bob Dylan's 1965 album *Bringing It All Back Home*, he wails: "I got a head full of ideas that are drivin' me insane . . . ."<sup>225</sup> The preceding discussion raises its own risk of producing information overload. So how does the weaver of the legal tapestry bring together the many strands of analysis, some central and some subsidiary, set

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substantive effect that is compatible with the rest of the law" (citations omitted)); *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925) (observing that "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the . . . ingenuity and study of an acute and powerful intellect would discover" (citation omitted)). As the forgoing discussion shows, the clarity-for-all-past-Presidents interpretation does not render the reference to an "acting . . . President" in the transition clause mere surplusage. But what if one somehow concluded that it did? On the better view, that interpretation would still be the right one. Indeed, at least five reasons support this conclusion. First, in context, the reference to acting Presidents in the transition clause very naturally carried forward to that clause identical language that already appeared in the operative-rule-creating, immediately-preceding sentence of the Twenty-Second Amendment. (In particular, the Amendment's operative clause rendered it applicable to a "person who *has held the office of President, or acted as President*, for more than two years." It thus was entirely natural and sensible to deploy a parallel construction in the transition clause.) Second, the reference to the acting President helped to communicate the comprehensive coverage meant to be provided by the second portion of the transition clause—that is, coverage of every potential ratification-term President except Harry Truman. Third, the interpretive canon based on mere surplusage must be applied in any event with attentiveness to other canons, including canons based on textual clarity that may (and, in this case, very strongly do) exert counterforces. *See King*, 135 S. Ct. at 2492 (noting that "our preference for avoiding surplusage is not absolute" (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004))); SCALIA & GARNER, *supra* note 220, at 59, 176 (noting that "[n]o canon of interpretation is absolute" and that "[e]ach may be overcome by the strength of differing principles that point in other directions"; adding, with regard to the anti-surplusage canon, that: "So like all other canons, it must be applied with judgment and discretion, and with careful regard to context. It cannot be always dispositive . . . ."). Fourth, the anti-surplusage canon does not operate, in any event, when the relevant text is rightly viewed as serving to remove any doubt about how the Constitution operates in a particular context. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (noting that the Necessary and Proper Clause was included in the Constitution simply to "remove all doubts" about the existence of implied legislative powers). Finally, in crafting the Twenty-Second Amendment, there was especially good reason to remove any doubt about the delegitimizing of any person handling the presidential office—including any successor or acting President—during the one-time, distinctly volatile presidential term in which the Twenty-Second Amendment would initially take effect. In particular, this clarification (even if it were only a clarification) held the promise of sparing both the then-sitting or then-acting President and the nation as a whole from the risk of severe disruption by preempting any effort by such a person's political opponents to demand an immediate ouster from office on the date of ratification. Notably, the existence of any such demands—regardless of their lack of legal merit—would inevitably involve distraction, partisan rancor, and unfairness both to the actual or acting President and to those members of the electorate who had supported the ticket that included that person prior to ratification. With these dangers in view, it would have been, and was, entirely sensible for the drafters of the transition clause simply to sweep all such arguments off the table for purposes of the set-of-one four-year term during which ratification occurred.

<sup>225</sup> BOB DYLAN, *Maggie's Farm*, on BRINGING IT ALL BACK HOME (Columbia Records 1965).

forth in the preceding pages? To recognize the complexity of the task is important in and of itself. The vast majority of analyses of whether a twice-elected President can take on the vice-presidency have cropped up in newspaper commentaries, television interviews, blog posts, and the like. There is nothing wrong with analyses of this kind. As this Article shows, however, the questions raised by the Twelfth and Twenty-Second Amendments do not lend themselves to quick and easy answers.

This point should cause us to shift attention to another fact of legal life. Those who labor in the field of constitutional interpretation inevitably bring to their efforts differing values, differing styles of analysis, and differing points of emphasis. In working through the questions considered here, some analysts will focus on the text of the Twelfth and Twenty-Second Amendments; others will pay more attention to their underlying purposes. Some observers will attend to how the Twenty-Second Amendment came to be; others will ignore that history altogether. Some interpreters will bring to the task a preference for broad and clear directives; others will be willing to accept a greater measure of nuance and contextualism. Some analysts will brush aside efforts to rely on the “spirit of the Constitution”; others will not hesitate to seek guidance in the organizing themes of our founding charter. And there will be great differences of opinion, too, about what those organizing themes might be. In this setting, for example, some analysts will emphasize the longstanding republicanism-centered norm of maximizing free voter choice. But others will say that the crafters of the Twenty-Second Amendment sought to forestall the emergence of autocracy, thus establishing a pro-republican counter-theme of properly limiting voter freedom in nationwide elections. Many interpreters will insist that the meaning of the Twelfth and Twenty-Second Amendments must operate today in exactly the same way it operated in 1951; others might pay heed to shifting background conditions, emphasizing such matters as the ever-growing powers of the modern presidency, the lengthening of human lifespans, or the proliferation of ever-more-vexing international crises.

In the face of these complexities, some observers will take the view that a decisive cutting of the Gordian Knot is needed, so as to bring at least the benefit of legal certainty to this welter of confusion. Adopting this view, however, does not move the ball forward because there exist two polar-opposite ambiguity-defeating resolutions of the interpretive muddle. According to one resolution, a twice-before-elected President cannot become Vice-President and therefore cannot succeed from that office to the presidency if a vacancy occurs. According to the other resolution, a twice-before-elected President can run for Vice-President, can succeed from that office to the presidency if a vacancy arises, and then can serve out the full remainder of the still-unfolding term. Because each of these resolutions

provides a clear and comprehensive solution, a commitment to the cause of certainty does not help resolve the key questions at hand. Some other way to “bring it all back home” must be found. So how should the story end?

It is important at the outset to recognize that the analysis set forth in this Article—despite its twists and turns—does not leave the law rudderless on a sea of doubt. Take, for example, Judge Posner’s argument that the Twenty-Second Amendment, of its own force, bars the election of a twice-before-elected President to the vice-presidency. On close inspection, this contention faces so many difficulties that it should be moved off the table. The thrust of Judge Posner’s contention is that the Vice-President is “elected to the office of the President”—albeit conditionally—within the meaning of the Twenty-Second Amendment. But other portions of the Twenty-Second Amendment itself directly undermine this interpretive position, even if one can somehow dodge the separate problem that ordinary speakers would seldom describe being elected to the office of Vice-President as the same thing as being “elected to the office of the President.” It follows that, if a twice-before-elected President cannot run for Vice-President, it must be because of the joint operation of the Twelfth and Twenty-Second Amendments.

As to this matter, thoughtful observers have expressed different views. Indeed, first-rate legal thinkers have concluded that the class of persons who are “ineligible for the office of the President” under the Twelfth Amendment includes those persons who cannot “be elected” to that office under the Twenty-Second. But the treatments of the issue offered by these commentators tend to be preliminary in nature or abbreviated in scope, whereas the comprehensive treatment offered in the preceding pages shows at least that these analysts have failed to grapple with key arguments against their position. Most important, if the drafters of the Twenty-Second Amendment had meant to establish a rule about eligibility, they could have, should have, and would have used the language of eligibility. Indeed, the logic of this contention is especially strong because the word “eligible” (1) is the operative term of the Twelfth Amendment, (2) was used in Article II, Section 1 to capture the very set of exclusions meant to be covered by the Twelfth Amendment rule, and (3) appeared repeatedly in drafts of the Twenty-Second Amendment before Congress, with good reason, specifically chose to abandon its use. In these circumstances, basic principles of interpretation point with clarity to a simple conclusion: Congress’s decision not to use the language of eligibility in the Twenty-Second Amendment indicates that it meant not to establish an eligibility rule.

Nor is this problem somehow skirted by reformulating the no-eligibility approach to focus on ineligibility only for election, as opposed to ineligibility for appointment. As we have seen, there are many problems



with this approach. Most fundamentally, it is at odds with the Twelfth Amendment's unitary textual focus on "eligibility for the office of the President"—a phrasing that offers not the faintest hint of recognizing a distinction between alternative modes of assuming the presidential or the vice-presidential office.

This brings us to the transition clause. Professor Amar has rendered valuable service in highlighting the relevance of the clause to the matters considered here. But any effort to build an argument for ineligibility based on this obscure provision travels several bridges too far. Put simply, the many arguments for permitting two-time Presidents to become Vice-President—based on textual non-parallelism, late-stage substitution of new terminology, the contextual relevance of Senator Magnuson's substitute amendment, and the underlying constitutional theme of free voter choice—render untenable any effort to exploit the "housekeeping" transition clause to salvage the otherwise unsalvageable eligibility-limiting interpretation of the governing Amendments' substantive terms. And that is all the more the case because other, more reasonable extrapolations from the transition clause are at hand.

So which of the non-eligibility-related extrapolations makes the most sense—the no-succession-right interpretation, the two-years-only-successor-right interpretation, the no-future-prejudice interpretation, or the clarity-for-all-past-Presidents interpretation? The last of these choices is the best by a wide margin.

Embracing the no-succession interpretation requires an assumption that the drafters of the Twenty-Second Amendment somehow meant to set forth a functionally problematic restriction that was wholly untethered to the Amendment's substantive terms. And although the two-years-only-succession-right interpretation may be the most plausible of these interpretations that place an ongoing, substantive limit on vice-presidential service, it creates serious problems of its own. In particular, this interpretation reflects a highly ambitious, non-past-tense reading of the statutory text that would compel destabilizing mid-term shifts in the presidency under some circumstances.

The no-future-prejudice interpretation is more plausible than either the no-succession-right interpretation or two-years-only-succession-right approach to the Twenty-Second Amendment. But the clarity-for-all-past-Presidents interpretation best fits with the text and structure of the transition clause itself. That approach, after all, focuses the operation of the transition clause on the transition period itself, while attributing to the drafters a sensible plan to deal with the distinctly complex set of transition problems presented by the operative terms of the Twenty-Second Amendment. Most importantly, the clarity-for-all-past-Presidents approach accords significance to all the words of the transition clause, while ascribing a meaning to it that

is simultaneously responsive to the text, structure, purpose, and history of all the operative constitutional provisions.

*Bringing It All Back Home* includes another track—Dylan’s famous *Subterranean Homesick Blues*—in which he famously observes: “You don’t need a weatherman to know which way the wind blows.”<sup>226</sup> Perhaps Dylan’s point applies here. Some observers are sure to declare that no party convention would ever choose a former two-term President to run for the vice-presidency. Indeed, they might note that the very swirl of legal complexities revealed by this Article confirms the soundness of this prognostication. But if history teaches us any lesson at all, it is to never say never. It may be that no prior-two-term President will seek the vice-presidency in our next presidential election. But someday, one likely will. And when that happens, the analysis offered in this Article indicates three things: (1) America’s voters can legally place that person in the vice-presidency; (2) that person can later succeed from that office to the presidency; and (3) if such a succession occurs, no cap on the duration of resulting presidential service will inhibit that person from serving out the full remainder of the term.

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<sup>226</sup> BOB DYLAN, *Subterranean Homesick Blues*, on BRINGING IT ALL BACK HOME, *supra* note 225.