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## History and Constitutional Interpretation: Some Lessons from the Vice Presidency

Joel K. Goldstein\*

In recent times, the principal demarcation in academic discussions of constitutional theory and judicial decision-making separates originalists and living constitutionalists.<sup>1</sup> Both categories include a variety of approaches, but in essence originalists believe that a constitutional text means forever what it meant when it became part of the Constitution, whereas living constitutionalists believe that constitutional meaning is not fixed but evolves in response to societal changes.<sup>2</sup> Living constitutionalists draw inspiration from Chief Justice John Marshall's immortal words from *McCulloch v. Maryland* that the Constitution is "intended to endure for ages to come, and, consequently,

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\* Vincent C. Immel Professor of Law, Saint Louis University School of Law. I am grateful to Mark Killenbeck and to the members of the Hartman Hotz Lecture Committee for the invitation to deliver the lecture in Mr. Hotz's memory on April 14, 2016. The list of prior Hotz lecturers itself made this invitation a real privilege, but my appreciation increased on December 2, 2015, when I had lunch with my friend, David V. Capes, a 1971 graduate of University of Arkansas School of Law and a co-founder of the St. Louis law firm of Capes Sokol. When conversation turned to people who had influenced us in our legal careers, David replied that while in law school he had worked for a brilliant lawyer in Fayetteville who had pressed him to dig deeper into subjects and to master the context of the legal problem as well as the specific subject at hand. He credited this lawyer with having helped shape the practices he adopted during his career. "His name was Hartman Hotz and there's a lecture at the law school named for him," David said. His testimonial enhanced for me what was already a cherished honor and my experience at the law school and interaction with members of the faculty and students made it a truly memorable occasion for me. Roy E. Brownell, II provided insightful comments which drew on his deep knowledge of the history of the vice presidency which helped me improve this article. Jordan Buchheit provided valuable research assistance and Stephanie Haley provided helpful administrative assistance.

1. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 241 (2009) (describing "the primary divide in American constitutional theory" as between originalists and nonoriginalists).

2. See, e.g., David A. Strauss, *Do We Have a Living Constitution?* 59 DRAKE L. REV. 973, 975 (2011).

to be adapted to the various *crises* of human affairs.”<sup>3</sup> For originalists, the Constitution’s original meaning prevails over constitutional interpretations based on other methodologies.<sup>4</sup> Living constitutionalists tend to be more pluralistic in the type of arguments they endorse.<sup>5</sup>

This categorization, like many shorthands, obscures as well as illuminates. In part, the dichotomy implies that those in the first group always follow originalism and that those in the second group never do. In fact, originalists often adopt,<sup>6</sup> sometimes candidly, sometimes not,<sup>7</sup> other modes of constitutional argument. Similarly, non-originalists almost invariably accord originalism some place in their methodologies.<sup>8</sup> Virtually everyone agrees that originalism in some sense is relevant to constitutional interpretation.<sup>9</sup> To paraphrase Thomas Jefferson, we are all originalists, we are all nonoriginalists,<sup>10</sup> although perhaps not to the same extent. (Or, as Groucho Marx more cynically put it, “These are my principles. If you don’t like them I have others.”)<sup>11</sup>

Moreover, the divide between originalism and living constitutionalism implies that originalists view constitutional interpretation as a historical exercise whereas living

3. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

4. Colby & Smith, *supra* note 1, at 242-43.

5. See, e.g., Joel K. Goldstein, *Calling Them As He Sees Them: The Disappearance of Originalism in Justice Thomas’s Opinions On Race*, 74 MARY. L. REV. 79, 81 (2014) (comparing Justice Thomas as a professed originalist with constitutional pluralists).

6. Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1754 (2015) [hereinafter Fallon, *History in Constitutional Adjudication*] (“[F]ew originalists are exclusive originalists.”).

7. See, e.g., Goldstein, *Calling Them as He Sees Them*, *supra* note 5, at 80 (pointing out that Justice Thomas uses various nonoriginalist arguments in race cases, not originalism).

8. See, e.g., Fallon, *History in Constitutional Adjudication*, *supra* note 6, at 1754 (“[N]early all of those who characterize themselves as nonoriginalists readily acknowledge the importance to constitutional adjudication of evidence bearing on the original meaning of constitutional language.”).

9. See, e.g., Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 165 (“It is hard to quarrel with the proposition that the views of the Framers are relevant to constitutional interpretation.”).

10. NOBLE E. CUNNINGHAM, JR., THE INAUGURAL ADDRESSES OF PRESIDENT THOMAS JEFFERSON, 1801 AND 1805 5 (2001).

11. Julius Henry “Groucho” Marx Quote (Feb. 7, 1983), in THE YALE BOOK OF QUOTATIONS 498 (Fred R. Shapiro ed., 2006).

constitutionalists subordinate the past while drawing principally from the present to look towards the future. Some even characterize originalism as the exclusive historical approach.<sup>12</sup>

It is not. Originalism represents only one, or actually only several,<sup>13</sup> types of historical arguments used to interpret the Constitution or to explain constitutional conclusions. Yet there are many other ways that history is used to illuminate constitutional meaning. In fact, history pervades constitutional interpretation.<sup>14</sup> Virtually every form of constitutional argument draws from the past, and accordingly living constitutionalists, like originalists, lean heavily on history in interpreting the Constitution.<sup>15</sup> History and constitutional interpretation go together.

Contrary to common portrayal, the real dichotomy in constitutional interpretation is not between those who use or ignore history. It is rather between those who purport to focus on certain discrete historical moments when interpreting the constitution, namely when a particular constitutional text was written or ratified, and those who see the relevant constitutional history as a continuing process which stretches well past the moment of textual creation towards the present. David Strauss has helpfully delineated these competing approaches as the command and common law approaches.<sup>16</sup> Whereas the command

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12. See, e.g., Scott Douglas Gerber, *Clarence Thomas' Views to Loom Larger at Supreme Court Following Scalia's Death*, THE PLAIN DEALER (Mar. 6, 2016, 6:16 AM), [http://www.cleveland.com/opinion/index.ssf/2016/03/clarence\\_thomas\\_views\\_sure\\_to.html#incart\\_river\\_index](http://www.cleveland.com/opinion/index.ssf/2016/03/clarence_thomas_views_sure_to.html#incart_river_index) [https://perma.cc/Y39A-C9NT] (calling Thomas the Court's "only remaining proponent of the historical approach to interpreting the Constitution . . ."); cf. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 13 (1991) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION] (conflating historical and originalist arguments); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982) [hereinafter BOBBITT, CONSTITUTIONAL FATE] ("*Historical argument* is argument that marshals the intent of the draftsmen of the Constitution and the people who adopted the Constitution.").

13. Eric Berger, *Originalism's Pretenses* 16 U. PA. J. CONST. L. 329, 332-36 (2013) (describing various originalist approaches); Colby & Smith, *supra* note 1, at 243-62 (describing varieties of originalist approaches of recent decades).

14. Fallon, *History in Constitutional Adjudication*, *supra* note 6, at 1753 ("Appeals to history, and to the authority of decisions made in the past, occur nearly ubiquitously in constitutional law.").

15. *Id.* at 1755.

16. DAVID A. STRAUSS, THE LIVING CONSTITUTION 36-37 (2010).

theory sees law as an order from an authorized boss or sovereign, the common law approach sees law as developing over time, as “the evolutionary product of many people, in many generations.”<sup>17</sup> The dichotomy Strauss identifies does not turn entirely on whether law occurs at a discrete, identifiable time or emerges through an evolutionary process but that distinction is part of, or perhaps a consequence of, the difference.<sup>18</sup> Adherents of the command model look at the time when a text becomes law to find constitutional meaning whereas the common law approach uses history panoramically and admits the possibility that today’s interpretation may subsequently yield to new conclusions based on history that has not yet happened.<sup>19</sup> Although sometimes a constitutional text remains continually linked to its original meaning, more often constitutional argument relies on dynamic, not originalist, historical arguments to allow the Constitution, in Chief Justice Marshall’s words, “to endure for ages to come.”<sup>20</sup>

This article discusses the use of history in constitutional interpretation by focusing on the Constitution’s provisions relating to the vice presidency. If that approach seems somewhat idiosyncratic, it is only because it is. It is also opportunistic since it allows me to write about the subject I know best, one I have been studying for more than forty years.

Yet using the vice presidency as a case study of historical approaches to constitutional interpretation also has some more general validity. Most discussions of constitutional theory focus on the justiciable clauses of the Constitution, the texts and resulting doctrines that engage the Supreme Court in high profile cases. Professor Richard H. Fallon, Jr., has recently written a comprehensive and characteristically illuminating account of the roles of history in constitutional adjudication<sup>21</sup> and, as is usually the case after Professor Fallon addresses

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17. *Id.*

18. *Id.* at 37.

19. *Id.* at 10, 36-38.

20. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

21. Fallon, *History in Constitutional Adjudication*, *supra* note 6.

even such a large subject, his discussion is so comprehensive and thoughtful that little remains for others to say about the various ways courts use history in constitutional cases.

Yet much recent scholarship has recognized that significant constitutional interpretation occurs outside of the courts in the regular operation of political institutions.<sup>22</sup> Even courts, dating at least to *McCulloch* have recognized that the judiciary does not possess a monopoly over constitutional interpretation.<sup>23</sup> Although sometimes courts claim they are the ultimate constitutional interpreters,<sup>24</sup> in other contexts they acknowledge the superior claims of another branch.<sup>25</sup> Scholars have explored the use of history in judicial decisions. Perhaps it is time to look elsewhere. As the great philosopher Yogi Berra once said about a St. Louis restaurant, “Nobody goes there anymore. It’s too crowded.”<sup>26</sup> The study of constitutional interpretation and practice outside the courts receives less traffic but offers insights into those activities. There is often reward in wandering off the beaten trail.

The recent shift in emphasis of originalism from original intent to original meaning also invites attention to nonjusticiable parts of the Constitution.<sup>27</sup> Whereas original intent was offered in the late twentieth century as a strategy to promote judicial restraint and accordingly

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22. See, e.g., HAROLD H. BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* (2015) (discussing frequency and importance of presidential interpretations of the Constitution); MICHAEL J. GERHARDT, *THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY* (2013) (also discussing presidential interpretations of the Constitution). See also Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions* 38 DUBLIN U. L.J. 387 (2015) (discussing role of constitutional norms and conventions in producing informal constitutional change in United States and Canada).

23. See, e.g., *McCulloch*, 17 U.S. at 401-02 (recognizing the role of past practice of political branches in shaping constitutional meaning); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (recognizing political question doctrine under which some constitutional questions are left to political branches).

24. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

25. See, e.g., *Nixon v. United States*, 506 U.S. 224, 229-30 (1993) (concluding the Constitution empowers the Senate to decide what “try” means in Impeachment Trial Clause of Constitution).

26. YOGI BERRA, *THE YOGI BOOK* 16 (1998).

27. Joel K. Goldstein, *Constitutional Change, Originalism, and the Vice Presidency*, 16 U. PA. J. CONST. L. 369, 382 (2013) [hereinafter Goldstein, *Constitutional Change*].

leave more decisions to elected officials,<sup>28</sup> originalists have now subordinated that goal.<sup>29</sup> Instead, they advance original meaning as the preferred methodology on the grounds that it reflects the true constitutional meaning.<sup>30</sup> Yet if original public meaning is the route to constitutional interpretation, then it is such not only for provisions judges construe but also for those that receive legislative or executive, not judicial, interpretations.<sup>31</sup> If originalism no longer finds its primary justification in restraining judges, there is no reason to test it simply in judicial settings.

Of course, the belief that the nonjusticiable portions of the Constitution present fertile areas of study does not necessarily lead to those parts relating to the vice presidency. Yet these vice-presidential provisions present some advantages in exploring historical approaches to discerning constitutional meaning. Several such constitutional provisions exist and history has shaped their meanings at different times and in different ways.

Moreover, the vice presidency has recently undergone a remarkable, and very positive, transformation. The trials and tribulations of the office through most of American history are legendary.<sup>32</sup> It is no longer the office the framers created and its recent development is the major recent success story of American governmental institutions.<sup>33</sup> What has made the vice presidency successful is that it has evolved in response to practice, consequential considerations, and structure—three types of historical constitutional argument which are featured in *McCulloch v. Maryland*—

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28. Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464-65 (1986); see also Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 601-02 (2004).

29. See, e.g., Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1189 (noting that new originalism has dropped the emphasis on judicial restraint with new focus on correct interpretation).

30. Goldstein, *Constitutional Change*, *supra* note 27, at 378-80.

31. *Id.* at 382.

32. JOEL K. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE, MONDALE TO BIDEN 1* (2016) [hereinafter GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY*].

33. *Id.* at 4-5, 301-03.

and away from the framers' original design in every respect.<sup>34</sup>

It is no coincidence that I have mentioned *McCulloch* several times. Few cases teach so much about constitutional interpretation as does *McCulloch* and few, if any, have taught so much about *McCulloch* as The University of Arkansas Law School's distinguished scholar, Mark R. Killenbeck, in his wonderful book<sup>35</sup> and other writings<sup>36</sup> on that canonical case. As Professor Killenbeck wrote, "The consensus is that the principles for which *M'ulloch* stands lie at the heart of the American constitutional order, that this is one case that no one interested in the Constitution or the history of this nation can afford to ignore."<sup>37</sup> *McCulloch*, as Professor Killenbeck points out, is not simply about the nature of the Constitution and methods of constitutional interpretation. Yet those subjects are among the areas of constitutional law on which *McCulloch* sheds light and are the topic of this discussion.

## I. SOME TYPES OF HISTORICAL ARGUMENT

Scholars have identified various forms of argument, justification, and considerations conventionally used in constitutional interpretation. For instance, Charles A. Miller identified constitutional text, doctrine, precedent, social evidence, and history in his 1969 study of the Supreme Court's use of history.<sup>38</sup> He subdivided history in various ways including original intent—or understanding—and ongoing history.<sup>39</sup> Philip Bobbitt later identified six modalities of constitutional argument—historical

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34. Goldstein, *Constitutional Change*, *supra* note 27, at 401-10.

35. MARK R. KILLENBECK, *M'CULLOCH V. MARYLAND: SECURING A NATION* (2006).

36. See, e.g., Mark R. Killenbeck, *It's More Than a Constitution*, 49 ST. LOUIS U. L.J. 749, 752 (2005).

37. KILLENBECK, *supra* note 35, at 7.

38. CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 14-20 (1969).

39. *Id.* at 20-28. For instance, Miller distinguished between history internal to a case, i.e., its factual background, and that which is external to the case which included history internal to the law, such as precedents and legal history, and history external to the law such as general history. *Id.* at 20-26.



(originalist), textual, structural, doctrinal, ethical, and prudential.<sup>40</sup> In 1987, Richard A. Fallon, Jr. focused on five conventional types of constitutional argument.<sup>41</sup> More recently, Professor Fallon has pointed out the ubiquity of historical argument in constitutional adjudication and has identified at least sixteen different types of historical argument that appear in constitutional decisions.<sup>42</sup>

Although originalism comes in various forms,<sup>43</sup> all involve historical inquiry. With respect to the original Constitution, original intent or intent of the framers looked to evidence of the subjective intent of the men who wrote the Constitution in Philadelphia or, in some cases, ratified it in their various colonies.<sup>44</sup> A similar inquiry was made regarding the intent of those who drafted or ratified various amendments. As critics pointed out problems with interpreting the Constitution to coincide with original intent,<sup>45</sup> some migrated to original understanding which associated constitutional meaning with the subjective understandings of how particular constitutional language would operate at the time it was added.<sup>46</sup> More recently most originalists emphasize the original public meaning of constitutional language as dispositive although many concede that it is often indeterminate and must give way to constitutional construction, whereas others rely on a hypothetical reasonable person to produce meaning.<sup>47</sup> Notwithstanding these different species of originalism,

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40. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 12, at 12-13; BOBBITT, CONSTITUTIONAL FATE, *supra* note 12, at 7, 93-98.

41. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-90 (1987) [hereinafter Fallon, *Theory of Constitutional Interpretation*].

42. Fallon, *History in Constitutional Adjudication*, *supra* note 6, at 1759-96 (identifying twelve types of historical arguments or sixteen including different types of originalism). See also Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 660 (2013) (identifying eleven types of historically based constitutional arguments).

43. See, e.g., Fallon, *History in Constitutional Adjudication*, *supra* note 6, at 1762-72.

44. See, e.g., Colby, *supra* note 28, at 720; Colby & Smith, *supra* note 1, 247-50.

45. See Colby & Smith, *supra* note 1, at 248-49.

46. *Id.* at 250-52.

47. *Id.* at 254-55.

they all look for historical evidence at or about the time a constitutional text was written or ratified.

But the various forms of originalism do not monopolize historical interpretation. On the contrary, virtually every mode of constitutional argument involves history in one way or another. Take textual argument. Textual interpretation requires some premise regarding the time frame when its meaning will be set.<sup>48</sup> Disagreements over the meaning of terms like “commerce,” “executive power,” and “cruel and unusual” stem in part from differences regarding whether the meaning of those words was fixed at ratification or is capable of change. Notwithstanding these and other differences, there are areas of agreement. The Constitution prohibits someone who is not a “natural born Citizen” from serving as President.<sup>49</sup> Although all do not agree on whether to anchor that phrase to its eighteenth-century meaning, all interpret the term as imposing a geographic or perhaps a parental criteria; no one has seriously argued that a Caesarean delivery would preclude a newborn from serving as President.<sup>50</sup>

Precedent or doctrinal argument is inherently historical in several ways. To begin with, one relying on judicial precedent must look backwards to find the decisions to apply. Yet application is not automatic, especially where constitutional interpretation is involved. Sometimes the Court rejects a prior decision in order to apply a different rule based on experience. As Justice Louis D. Brandeis pointed out in a classic dissent, “The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”<sup>51</sup> Courts consider the impact of subsequent developments on precedent before

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48. Cf. BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 12, at 26, 36 (arguing that textual approach relies on contemporary meaning of constitutional language); Fallon, *Theory of Constitutional Interpretation*, *supra* note 41, at 1197-1198, 1252.

49. U.S. CONST. art. II, § 1, cl. 5.

50. Fallon, *History in Constitutional Adjudication*, *supra* note 6, at 1760-61.

51. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405, 407-08 (1932) (Brandeis, J., dissenting).

deciding to follow it. Have later changes in law or fact strengthened or weakened the rationale for applying the precedent?<sup>52</sup> Has the precedent proved workable in its past applications?<sup>53</sup> Is the received rule a historical outlier, lacking in prior support or subsequent application?<sup>54</sup>

Three other types of historical constitutional arguments—ongoing practice, consequential or pragmatic argument, and structural argument—apply to the history of the vice presidency. These types of arguments invite attention here because they were prominent in *McCulloch v. Maryland*, the classic case which is the subject of Professor Killenbeck's book, and they impact nonjudicial behavior.

Ongoing practice presents an important way that the behavior over time of nonjudicial governmental institutions shapes constitutional meaning especially regarding separation of powers.<sup>55</sup> Writing in *The Federalist Papers*, James Madison recognized that constitutional language required liquidation through practice to determine meaning. "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications," he wrote.<sup>56</sup>

Whereas precedent or judicial doctrine looks to past judicial behavior as a source of constitutional meaning, ongoing practice finds constitutional meaning established or influenced by the actions of nonjudicial governmental

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52. *Burnet*, 285 U.S. at 412 ("[C]onditions may have changed . . . Moreover, the judgment of the Court in the earlier decision may have been influenced by prevailing views as to economic or social policy which have since been abandoned."); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855, 857-60 (1992) (identifying subsequent changes in fact or law as factors that might undermine a precedent).

53. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543, 545, 546 (1985) (rejecting existing constitutional rule as unworkable).

54. See, e.g., *United States v. Darby*, 312 U.S. 100, 116, 117 (1941) (rejecting prior rule as based on novel principle which had not been followed).

55. Fallon, *History in Constitutional Adjudication*, *supra* note 6, at 1777.

56. THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

actors, such as executive officials and congressmen.<sup>57</sup> Thus, in *McCulloch v. Maryland*, Chief Justice Marshall considered the past behavior of the executive branch and Congress in concluding that Congress had power to create a Bank of the United States.<sup>58</sup> He observed that “a doubtful question . . . in the decision of which . . . the respective powers of those who are equally the representatives of the people, are to be adjusted . . . ought to receive a considerable impression from [government] practice.”<sup>59</sup> More than a century later, Justice Felix Frankfurter wrote that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution . . . may be treated as a gloss on ‘executive [p]ower’ . . .” that Article II vested in the President.<sup>60</sup> Practice is often viewed as a relevant factor even when it began or occurred long after the founding period.<sup>61</sup> Not all past nonjudicial activity counts as precedential, Michael Gerhardt has pointed out, but that which is discoverable and is acted upon sufficiently frequently may have such significance.<sup>62</sup>

Consequential or prudential arguments respond to circumstances and rest on the premise that wherever possible the Constitution should be interpreted in a manner likely to lead to good, rather than bad, results.<sup>63</sup> Such arguments appear frequently in Court cases including, and inspired by, *McCulloch*<sup>64</sup> where Chief

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57. JOHN B. ATTANASIO & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 13-15 (4th ed. 2012).

58. 17 U.S. 316, 401 (1819).

59. *Id.*

60. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

61. See, e.g., *NLRB v. Canning*, 134 S. Ct. 2550, 2560 (2014) (“[T]his Court has treated practice as an important interpretive factor even when . . . that practice began after the founding era.”); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (relying on long practice of Congressional acquiescence as basis for finding of presidential authority to suspend judicial claims).

62. MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 112-13 (2008).

63. ATTANASIO & GOLDSTEIN, *supra* note 57, at 19.

64. *McCulloch*, 17 U.S. at 408 (arguing that Constitution should be construed to allow beneficial execution of governmental powers); *id.* at 415 (“It must have

Justice Marshall advanced the basic premise that wherever possible the Constitution should be interpreted in a way that promised success rather than failure.<sup>65</sup> Chief Justice Marshall argued in *McCulloch* that “general reasoning” rejects the idea that the Constitution should be interpreted in a way that would imperil its basic purposes.<sup>66</sup> Consequential argument relies on historical data to form conclusions about the likely impacts of competing interpretations.

Finally, structural arguments discern general constitutional principles from the architecture and themes of the Constitution. Whereas textual arguments base constitutional conclusions on specific clauses speaking directly to a problem, structural arguments find principles in the larger design of the Constitution to influence construction.<sup>67</sup> Thus, in *McCulloch*, Chief Justice Marshall used structural reasoning to reach his two central conclusions: that Congress had power to create the Bank of the United States and that Maryland lacked power to tax such a federal instrumentality.<sup>68</sup> Structural reasoning may seem originalist because it relies on a wide-angle view of the text to find themes or patterns in its construction.<sup>69</sup> Yet as the study of the presidency and vice presidency illustrate, structural argument is also inherently historical because the Constitution’s formal provisions regarding these institutions have changed throughout American history. Accordingly, structural reasoning in these areas requires some understanding of how ideas implicit in constitutional amendments shape constitutional themes more generally through the interaction of constitutional language created at different times by different generations based on different experiences.

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been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution.”).

65. *Id.* at 408.

66. *See id.* at 408-11.

67. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7-8 (1969).

68. *Id.* at 14-15.

69. ATTANASIO & GOLDSTEIN, *supra* note 57, at 18.

## II. THE ORIGINAL CONSTITUTION AND THE VICE PRESIDENCY

The White House vice presidency that exists today bears no resemblance to the office the founders created. The Constitution initially made provision for the selection of the Vice President<sup>70</sup> and gave that officer a regular duty, to preside over the Senate,<sup>71</sup> and a conditional duty, to serve as a presidential successor.<sup>72</sup> With respect to each of these provisions, those regarding the selection, the ongoing duty and contingent role, the Constitution's apparent original intent or meaning was jettisoned, quickly in two cases and over time in the third, and replaced by arrangements that developed through ongoing practice and in response to prudential considerations. In each instance, one form of historical argument yielded to others, in each case, practice informed by prudential judgments prevailed over the original approach, and in each case, constitutional norms shifted in response to experimentation and prudential judgments.

### A. The Presidential Election Clause

The framers probably created the vice presidency to help solve the vexing question of how to elect a President.<sup>73</sup> The Constitution initially gave electors two votes for President but provided that one vote had to be cast for someone not from the elector's state, a measure designed to combat the parochialism the framers thought

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70. U.S. CONST. art. II, § 1, cl. 3 (providing that Vice President was runner up in presidential balloting).

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

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

73. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY*, *supra* note 32, at 12; Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 512-13 (1995) [hereinafter Goldstein, *New Constitutional Vice Presidency*].

would otherwise preclude the choice of a national President after George Washington served.<sup>74</sup> They apparently created the vice presidency to encourage electors to make serious use of both votes.<sup>75</sup> The evidence of original intent is scant, as it often is,<sup>76</sup> and the incomplete nature of the records makes the challenging task of fathoming the intent of a collective body even more elusive.<sup>77</sup> Still, at the Constitutional Convention, delegate Hugh Williamson explained that a Vice President “was not wanted” but that the office was “introduced only for the sake of a valuable mode of election which required two to be chosen at the same time.”<sup>78</sup> The vice presidency and the Electoral College apparently entered the Convention at the same time and the only discussion of the second office in *The Federalist Papers* comes at the end of No. 68<sup>79</sup> describing the Electoral College.<sup>80</sup> These parallel tracks are not coincidental but tend to confirm the relationship of the two institutions. In *Federalist* 68 Alexander Hamilton effusively praised the Electoral College arrangement, saying that it was, if “not perfect, it is at least excellent.”<sup>81</sup> Actually, it was not.<sup>82</sup>

The framers apparently intended and expected the electors to exercise discretion,<sup>83</sup> to act independently,<sup>84</sup>

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74. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 167 (2005) [hereinafter AMAR, *AMERICA'S CONSTITUTION*]; TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804* 23 (1994).

75. AMAR, *AMERICA'S CONSTITUTION*, *supra* note 74, at 167-68; Richard Albert, *The Evolving Vice Presidency*, 78 *TEMP. L. REV.* 811, 817-18 (2005).

76. EDWIN M. YODER, *THE HISTORICAL PRESENT: USES AND ABUSES OF THE PAST* 76, 79 (1997) (stating that “original constitutional materials” including those regarding the 1787 Philadelphia, and state ratifying, conventions “range from fragmentary to nonexistent.”).

77. *See id.* at 79-80.

78. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 537 (Max Farrand ed., 1966).

79. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY*, *supra* note 32, at 12, 318.

80. *THE FEDERALIST* NO. 68, *supra* note 56, at 414 (Alexander Hamilton).

81. *Id.* at 412.

82. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 391 (2012) [hereinafter AMAR, *AMERICA'S UNWRITTEN CONSTITUTION*] (calling it “a calamity waiting to happen . . .”).

83. *THE FEDERALIST* NO. 68, *supra* note 56, at 412 (“It was equally desirable that the immediate election should be made by men most capable of analyzing the

and to cast two presidential votes.<sup>85</sup> In fact, those original intents and expectations were soon frustrated as parties formed and presented tickets. Although formally electors still cast two votes for President, it was understood that one candidate was intended for the presidency, the other for the second office.<sup>86</sup> The system survived the election of 1796 when competing presidential candidates John Adams and Thomas Jefferson wound up in the presidency and vice presidency respectively although Adams had run with Thomas Pinckney of South Carolina and Jefferson with Aaron Burr.<sup>87</sup> In a sense, the Adams-Jefferson election was how the system was supposed to function, with the two top men elected, though without the intervention of political parties which introduced a complication.

But in 1800, Jefferson and his ticket partner, Burr tied.<sup>88</sup> Although each had seventy-three electoral votes, Jefferson's were for President whereas Burr's were de facto for Vice President.<sup>89</sup> It took the House of Representatives thirty-six ballots before enough

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qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated investigations."); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 531 (1987).

84. THE FEDERALIST NO. 68, *supra* note 56, at 412 ("And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place."); STORY, *supra* note 83, at 531, 532.

85. GOLDSTEIN, THE WHITE HOUSE VICE PRESIDENCY, *supra* note 32, at 12.

86. See, e.g., RON CHERNOW, ALEXANDER HAMILTON 510 (2004) (referring to "vague understanding" among Federalists that Adams was presidential and Thomas Pinckney vice-presidential candidate); KURODA, *supra* note 74, at 57 (describing election of 1792 as election for vice presidency); *id.* at 108 (noting that politicians and journalists differentiated between presidential and vice-presidential candidates).

87. GOLDSTEIN, THE WHITE HOUSE VICE PRESIDENCY, *supra* note 32, at 15.

88. *Id.* at 16.

89. 3 DUMAS MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY 473-74 (1962) [hereinafter MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY]; RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840, at 128 (1969) (stating that Jefferson was understood to be the presidential candidate).



Federalists, concluding that Jefferson was the lesser evil, abstained to allow his election.<sup>90</sup> The Jeffersonians changed the system in 1804, right before that year's election, by securing ratification of the Twelfth Amendment that separated the elections of President and Vice President.<sup>91</sup>

In essence, practice had deviated from original design. In different ways, Hamilton and James Madison had been architects and proponents of the initial electoral system that envisioned electors using discretion to cast two votes independently of national coordination and pressure. Yet they also were creators and implementers of the national party system that undermined the very presidential election system Hamilton had endorsed as "at least excellent."<sup>92</sup> The parties constructed tickets, slotted candidates for President and Vice President, and urged electors to vote the party line not use discretion (although Adams suspected Hamilton of scheming to manipulate things so the Pinckneys would outpoll him<sup>93</sup>). The creation of national political parties undermined the Framers' design.<sup>94</sup> I am aware of no record that Hamilton or Madison resisted the practice of running national tickets and encouraging partisan support for both members as offensive to the original intent or meaning of the Constitution. Instead, their commitment to the original design succumbed to partisan expediency. Once it was clear that the design was not working as intended, neither they, nor most others, insisted on sticking to it. They

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90. MALONE, *JEFFERSON AND THE ORDEAL OF LIBERTY*, *supra* note 89, at 504.

91. KURODA, *supra* note 74, at 155-161; 4 DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805*, at 393-395 (1970) [hereinafter MALONE, *JEFFERSON THE PRESIDENT*].

92. *THE FEDERALIST NO. 68*, *supra* note 56, at 414.

93. CHERNOW, *supra* note 86, at 511, 515-516, 612, 617-618; STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 734-738 (1993).

94. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829*, at 39 (2001) ("The growth of political parties had wrecked the Framers' well-laid plans."). Just as Madison's thinking on the Presidential Election Clause evolved, so, too, did his thinking on the constitutionality of Congress creating the Bank of the United States. See KILLENBECK, *supra* note 35, at 19-21 (discussing Madison's constitutional arguments against establishment of the First Bank which drew on original history); *id.* at 60-61 (discussing Madison's later change in constitutional position based on ongoing history); *id.* at 63 (reporting Madison's considerations in signing bill creating Second Bank).

disregarded original history and developed divergent practice to accommodate better reasoning.

Ultimately, of course, the Twelfth Amendment changed the presidential election system pursuant to the constitutionally prescribed amendment procedure.<sup>95</sup> It did so because the practice of running a party ticket for President and Vice President had deviated from original design. Indeed, the Jeffersonians feared that under the original system the new practice would allow the Federalist minority to deal with the Democrat-Republican vice presidential candidate to defeat Jefferson.<sup>96</sup> In creating a new presidential election system, the Twelfth Amendment design followed the logic of that new practice by separating the presidential and vice-presidential elections.<sup>97</sup>

### B. The President of the Senate Clause

A second constitutional clause where practice diverged from original intent involved the President of the Senate Clause, although the change took much longer than the departure from the original electoral design and occurred informally without a constitutional amendment or statutory intervention.<sup>98</sup> The President of the Senate Clause provides that “[t]he Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”<sup>99</sup> In fact, as Williamson said, the Vice President “was not wanted” and some delegates, including Elbridge Gerry, later the fifth Vice President, opposed creating the office or making its occupant the Senate’s presiding officer.<sup>100</sup> But Roger

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95. U.S. CONST. art. V.

96. KURODA, *supra* note 74, at 118, 155-57; MALONE, JEFFERSON THE PRESIDENT, *supra* note 91, at 393-95.

97. See MALONE, JEFFERSON THE PRESIDENT, *supra* note 91, at 393-94.

98. See generally Goldstein, *Constitutional Change*, *supra* note 27, at 382-94 (providing a more comprehensive discussion of the Vice President’s role as President of Senate).

99. U.S. CONST. art. I, § 3, cl. 4.

100. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 78, at 536-37 (discussing Gerry opposing creating the Vice President); *id.* at 537 (discussing Randolph opposing making the Vice President the President of the Senate); *id.* (discussing Mason opposing making the Vice President the President of the Senate).

Sherman pointed out that if the Vice President “were not to be President of the Senate, he would be without employment” and a senator would have to sacrifice his state’s equal suffrage in order to be a fair presiding officer.<sup>101</sup> On September 7, 1787, the Convention voted, eight states to two states, to designate the Vice President as President of the Senate.<sup>102</sup>

As “President of the Senate” the Vice President was to preside regularly over that body.<sup>103</sup> The Clause as originally drafted made that clear.<sup>104</sup> Senator Oliver Ellsworth of Connecticut, a constitutional expert of the founding period and an influential drafter of the Constitution at the Philadelphia convention, told John Adams, our first Vice President, without noted dissent that he was obliged to preside whenever the Senate met<sup>105</sup> and Adams acted upon this view.<sup>106</sup> His successor, Jefferson, also treated presiding over the Senate as his regular duty.<sup>107</sup> The President of the Senate Clause assigns the Vice President’s only explicit ongoing constitutional duty, a reality Adams implied when he said, “I am Vice President, in this I am nothing . . . but I am

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101. *Id.* at 537.

102. *Id.* at 532, 538.

103. See Goldstein, *Constitutional Change*, *supra* note 27, at 390-91.

104. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 78, at 498 (“The vice-president shall be ex officio President of the Senate, except when they sit to try the impeachment of the President, in which case the Chief Justice shall preside, and excepting also when he shall exercise the powers and duties of President, in which case & in case of his absence, the Senate shall chose a President pro tempore. The vice President when acting as President of the Senate shall not have a vote unless the House be equally divided.”).

105. 9 THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 6 (Kenneth R. Bowling & Helen E. Veit eds., 1988) [hereinafter THE DIARY OF WILLIAM MACLAY] (“I find Sir, it is evident & Clear Sir, that wherever . . . the Senate is to be, then Sir you must be at the head of them.”).

106. Letter from Abigail Adams to Mary Smith Cranch (July 4, 1790), in 9 ADAMS FAMILY CORRESPONDENCE 73-74 (Margaret A. Hogan et al. eds., 2009) (complaining that John Adams constantly presided over Senate).

107. 6 ANNALS OF THE CONGRESS OF THE UNITED STATES 1580-1582 (1797); MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY, *supra* note 89, at 300 (stating that Jefferson regarded his duties as purely legislative); *id.* at 452-53 (reporting that Jefferson took his presiding duties “seriously”); see also Goldstein, *Constitutional Change*, *supra* note 27, at 391.

President also of the Senate.”<sup>108</sup> The ongoing Senate assignment juxtaposed with simply a contingent executive role led most to characterize the Vice President as a legislative, not an executive, figure. After all, as Sherman said, without the Senate gig the Vice President would be unemployed.<sup>109</sup> Although some framers expressed the view that the vice presidency improperly blended executive and legislative powers,<sup>110</sup> Adams and Jefferson both conceived of the office as entirely legislative.<sup>111</sup>

The apparent original intent, understanding, and meaning of the President of the Senate Clause was that the Vice President’s duty was to preside over the Senate.<sup>112</sup> For most of American history that interpretation guided behavior. To be sure, there were occasions when the vice presidency was vacant or when Vice Presidents were absent, due to bad health or neglect, but most Vice Presidents took this constitutional obligation seriously.<sup>113</sup> Indeed, in 1920 Thomas Marshall, Woodrow Wilson’s Vice President, opposed the Vice President sitting with the Cabinet as inconsistent with the constitutional obligation to preside over the Senate.<sup>114</sup> Most of the first thirty-five Vice Presidents, from Adams to Alben Barkley (1949-1953), regularly presided over the Senate.<sup>115</sup>

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108. 9 THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES, *supra* note 105, at 6.

109. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 78, at 537.

110. See Roy E. Brownell, II, *A Constitutional Chameleon: The Vice President’s Place Within the American System of Separation of Powers: Part 1: Text, Structure, Views of the Framers and the Courts*, 24 KAN. J.L. & PUB. POL’Y 1, 58-61 (2014) [hereinafter Brownell, II, *Part I*].

111. Goldstein, *Constitutional Change*, *supra* note 27, at 389-90; see also Roy E. Brownell, II, *A Constitutional Chameleon: The Vice President’s Place Within the American System of Separation of Powers: Part II: Political Branch Interpretation and Counterarguments*, 24 KAN. J.L. & PUB. POL’Y 294, 301-302, 310-313 (2015) [hereinafter Brownell, II, *Part II*].

112. Goldstein, *Constitutional Change*, *supra* note 27, at 390-92.

113. See, e.g., Harold C. Relyea, *The Executive Office of the Vice President: Constitutional and Legal Considerations*, 40 PRESIDENTIAL STUD. Q. 327, 327-28 (2010) (reporting that Vice Presidents generally presided over Senate for first century and one half).

114. *Marshall Opposed to Seat in Cabinet*, N.Y. TIMES, Dec. 5, 1920, at 4.

115. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY*, *supra* note 32, at 16, 21-22 (reporting that Vice Presidents generally presided over Senate through Barkley).

Yet practice began to revise constitutional prescription. Most Vice Presidents beginning with Calvin Coolidge (1921-1923) began to meet regularly with the President's Cabinet.<sup>116</sup> Henry Wallace (1941-1945) headed executive councils and undertook some diplomatic assignments which took him away from the Senate and Washington, D.C. for extended periods.<sup>117</sup> Changes in American politics and government created a new context in which the vice presidency was drawn from the legislative to the executive branch. The increased demands on the presidency occasioned by the New Deal and World War II created more work in the executive branch.<sup>118</sup> The Cold War heightened the need for a prepared successor, a development which in 1949 caused Congress to add the Vice President to the National Security Council (NSC), a body otherwise consisting of executive branch officials.<sup>119</sup> Vice Presidents still presided over the Senate on a regular basis through Barkley but a few also did some minor executive chores.<sup>120</sup>

The vice presidency of Richard M. Nixon (1953-1961) propelled the office towards the executive branch.<sup>121</sup> Nixon spent little time presiding over the Senate.<sup>122</sup> A few years after leaving the second office, Nixon testified that presiding over the Senate was the Vice President's "least burdensome duty."<sup>123</sup> Nixon instead attended

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116. *Id.* at 20-21; Goldstein, *Constitutional Change*, *supra* note 27, 395-96; see also Brownell, II, *Part I*, *supra* note 110, at 319-21 (presenting some earlier instances when Vice Presidents met on occasional basis with Cabinet); Brownell, II, *Part II*, *supra* note 111, at 324-29 (reporting some executive activities of earlier Vice Presidents).

117. MARK O. HATFIELD, *VICE PRESIDENTS OF THE UNITED STATES, 1789-1993*, at 401-04 (Wendy Wolff ed., 1997).

118. JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* 15-45, 140-42, 301-08 (1982) [hereinafter GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY*].

119. See *id.* at 140.

120. See GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY*, *supra* note 32, at 20-22.

121. *Id.* at 25; Albert, *supra* note 75, at 833; Brownell, II, *Part I*, *supra* note 110, at 342-43; Goldstein, *Constitutional Change*, *supra* note 27, at 397-98.

122. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY*, *supra* note 118, at 142.

123. *Presidential Inability and Vacancies in the Office of Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the Comm. on the Judiciary*, 88th Cong. 245 (1964) (statement of Richard Nixon).

Eisenhower's regular Cabinet, NSC, and meetings with Republican legislative leaders, took seven diplomatic trips as the President's representative, headed executive branch commissions, and handled political work for the administration.<sup>124</sup> Writing in the 1950s, Edward Corwin described the vice presidency as having undergone "something of a renaissance" in the twentieth century<sup>125</sup> with the "significant changes [] centered on its executive side" such that Nixon regarded "his executive role as higher in obligation and importance than his legislative role."<sup>126</sup>

In March 1961, the Department of Justice recognized that practice had revised the original conception of the vice presidency.<sup>127</sup> It opined that during the prior fifty years and especially since 1933, the vice presidency "has moved closer and closer to the Executive."<sup>128</sup> The Vice President could now "engage in activities ranging into the highest levels of diplomacy" anywhere in the world as the President's representative.<sup>129</sup> The constitutional duty to preside over the Senate was not an obstacle to such travel because the Vice President's "lengthy absences" from the Senate "have become the custom and not the exception."<sup>130</sup> Similarly, the domestic assignments to the Vice President that were advisory or subordinate to the President posed no constitutional impediment.<sup>131</sup> The Department of Justice relied heavily on practice in shaping the Vice President's status even when that practice

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124. See generally IRWIN F. GELLMAN, *THE PRESIDENT AND THE APPRENTICE: EISENHOWER AND NIXON, 1953-1961* (2015) (describing the many executive duties that Richard Nixon took on as Vice President). See also GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY*, *supra* note 118, at 152, 159, 163, 167-68, 178, 184-85, 190-91; GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY*, *supra* note 32, at 25.

125. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 61 (4th ed. 1957).

126. *Id.* at 67.

127. See Memorandum from Nicholas deB. Katzenbach, Assistant Attorney Gen., Office of Legal Counsel, Participation of the Vice President in the Affairs of the Exec. Branch 214-23 (Mar. 9, 1961), <https://www.justice.gov/sites/default/files/olc/opinions/1961/03/31/op-olc-supp-v001-p0214.pdf> [<https://perma.cc/5QQE-TYUZ>].

128. *Id.* at 219-20.

129. *Id.* at 220.

130. *Id.*

131. See *id.* at 222-23.

conflicted with the text and original constitutional expectations.

John F. Kennedy gave Lyndon Johnson an office in the Executive Office Building,<sup>132</sup> which his successors retained,<sup>133</sup> and assignments similar to those Nixon handled.<sup>134</sup> As President, Johnson named Hubert H. Humphrey to numerous commission chairmanships and sent him on foreign missions.<sup>135</sup> Nixon gave Spiro T. Agnew similar responsibilities and named him to head an Advisory Commission on Intergovernmental Relations.<sup>136</sup> In so doing, he was supported by an opinion from William H. Rehnquist as head of the Department of Justice's Office of Legal Counsel, which reasoned that based on precedents from the three immediately preceding administrations the Vice President's status could be viewed as executive depending on the context.<sup>137</sup> Like his recent predecessors, Gerald R. Ford performed some executive and political tasks during his brief vice presidency<sup>138</sup> and, as President, named Nelson A. Rockefeller the head of the Domestic Council and the chair of an executive branch inquiry into abuses of the Central Intelligence Agency among other assignments.<sup>139</sup>

Although original history obligated the Vice President to preside over the Senate,<sup>140</sup> and although Vice Presidents performed that duty pretty regularly until 1953, by 1976 a new practice of ignoring the duty to preside over the Senate had

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132. Goldstein, *Constitutional Change*, *supra* note 27, at 398.

133. *Id.* at 399.

134. See, e.g., Robert Dallek, *Frustration and Pain: Lyndon B. Johnson as Vice President*, in *AT THE PRESIDENT'S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY* 88, 88-100 (Timothy Walch ed., 1997).

135. See, e.g., Joel K. Goldstein, *More Agony than Ecstasy: Hubert H. Humphrey as Vice President*, in *AT THE PRESIDENT'S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY* 103, 107, 112-13, 115-16 (Timothy Walch ed., 1997).

136. JULES WITCOVER, *VERY STRANGE BEDFELLOWS: THE SHORT AND UNHAPPY MARRIAGE OF RICHARD NIXON & SPIRO AGNEW* 58, 221 (2007).

137. See Memorandum from William H. Rehnquist, Assistant Attorney Gen., Office of Legal Counsel, to the Honorable Edward L. Morgan, Deputy Counsel to the President, *Advisory Comm'n on Intergovernmental Relations* 2 (Feb. 7, 1969).

138. See James Cannon, *Gerald R. Ford and Nelson A. Rockefeller: A Vice-Presidential Memoir*, in *AT THE PRESIDENT'S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY* 135, 135-37 (Timothy Walch ed., 1997).

139. *Id.* at 139-41.

140. Goldstein, *Constitutional Change*, *supra* note 27, at 390-92.

replaced the old and made that original duty a rare, not regular, occupation.<sup>141</sup> The new practice, which began with Nixon, was reinforced by the imitation of his successors from 1953 to 1977.<sup>142</sup> The repeated vice presidential absence from the Senate acquiesced in by that body had transformed the constitutional words “President of the Senate” from an obligation to simply a title and a right to be exercised at the Vice President’s discretion. Although practice had reinforced the original design for nearly a century and two-thirds, those two historical supports were insufficient to prevent the vice presidency from moving to the executive branch and abandoning the Senate presiding role when prudence so dictated.

### C. The Original Vice Presidential Succession Clause

In addition to the ongoing duty to preside over the Senate, the Constitution made the Vice President the first presidential successor.<sup>143</sup> For most of American history, it has been understood that when a President dies, resigns or is removed from office, the Vice President becomes President.<sup>144</sup> Yet the original intent and public meaning of the original Constitution, to the extent it can be recovered, seemed to envision a more modest status for the Vice President in those three situations (*i.e.*, death, resignation, removal) involving a President’s permanent departure from his office.<sup>145</sup> Specifically, original history seemed to suggest that the Vice President would simply act as, but not become, President following such an event, or a presidential inability, and would do so only until the inability was removed or a new President was chosen, perhaps by a special election.<sup>146</sup> Once again, a divergent historical practice developed and it pushed constitutional interpretation in a different direction.

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141. GOLDSTEIN, THE MODERN AMERICAN VICE PRESIDENCY, *supra* note 118, at 142 (discussing how infrequently Vice Presidents preside over the Senate).

142. *See id.* at 142.

143. U.S. CONST. art. II, § 1, cl. 6.

144. GOLDSTEIN, THE MODERN AMERICAN VICE PRESIDENCY, *supra* note 118, at 203-05.

145. *See id.*

146. *See id.*



Some evidence of the original intent of the Vice Presidential Succession Clause is suggested by the draft the Philadelphia Convention approved in early September 1787 and sent to the Committee on Style.<sup>147</sup> It read, in pertinent part, as follows: “[I]n case of his removal as aforesaid, death, *absence*, resignation or inability to discharge the powers or duties of his office the Vice President *shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.*”<sup>148</sup> Significantly, the clause made clear that the Vice President simply “exercise[d]” presidential powers and duties rather than becoming President. Moreover, the clause, and its drafting history, emphasized that the Vice President was not a full President by suggesting that the Vice President’s exercise was subject to two potential limits other than the end of the term for which he was elected. In addition to removal of the President’s inability, the Vice President’s exercise of presidential powers would end when “another President [was] chosen,” language that was intended to allow for a special election.<sup>149</sup>

The Committee of Style modified that language essentially to its present form in two ways which obscured the intended meaning. It changed the language regarding what happened following presidential continuity contingencies to read as follows: “In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, *the same shall devolve* on the vice-president . . . .”<sup>150</sup> This modification introduced an ambiguity in the Clause, at least when read alone, since it became less clear whether “the same” referred to the office of President devolving (in which case the Vice President became the President) or simply “the powers and duties of the said Office” in which case the Vice

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147. JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 48 (1965).

148. *Quoted in id.* (emphasis added by Feerick).

149. *Id.* at 46-47, 49-50.

150. *Id.* at 48.

President exercised presidential powers and duties while retaining his prior station.<sup>151</sup>

The Committee also combined the similar language which had modified the proposed Vice Presidential Succession Clause<sup>152</sup> and the Officer Succession Clause<sup>153</sup> into a single clause.<sup>154</sup> Previously, each clause provided that the Vice President, or officer Congress designated as the next successor, acted as President until a new President was elected or the President's (or in the latter case, the President's or Vice President's) disability was removed.<sup>155</sup>

The authority of the Committee on Style was simply "to revise the style of and arrange the articles agreed to by the [Convention]," not to modify its substance.<sup>156</sup> The prior history would suggest that what "devolve[d]" was the "Powers and Duties of the said Office," not the office itself.<sup>157</sup> Further evidence of the framers' intent comes from a fragment of the Federalist Papers where Alexander Hamilton wrote that the Vice President might occasionally

151. *Id.* at 48, 50.

152. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 78, at 575 ("[A]nd in case of his removal as aforesaid, death, absence, resignation or inability to discharge the powers or duties of his office the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.").

153. *Id.* at 573 ("The Legislature may declare by law what officer of the United States shall act as President in case of the death, resignation, or disability of the President and Vice President; and such Officer shall act accordingly, until such disability be removed, or a President shall be elected.").

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

155. The two clauses did use slightly different formulations. The Vice Presidential Succession Clause provided that "the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 78, at 573. The Officer Succession Clause provided that "such Officer shall act accordingly, until such disability be removed, or a President shall be elected." *Id.* at 573.

156. *Id.* at 547; FEERICK, *supra* note 147, at 48; RUTH C. SILVA, PRESIDENTIAL SUCCESSION 8 (1951).

157. SILVA, *supra* note 156, at 8-9; FEERICK, *supra* note 147, at 48, 50-51.

“become a substitute” for the President and be called on “to exercise the authorities and discharge the duties of the President.”<sup>158</sup> Hamilton did not characterize the Vice President as becoming President or holding the office.

Although the Vice Presidential Succession Clause might appear ambiguous when viewed alone, its original public meaning becomes more apparent when other constitutional language is considered. Elsewhere the Constitution itself suggests that following a permanent or temporary presidential vacancy, the Vice President simply acts as, but does not become, President. For instance, the Senate President Pro Tempore Clause provides that the Senate elects such an officer to preside over it when the Vice President is absent, or when he “shall exercise the Office of President of the United States,” not when he shall “hold” the presidency.<sup>159</sup> Moreover, the formulation that the Vice President “shall exercise the Office of President of the United States” suggests that he remains Vice President rather than becoming President. Other constitutional language makes it even clearer that the Vice President’s status was as Vice President acting as President, not as President. The Twelfth Amendment, which was ratified in 1804, states that if the House of Representatives does not elect a President before the new term begins “the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.”<sup>160</sup> The clause makes clear that in cases of “death or other constitutional disability of the President” the Vice President simply acts as President. Leading scholars who have studied the issue have concluded that the original intent of the Constitution was to empower the Vice President simply to discharge the powers and duties of the President temporarily, not to become President and to make him subject to having that exercise ended by a special election.<sup>161</sup>

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158. FEDERALIST NO. 68, *supra* note 56, at 415.

159. U.S. CONST. art. 1, § 3, cl. 5 (“The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.”).

160. U.S. CONST. amend. XII.

161. FEERICK, *supra* note 147, at 50-51, 55-56; *see also* CORWIN, *supra* note 125, at 54; SILVA, *supra* note 156, at 8-10, 13.

Yet when William Henry Harrison died on April 4, 1841, one month into his presidency, his Vice President, John Tyler, insisted that he was President, not simply Vice President acting as President.<sup>162</sup> Tyler took the oath of office as President as a precaution, although he thought his vice presidential oath was sufficient.<sup>163</sup> Some have suggested that the logic of Tyler's position would seem to suggest that he initially thought he was simply Vice President acting as President,<sup>164</sup> especially since the Constitution requires that a President take the presidential oath "[b]efore he enter on the execution of his office."<sup>165</sup> In any event, taking the presidential oath constitutes a claim to the presidency since it is a prerequisite for the President to exercise "his" office. Three days later, Tyler delivered an inaugural address in which he declared that the "Presidential office" had devolved upon him.<sup>166</sup> Not everyone agreed.<sup>167</sup> Representative (and former President) John Quincy Adams complained that Tyler "styles himself President of the United States, and not Vice-President acting as President, which would be the correct style."<sup>168</sup> Adams thought Tyler's view was a "direct violation both of the grammar and context of the Constitution," which in such situations gave the Vice

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162. FEERICK, *supra* note 147, at 90-93.

163. FEERICK, *supra* note 147, at 92 ("I, William Cranch, chief judge of the circuit court of the District of Columbia, certify that the above-named John Tyler personally appeared before me this day, and although he deems himself qualified to perform the duties and exercise the powers and office of President on the death of William Henry Harrison, late President of the United States, without any other oath than that which he has taken as Vice-President, yet as doubts may arise, and for greater caution, took and subscribed the foregoing oath before me. W. CRANCH. APRIL 6, 1841.")

164. CORWIN, *supra* note 125, at 54.

165. U.S. CONST. art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.").

166. FEERICK, *supra* note 147, at 93 ("For the first time in our history the person elected to the Vice-Presidency of the United States, by the happening of a contingency provided for in the Constitution, has had devolved upon him the Presidential office.")

167. SILVA, *supra* note 156, at 20-22; FEERICK, *supra* note 147, at 94-96.

168. 10 MEMOIRS OF JOHN QUINCY ADAMS: COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, 463 (Charles Francis Adams ed., 1876).

President not the presidency but simply its powers and duties.<sup>169</sup> When Congress convened on May 31, 1841, some members of both houses moved that Tyler be addressed as Vice President who was acting as President.<sup>170</sup> After debate, the issue was resolved in Tyler's favor in the House of Representatives and thirty-eight to eight in the Senate.<sup>171</sup>

Nine years later, when President Zachary Taylor died, his Vice President, Millard Fillmore, followed Tyler's example and immediately announced plans to take the presidential oath.<sup>172</sup> The Tyler Precedent was also followed when Vice Presidents Andrew Johnson, Chester A. Arthur, Theodore Roosevelt, Calvin Coolidge, Harry S. Truman and Lyndon B. Johnson succeeded to the presidency after the deaths of their predecessors.<sup>173</sup> Tyler and these other seven Presidents by succession were recognized as being Presidents, not simply acting as such while completing a vice-presidential term.<sup>174</sup>

The Tyler Precedent conflicted with the Constitution's original intent<sup>175</sup> and a textualist or originalist would have resisted its validity. Ruth C. Silva, for instance, attributed the presidential status of the Vice Presidents who succeeded a deceased President from 1841 to 1945<sup>176</sup> to "usage" not "constitutional provision" and argued that "long acquiescence of Congress and the Executive does not make constitutional that which is unconstitutional."<sup>177</sup> Yet the better view recognized repeated historical usage as capable of establishing constitutional meaning. Chief

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169. *Id.* at 463-64.

170. FEERICK, *supra* note 147, at 95.

171. *Id.* at 95-96.

172. *Reply of Mr. Fillmore to the Announcement of the Death of President Taylor*, THE AM. PRESIDENCY PROJECT (July 9, 1850), <http://www.presidency.ucsb.edu/ws/?pid=68106> [<https://perma.cc/SP4V-R5SQ>].

173. See SILVA, *supra* note 156, at 27-37 (discussing Tyler Precedent applying to Johnson, Arthur, T. Roosevelt, F. D. Roosevelt, Coolidge, and Truman).

174. SILVA, *supra* note 156, at 27-37 (regarding Tyler Precedent being followed by Fillmore, Johnson, Arthur, Roosevelt, Coolidge, and Truman).

175. *Id.* at 31.

176. Silva's book was written in 1951 before the Kennedy-Johnson succession.

177. SILVA, *supra* note 156, at 47-48.

Justice Marshall had so suggested in *McCulloch v. Maryland*<sup>178</sup> and other Court opinions also recognized the validity of this method of constitutional interpretation.<sup>179</sup> Notwithstanding the apparent original intent that the Vice President would simply act as President following the death of the chief executive, the repeated historical practice of eight Presidents becoming President resolved the issue.<sup>180</sup> The Tyler Precedent foreclosed any possibility of a special election when a vice president succeeded following an intraterm presidential vacancy. If the Vice President became President, he was entitled to complete the presidential term.

#### D. The Tyler Precedent and Presidential Inability

The Tyler Precedent presented another problem. The Constitution's text and its original intent and public meaning suggested that whatever passed to the Vice President following the President's death, resignation or removal also passed to him when the President was disabled. After all, identical language—"the Same shall devolve on the Vice President"—applied to all four contingencies of presidential death, resignation, removal and inability.<sup>181</sup> If the Vice President became President

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178. *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819) ("But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the Government, ought to receive a considerable impression from that practice.").

179. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 595, 610-12 (1952) (Frankfurter, J., concurring) (recognizing ongoing practice as shaping constitutional meaning). *But see* *INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[O]ur inquiry is sharpened, rather than blunted, by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies . . .").

180. CORWIN, *supra* note 125, at 54 (explaining "Tyler's exploit, however, having been repeated six times, must today be regarded as having become law of the land" even though contrary to original intent); Letter from Robert F. Kennedy, Attorney Gen., to President John F. Kennedy 23, 36 (undated), <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-080-015.aspx> [<https://perma.cc/8U2U-68SV>]. These sources were, of course, written before the Kennedy assassination in 1963.

181. U.S. CONST. art. II, § 1, cl. 6.

following a presidential death, as the Tyler Precedent provided, the semantic logic dictated that he also became President upon the occurrence of a presidential inability.

The textual symmetry concealed a problem. Presidential death, resignation and removal created permanent vacancies, but a presidential inability might be only temporary. If a presidential inability caused the presidency to devolve, then presumably the disabled President would be forever ousted from office even upon a transient incapacity. That conclusion seemed to follow from the Executive Vesting Clause<sup>182</sup> which assigned “executive Power” to “a President of the United States,” not multiple ones. Yet it was not difficult to imagine short-term situations in which a President might not be able to discharge essential presidential powers and duties, which required immediate attention. The need for presidential response might require devolution to the Vice President, but it seemed unduly harsh and undemocratic for the President to lose office upon a temporary incapacity.

History presented that issue forty years after the Tyler Precedent when President James Garfield was shot on July 2, 1881.<sup>183</sup> He performed essentially no executive duties during the eighty days between the shooting and his death.<sup>184</sup> Neither did Vice President Chester A. Arthur.<sup>185</sup> Garfield and Arthur represented rival political wings in the Republican Party.<sup>186</sup> Although the “predominant view” was that a Vice President could act as President temporarily pending the President’s recovery,<sup>187</sup> “[a] not inconsiderable body of opinion” thought that a vice-presidential assumption of presidential authority would occasion a permanent succession.<sup>188</sup> The uncertainty prevented the Cabinet from inviting Arthur to act as President although its members all thought that

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182. U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

183. FEERICK, *supra* note 147, at 118.

184. SILVA, *supra* note 156, at 52-53.

185. *Id.* at 54.

186. FEERICK, *supra* note 147, at 120-21.

187. *Id.* at 134.

188. *Id.* at 133.

desirable.<sup>189</sup> Arthur was reluctant to act, fearing he would be viewed a usurper, and the Cabinet refrained from discussing the matter with Garfield given his precarious condition.<sup>190</sup> No transfer of power occurred to Vice President Thomas Marshall after Woodrow Wilson suffered a stroke in 1919, which essentially disabled him for much or all of the remaining seventeen-plus months of his term.<sup>191</sup> It is not clear the extent to which concerns about permanently displacing Wilson affected matters.<sup>192</sup> On one occasion, Wilson's secretary, Joe Tumulty, associated efforts by Cabinet members to discuss inability as tantamount to "ousting" Wilson, and Wilson used the same suggestive terminology.<sup>193</sup> It seems more likely that the intransigence of Wilson and First Lady Edith Bolling Wilson stemmed from personal and ideological commitments in addition to the constitutional ambiguities.<sup>194</sup>

President Dwight D. Eisenhower suffered three serious illnesses during the early years of the Cold War and nuclear age, an experience that perhaps encouraged him to take the problem of presidential inability quite seriously. After the second illness, Eisenhower had discussions with Nixon to address the possibility of a presidential inability which resulted in a remarkable letter agreement between them.<sup>195</sup> It allowed either Eisenhower or Nixon to determine that Eisenhower was disabled at which point Nixon would act as President until Eisenhower decided he was able to discharge presidential powers and duties again.<sup>196</sup>

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189. SILVA, *supra* note 156, at 55-56.

190. FEERICK, *supra* note 147, at 135-138.

191. Joel K. Goldstein, *Vice-Presidential Behavior in a Disability Crisis*, 33 POL. & LIFE SCI. 37, 37-38, 45 (2014).

192. *See id.* at 45-49.

193. FEERICK, *supra* note 147, at 170, 178-79.

194. *See* Goldstein, *Vice-Presidential Behavior in a Disability Crisis*, *supra* note 191, at 37, 39-40, 42-44.

195. SHERMAN ADAMS, *FIRSTHAND REPORT: THE STORY OF THE EISENHOWER ADMINISTRATION* 198, 228-29 (1961).

196. *Id.* at 199; FEERICK, *supra* note 147, at 228.



Eisenhower memorialized their arrangement in a letter to Nixon on February 5, 1958.<sup>197</sup> He referred to the “differences of opinion as to the exact meaning of that feature of the Constitution which provides that the Vice President will have the powers and the duties of the President when the President is unable to discharge them.”<sup>198</sup> The perceived “differences of opinion” to which Eisenhower referred apparently related only to *how* the disability decision should be made, not whether a presidential inability ousted the President. Eisenhower acknowledged no uncertainty on that question.<sup>199</sup> In case of a presidential inability Eisenhower implicitly interpreted the Constitution to transfer simply the powers and duties of the presidency, not the office itself, thereby deeming the Tyler Precedent inapplicable to presidential inability.<sup>200</sup>

In the letter, Eisenhower identified some types of inability that could occur such as “disease or accident that would prevent the President from making important decisions,” “a failure of communications,” “uncertainty about the whereabouts of the President,” among others.<sup>201</sup> Eisenhower thought an agreement with Nixon could eliminate doubts and authorize Nixon to act without embarrassment or resistance from Eisenhower’s associates.<sup>202</sup> Eisenhower even stated that if “any group of distinguished medical authorities” that Nixon assembled concluded Eisenhower’s disability was permanent, he would resign but if he did not, Nixon should assume the presidency and move into the White House.<sup>203</sup> Otherwise,

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197. Letter from Eisenhower to Nixon (Feb. 5, 1958), *in* 19 THE PAPERS OF DWIGHT DAVID EISENHOWER 711, 711-13 (Louis Galambos & Daun Van Ee eds., 2001).

198. *Id.* at 711-12.

199. See ADAMS, *supra* note 195, at 199-200 (Eisenhower’s Attorney General, Cabinet, and the Justice Department had trouble determining a procedure to follow in the case of presidential inability. In any event, “Eisenhower said he was convinced that a President should be able under the Constitution to take himself temporarily out of office by his own statement of disability and resume office by a similar statement of his own competence.”).

200. See Letter from Eisenhower to Nixon (Feb. 5, 1958), *supra* note 197, at 711-12.

201. *Id.* at 712.

202. *Id.* at 712-13.

203. *Id.* at 713.

Nixon would simply act “for the necessary period” as Vice President and as “Acting President.”<sup>204</sup> Eisenhower favored a constitutional amendment along these general lines but no consensus developed in Congress regarding a resolution during his service.<sup>205</sup>

The Eisenhower-Nixon arrangement did not apply the Tyler Precedent in symmetrical fashion to presidential inability as constitutional formalism would suggest. To do so would have exalted semantic logic while ignoring the practical differences between situations causing permanent and temporary gaps in presidential continuity and the practical problems symmetry would introduce. In particular, as the Garfield experience suggested, Presidents would be less likely to transfer—and Vice Presidents would be less likely to claim—presidential power if they thought such action would shift the presidency permanently, not simply its powers and duties temporarily. Rather than accept that the original meaning mandated symmetrical treatment or attack the Tyler Precedent, Eisenhower took a pragmatic approach to resolve the constitutional issue in a way sensitive to the consequences of the solution.

The Eisenhower-Nixon approach was followed by the next three President-first successor pairs: Kennedy-Johnson, Johnson-Speaker John McCormack, and Johnson-Hubert H. Humphrey.<sup>206</sup> Attorney General Robert F. Kennedy concurred in opinions by his two immediate predecessors, Eisenhower’s two attorneys general, that a presidential inability simply caused the presidential powers and duties, not the office, to transfer to the Vice President and that the President retained power to reclaim them.<sup>207</sup> He recommended that his brother’s administration follow the Eisenhower-Nixon precedent since “this understanding may prove to be a persuasive precedent of what the Constitution means until it is amended . . . Cumulative precedents of this kind may be

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204. *Id.*

205. FEERICK, *supra* note 147, at 239, 242.

206. *Id.* at 228-29.

207. Letter from Robert F. Kennedy, Attorney Gen., to President John F. Kennedy, *supra* note 180, at 1-2.

valuable in the future.”<sup>208</sup> Repetition helped exclude instances of presidential inability from the Tyler Precedent and accordingly allowed Presidents to formulate means to transfer power temporarily that passed constitutional muster.

Although three consecutive Presidents—Eisenhower, Kennedy and Johnson—felt comfortable in providing for the temporary transfer of presidential powers and duties to four successors—Nixon, Johnson, McCormack and Humphrey—the letter agreement route was criticized as not having the force of law and depending on the goodwill between the top two officers<sup>209</sup> and a need for a constitutional solution was perceived.<sup>210</sup>

During the mid-1960s, Congress finally acted to provide for presidential continuity in a formal and more comprehensive way.<sup>211</sup> The Kennedy assassination on November 22, 1963, and the legislative leadership of Senator Birch Bayh were among the factors that finally produced a solution in the form of a constitutional amendment.<sup>212</sup> The Twenty-fifth Amendment contained four sections.<sup>213</sup> The first adopted the Tyler Precedent for cases of presidential death, resignation, and removal, but not for disability. Section two provided that whenever the vice presidency fell vacant the President could nominate a new Vice President who took office once confirmed by a majority of each house of Congress. Sections three and four dealt with the vexing problems of presidential inability by authorizing, and providing procedures for, a temporary transfer of presidential powers and duties to the Vice President who would act as President. The Amendment also made clear that the President would retain the office

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208. *Id.* at 35.

209. FEERICK, *supra* note 147, at 246.

210. HERBERT BROWNELL WITH JOHN P. BURKE, *ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL* 279 (1993).

211. Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 *FORDHAM L. REV.* 959, 963 (2010) [hereinafter Goldstein, *Taking from the Twenty-Fifth Amendment*].

212. *Id.* at 964-65, 1006-07.

213. U.S. CONST. amend. XXV. See generally JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* (3rd ed. 2013) (describing the historical background and implementation of the Twenty-fifth amendment).

and resume the powers and duties when able to do so (although subject to different provisions depending on whether the transfer was voluntary or involuntary).<sup>214</sup> Congress proposed the Amendment in 1965 and the necessary states completed the ratification process in 1967.<sup>215</sup>

I will return to the Twenty-fifth Amendment shortly. For now, it is worth noting that prior to the ratification of the Twenty-fifth Amendment the informal approach to handling presidential inability developed through the repetition of practices between three Presidents and four first successors over a twelve-year period. Although the pre-1967 constitutional text, by language and intent, treated all four presidential continuity contingencies the same, practice, quite sensibly, separated presidential inability from the others based on prudential considerations. Repetition of that approach entrenched its constitutional legitimacy.

#### E. Conclusion

The foregoing discussion demonstrates that in virtually every respect the original constitutional design regarding the vice presidency yielded to different arrangements based on the repetition of informal practices. The Tyler Precedent, the presidential-vice-presidential inability arrangements, the demise of the President of the Senate role, and the executivization of the vice presidency all fit this description. In some instances, repeated practice transformed the Constitution because it improved the framers' product or responded to conditions not initially foreseen. The movement of the vice presidency to the executive branch provides one example. Similarly, the initial presidential election system did not anticipate the rise of national parties and the appeal of ticket-balancing, and accordingly practice forced revision of the original design. The Tyler Precedent was constitutionalized by practice, which quickly triumphed

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214. U.S. CONST. amend. XXV, § 3.

215. FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 213, at 104, 105.

over resistance; the difficulties it posed regarding presidential inability were initially resolved by Eisenhower's prudential approach, which ignored the semantic problems it created.

In interpreting and implementing constitutional provisions relating to vice-presidential election, conduct, and role in presidential succession and inability situations, political actors often departed from original history. They did not, however, ignore history. Instead, the history they used was often ongoing history as they followed prior practice in applying the relevant constitutional provisions, not the history surrounding the textual creation. History guided constitutional interpretation, but the events political actors relied on were those that reflected ongoing practice and prudential judgments based on that experience, not those associated with the Constitution's origins.

### III. CONSTITUTIONAL AMENDMENTS AND THE VICE PRESIDENCY: STRUCTURAL ARGUMENTS

A surprising number of constitutional amendments have also influenced the development of the vice presidency, either by design or through unanticipated effects. Four of the twenty-seven constitutional amendments, or about fifteen percent, have addressed the presidency, vice presidency or both. And if one excludes the first ten amendments that were ratified immediately after the Constitution, those relating to the presidency and/or vice presidency grow to four of seventeen, or twenty-three percent. The Twelfth Amendment changed the manner of electing Vice Presidents (and Presidents), the Twentieth and Twenty-fifth Amendments addressed presidential succession and inability, and the Twenty-second Amendment imposed presidential term limits, a formal change that impacted the second office, too. A relatively high degree of the successful invocations of the Article V amendment process relate to the presidency and vice presidency.

In most cases, these amendments responded to, and incorporated, historical practice. For instance, the Twelfth Amendment took the practice of *de facto* stating a vice-presidential candidate, which had occurred in prior

elections, and formally adopted it by requiring electors vote separately for President and Vice President. The Twenty-fifth Amendment adopted the Tyler Precedent for permanent presidential departures; the Eisenhower arrangement for voluntary presidential inabilities, a revised form of the Eisenhower approach for involuntary disabilities; and a variation of political practice, which recognized that presidential nominees chose their running mates, for the selection of a new Vice President.<sup>216</sup> The Twenty-second Amendment formalized the two term tradition, which Presidents other than Franklin D. Roosevelt had followed.<sup>217</sup>

These constitutional amendments have a structural significance that transcends the specific problems they addressed. They also reshaped the constitutional structure in a way that contributes to a different constitutional vice presidency and presidency. Each of the four amendments relating to the presidency and vice presidency not only changed prior constitutional provisions or spoke to subjects on which the Constitution had been silent, they also rested upon a different mix of ideas about the presidency, vice presidency, and other political institutions than had the Constitution as it previously existed. In adding new ideas and patterns to the constitutional framework, they presented a way in which structural argument, the mode of constitutional reasoning for which *McCulloch* is most noted, is historical to an extent not often appreciated.

Take the Twelfth Amendment. Its principal objective was to prevent or at least significantly reduce the possibility that a de facto candidate for Vice President would end up as President, as almost happened in 1800 with Burr.<sup>218</sup> Separating the election of the President and Vice President largely accomplished that immediate goal. Yet the Amendment also had other impacts and introduced other ideas into the Constitution, or gave them

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216. Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 211, at 1002-03.

217. U.S. CONST. amend. XXII, § 1; AMAR, *AMERICA'S CONSTITUTION*, *supra* note 74, at 433, 436.

218. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY*, *supra* note 32, at 16.

added emphasis. That change made it highly likely that the President and Vice President would come from the same ticket, thereby promoting philosophical and political compatibility between a President and Vice President and laying the foundation for the vice presidency to much later move to the executive branch. It implicitly recognized political parties as a reality in American government. Formally, at least, it made explicit that the Vice President would be the vice-presidential winner, not the presidential runner-up. Although some have blamed the Twelfth Amendment for reducing the quality of Vice Presidents<sup>219</sup> and encouraging ticket-balancing rather than excellence, it confirmed a trend already underway towards ticket-construction<sup>220</sup> and a number of subsequent Vice Presidents were quite distinguished.<sup>221</sup> Yet the Amendment did suggest that candidates for Vice President were not subject to the same criteria as those for President. A candidate for Vice President needed simply to be deemed suitable for the second office, not the first.<sup>222</sup>

The Twentieth Amendment, which was ratified in 1933, impacted the vice presidency in several ways. It changed the Vice President's term of office, by making it start and end on January 20 rather than March 4, thus reducing the time between the popular and electoral voting and the inauguration.<sup>223</sup> It also provided that if a President-elect dies before the time he or she is to take office, the Vice President-elect becomes President at that time, but if he or she fails to qualify, the Vice President-elect shall simply "act as President."<sup>224</sup> In so doing, it filled a gap in the original Constitution that provided for the

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219. AMAR, *AMERICA'S CONSTITUTION*, *supra* note 74, at 343.

220. CURRIE, *supra* note 94, at 43; GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY*, *supra* note 32, at 17-18.

221. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY*, *supra* note 32, at 17-18.

222. Whereas the original system formally called on electors to cast a ballot for two people for President, the Twelfth Amendment had the electors vote for one person he or she believes is qualified to be President and one he or she believes is qualified for Vice President.

223. U.S. CONST. amend. XX, § 1.

224. U.S. CONST. amend. XX, § 3.

death of the President but not of the President-elect. Yet in doing so, it also reflected a recognition of the importance of executive continuity. Moreover, by providing that the Vice President-elect “become[s] President” upon the death of the President-elect, it applied the Tyler Precedent by constitutional amendment to that contingency while articulating a constitutional principle that the Vice President-elect should simply act as President during a potentially temporary vacancy.<sup>225</sup> That structural principle might have provided an instructive analogy to inform the handling of presidential inability prior to the adoption of the Twenty-fifth Amendment. Finally, by shortening the lame duck period and requiring Congress to meet each year on January 3, shortly before the President’s inauguration, the Twentieth Amendment probably strengthened the President’s position as a legislative leader.

The Twenty-second Amendment, which imposed term limits on the President, did not directly address the vice presidency, but it impacted the second office in two respects. By limiting the President’s ability to seek re-election, it allowed a second-term Vice President to plan a presidential campaign without fear of offending or competing with the President.<sup>226</sup> The Twenty-second Amendment, which was ratified in 1951, was not the only reason Nixon became the first Vice President nominated to seek the presidency in more than a century, but it eased his path.<sup>227</sup> Along with the President’s selection of his running mate and the move of the vice presidency to the executive branch, the imposition of presidential term limits gave Presidents reason to see their Vice President as their best chance to extend their policies. Moreover, the Amendment contributed structural arguments regarding presidential succession and inability. It said that “no person who has held the office of President, or acted as

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225. U.S. CONST. amend. XX, § 3. See also Albert, *supra* note 75, at 848-49 (pointing out that Amendment confirms Tyler Precedent for succession by Vice President-elect following death of President-elect).

226. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY*, *supra* note 118, at 255; Albert, *supra* note 75, at 856-57.

227. See GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY*, *supra* note 32, at 26.



President, for more than two years of a term to which some other person was elected President” could be elected President more than once.<sup>228</sup> The reference to persons holding the office during a term to which another was elected provided further confirmation of the Tyler Precedent.<sup>229</sup> Finally, the Amendment reflected a concern regarding presidential power, which it addressed by limiting the length of presidential service notwithstanding democratic support for a particular incumbent.<sup>230</sup>

The Twenty-fifth Amendment constitutionalized new ideas regarding the vice presidency, a topic I have discussed in much more detail in earlier works.<sup>231</sup> Contrary to the original Constitution which viewed the vice presidency as expendable once it helped produce a President,<sup>232</sup> the Twenty-fifth Amendment reflected the idea that the Vice President was an indispensable governmental office that must be filled whenever it became vacant.<sup>233</sup> The importance of the undertaking was such that Section 2 created a method that involved a considerable commitment of time by the executive branch and both houses of Congress.<sup>234</sup>

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228. U.S. CONST. art. XXII, § 1.

229. The reference to persons who “act[ed] as President” apparently referred to an officer other than the Vice President who Congress designated to act as President during any type of presidential vacancy, whether caused by death, resignation, removal, inability or failure to qualify. Succession to the Presidency: Hearing on S. Con. Res. 1 Before the S. Comm. on Rules & Admin., 80th Cong. 2-3 (1947).

230. Albert, *supra* note 75, at 853 (“Fears of an imperial Presidency gave rise to the Twenty-Second Amendment.”).

231. Goldstein, *New Constitutional Vice Presidency*, *supra* note 73, at 505; Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 211, at 963.

232. Goldstein, *New Constitutional Vice Presidency*, *supra* note 73, at 512-13. The original Constitution communicated its ambivalence to the vice presidency by failing to provide a means to fill a vice-presidential vacancy. *Id.* at 513, 515. In fact, it underscored this disparaging attitude towards the second office in the Officer Succession Clause, which provided that if both the President and Vice President were vacant or incapacitated, Congress was empowered to designate an officer to fill the presidency. U.S. CONST. art. II, § 1, cl. 6. No mention was made of filling the vice presidency, a silence that communicated the Constitution’s attitude that vice-presidential vacancy posed no peril.

233. Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 211, at 981.

234. Goldstein, *New Constitutional Vice Presidency*, *supra* note 73, at 526.

The drafters of the Twenty-fifth Amendment also saw the vice presidency as an executive, not a legislative office.<sup>235</sup> Since the Vice President would be involved in the ongoing work of the executive branch and needed to be prepared to succeed if necessary,<sup>236</sup> the President and Vice President should be compatible.<sup>237</sup> Accordingly, the President should nominate someone to fill a vice-presidential vacancy<sup>238</sup> subject to congressional approval to simulate election and ensure competency.<sup>239</sup> That approach provided further implicit recognition of the role of political parties in American government.<sup>240</sup> The architects of the Twenty-fifth Amendment saw the Vice President as the best means to address the vexing problems that presidential succession and inability presented to presidential continuity.<sup>241</sup> They thought the Vice President should become President following a permanent vacancy and should serve as such until the end of the presidential term underway.<sup>242</sup> Although the Amendment reflected a new vision of the office, it focused on the office's role as the first successor, a view underscored by the fact that each of the four provisions was directed to presidential succession, presidential inability or filling the vice presidency to best provide for presidential succession and inability.

The impact of these Amendments on the Constitution's structure has implications well beyond the vice presidency. The Twelfth Amendment implicitly recognized the party system and in doing so, according to Akhil Reed Amar, "paved the way for increased involvement of ordinary citizens in the presidential-

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235. *Id.* at 530-32.

236. Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 211, at 982-83.

237. Goldstein, *New Constitutional Vice Presidency*, *supra* note 73, at 532-33; Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 211, at 983.

238. Goldstein, *New Constitutional Vice Presidency*, *supra* note 73, at 533-34.

239. *Id.* at 534-36.

240. Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 211, at 984.

241. Goldstein, *New Constitutional Vice Presidency*, *supra* note 73, 536-40.

242. *Id.* at 537.

selection process.”<sup>243</sup> It also associated Presidents with partisan politics more directly. The Twenty-fifth Amendment reinforced that recognition by incorporating the custom that the presidential nominee chooses a running mate as the model for Section 2.<sup>244</sup> The Twentieth Amendment enhanced the President’s role as legislative leader by shortening the lame duck period and bringing Congress together before the beginning of a new presidential term.<sup>245</sup> The Twenty-second Amendment constitutionalized the essential term-limit practice that Presidents other than Franklin Roosevelt had observed.<sup>246</sup> And the Twenty-fifth Amendment expressed the importance of presidential continuity<sup>247</sup> (as does the Twentieth Amendment) but did so in a manner protective of the President’s entitlement to his office.<sup>248</sup> It also expressed an appreciation of the need that the person next in line be well-prepared,<sup>249</sup> that succession not shift party control of the White House,<sup>250</sup> and that the successor be the product of a democratic and politically-accountable selection process.<sup>251</sup> It expressed a faith in pre-existing procedures and laws to guide behavior<sup>252</sup> yet a recognition that results would depend upon the ability and willingness of officials to act in an appropriate manner.<sup>253</sup>

Most discussions of structural argument draw from the original design in formulating conclusions. Yet just as the Civil War Amendments affected the federal balance and the Fifteenth, Seventeenth, Nineteenth, Twenty-third, and

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243. AMAR, *AMERICA’S CONSTITUTION*, *supra* note 74, at 342; *see also* Albert, *supra* note 75, at 842.

244. U.S. CONST. amend. XXV, § 2; Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 211, at 984.

245. U.S. CONST. amend. XX, §§ 1-2.

246. U.S. CONST. amend. XXII, § 1.

247. Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 211, at 981-82.

248. *Id.* at 982, 987-91.

249. *Id.* at 982-83.

250. *Id.* at 984.

251. *Id.* at 991-93.

252. *See* Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 211, at 994-96.

253. *Id.* at 996-98.

Twenty-sixth Amendments altered ideas of democratic accountability, so, too, did the Twelfth, Twentieth, Twenty-second, and Twenty-fifth Amendments modify the structure of the presidency. Structural argument here, as elsewhere, cannot fairly proceed with reference simply to the original Constitution. Rather, structural constitutional arguments must incorporate the textual provisions added to the document at different moments in American history. Like a building that is modified over a long life, the Constitution's structure suggests themes from the addition of provisions over roughly two centuries. The themes implicit in the Constitution, accordingly, draw from texts created at different times, not just in the late 1780s, and the interactions between those constitutional texts. Consequently, structural argument regarding the presidency or vice presidency involves a historical exercise, but one that looks not only at original but ongoing history. The Constitution's ideas regarding the presidency and the vice presidency come from looking not simply at the provisions in Article II, but at the four amendments added in 1804, 1933, 1951 and 1967 and the history relating to their production and implementation.<sup>254</sup>

#### IV. THE MOST RECENT CHAPTER

The last forty years have demonstrated most dramatically how historical practice can reshape constitutional understandings, a theme I have developed in my recent book, *The White House Vice Presidency: The Path to Significance, Mondale to Biden*.<sup>255</sup> In late 1976, President-elect Jimmy Carter and Vice President-elect Walter F. Mondale reshaped the vice presidency by bringing the second officer, and his office, into the White House and into the President's inner circle.<sup>256</sup> The Vice President became an across-the-board presidential adviser and troubleshooter, a role that depended on

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254. See U.S. CONST. amend. XII (1804); U.S. CONST. amend. XX (1933); U.S. CONST. amend. XXII (1951); U.S. CONST. amend. XXV (1967).

255. See GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY*, *supra* note 32, at 308-14.

256. See *Id.* at 48-92.

extensive access to the President, the information he received, and other necessary resources Carter gave Mondale so he could function in this role.<sup>257</sup> The principal function of the White House vice presidency became helping the President on a regular basis, not the contingent successor role. Carter and Mondale's five successors have each been part of the President's inner circle with Mondale's role and resources.<sup>258</sup> For six administrations, the basic features of the White House vice presidency have existed and become more entrenched with each repetition.<sup>259</sup>

The White House vice presidency developed through the creation of new practices which better responded to the needs of the presidency and constitutional system and through their repetition by subsequent administrations. The vice-presidential vision of the Twenty-fifth Amendment certainly provides some structural support for this new vice-presidential model, yet that model did not develop in response to the Amendment.<sup>260</sup> In fact, more than a decade, and four vice presidencies, passed between the articulation of the vision and the creation of the White House vice presidency.<sup>261</sup>

The White House vice presidency marked a further and interesting constitutional development. Whereas the original constitution gave the Vice President the primary role of presiding over the Senate, with the contingent role as presidential successor, and whereas much of the twentieth century saw the successor role as primary, the White House vice presidency created an ongoing role for the Vice President in the executive branch, indeed in the West Wing. It made helping the existing President succeed, not succeeding that President, primary. Whereas the Twelfth Amendment separated the election of the President and Vice President, the White House vice

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257. *Id.* at 70-89.

258. Goldstein, *Constitutional Change*, *supra* note 27, at 401.

259. See GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY*, *supra* note 32, at 307-10.

260. Goldstein, *Constitutional Change*, *supra* note 27, at 405-06.

261. See *id.* at 399-401 (noting that the Twenty-Fifth Amendment was proposed in 1965, but the White House vice presidency was not fully realized until Walter Mondale served under President Jimmy Carter).

presidency gave added impetus to the argument that the Vice President must be presidential, not simply vice presidential. Otherwise, how could he or she discharge the ongoing roles of the office not to mention the successor role? Once again practice created new norms that improved the vice presidency.

## V. CONCLUSION

This snapshot of constitutional provisions relating to the vice presidency allows some generalizations regarding the role of history in constitutional interpretation outside the courts. Historical argument pervades constitutional interpretation, not simply the history surrounding the original creation of constitutional texts but the evolving history of institutional development. Original history is not always followed. In fact, political actors have often deviated from original intent, understanding, expectations, and meaning in clauses relating to the vice presidency. At times the deviation has simply followed prior divergent behavior, like the perpetuation of the Tyler Precedent. On other occasions, new practice has rested on consequential or prudential reasoning that identified an emerging practice as a more sensible arrangement. The move of the vice presidency from being largely a legislative officer to its current status as an intrinsic part of the presidency provides an example. Many of these institutions that practice and consequential reasoning created have won wide-spread support even though they defy the Constitution's original history. That experience should caution those who celebrate original history as a guide to constitutional interpretation to the exclusion of other forms of experience.

Public servants often invoke prior practice to justify behavior. Seven Vice Presidents who succeeded to the presidency in the nineteenth and twentieth century relied on the Tyler Precedent to justify their claims. In fact, the practice quickly won such acceptance that no citation was needed. Similarly, Kennedy and Johnson perpetuated the Eisenhower-Nixon inability arrangement. The assumption

of executive duties by the Vice President became accepted as Presidents, Vice Presidents, and Congress noted prior behavior approvingly and acquiesced in it.

Practice and consequential argument allow institutions to develop in a more flexible manner than does originalism. They allow subsequent generations to correct some of the framers' mistakes and to accommodate developments those who originated a constitutional text did not anticipate without the enormous effort required of a constitutional amendment. Learning from history, rather than being bound by it, often produces more workable government based on prior experience.

Ongoing history is also more historically inclusive than originalism. Whereas originalism seeks to understand the experience and conclusions of the one generation that produced a text, practice and consequential argument engage those of multiple generations. Ongoing history also candidly lends itself to experimentation and to correction as failed ventures can be abandoned or modified. Eisenhower's informal disability arrangement drew from the lessons of prior history. So, too, the development of the White House vice presidency learned from the mistakes of various administrations in trying to find an executive role for the Vice President. As David Strauss suggests, constitutional arguments that draw on history as it develops show "respect for the accumulated wisdom of the past."<sup>262</sup> They view the Constitution as "the work of generations of people—lawyers and nonlawyers, public officials and people living private lives—who have grappled with society's problems and done their best to pass what they have learned on to us."<sup>263</sup>

Although repeated practice tends to have an enduring quality, it does not necessarily chart an inexorable historical path. Just as courts can depart from judicial precedent, political institutions can deviate from patterns of nonjudicial activity when circumstance so dictates. As suggested above, Vice Presidents long thought they were obliged to preside over the Senate regularly until Nixon

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262. STRAUSS, *supra* note 16, at 139.

263. *Id.*

changed course in 1953 to assume a larger executive and political role, thereby creating a new historical pattern as his successors followed course. The move of the Vice President to the executive branch, which Nixon accelerated, did not signal the move a quarter century later to the White House that Carter and Mondale produced. In each instance, an administration deviated from the past practice and created a new historical pattern that imitation entrenched.

Moreover, ongoing history often serves as the basis for what is constitutionally permitted or expected but not necessarily what is constitutionally required. The practice of parties slotting tickets had become permissible based on past behavior before the Twelfth Amendment, but surely practice could have reverted to the conduct the framers intended without being unlawful.

Based on historical practice, the Vice President need not preside over the Senate without violating his or her duty but retains that right (except in the limited situations when it is constitutionally proscribed).

Structural argument is historical in an ongoing as well as originalist sense. The Constitution we expound was created over time, not simply in 1787. Amendments that post-dated the founding have revised the Constitution's structure and added new themes to constitutional reasoning or given familiar concepts different weight. Just as the Civil War Amendments affected the federal balance and the Fifteenth, Seventeenth, Nineteenth, Twenty-third, and Twenty-sixth Amendments altered ideas of democratic accountability, so, too, did the Twelfth, Twentieth, Twenty-second, and Twenty-fifth Amendments modify the structure of the presidency. Understanding the Constitution's structural ideas regarding the presidency, vice presidency, and other governmental institutions requires considering the Constitution that now exists, not simply the original document. Since these provisions were added to the Constitution at different times, the enterprise requires engaging in a journey through time to elicit the concepts and patterns they suggest and applying them to situations that arise.



Much of what I have said suggests limitations of original history in constitutional interpretation, yet original intent and meaning retain an important place in constitutional practice. Consistent with original design, the Vice President remains the first successor and entitled to preside over the Senate and break its tie votes. Consistent with the Twelfth Amendment, electors vote separately for Vice President and, for better or worse, the Electoral College chooses the Vice President as well as the President. Vice-presidential qualifications mirror those of the President.<sup>264</sup>

Originalism may have greater value in interpreting more recent constitutional amendments relating to the office since the available records are more comprehensive and allow more certain judgments of their purposes and meaning. Whereas the records of the original history of the Constitution proposed in 1787 and ratified the following year are pretty incomplete and accordingly may suggest erroneous inferences especially to modern interpreters who must try to recreate the context of those unfamiliar times, the documentation regarding the Twenty-fifth, Twenty-second, or Twentieth Amendments are more complete. There are times when stability and certainty have their place, at least as a starting point, and original history, when it can be discovered and understood, has that virtue and may shed light on the purposes and expectations that animated and informed fragments of constitutional text. Those attributes must be weighed against the loss of flexibility and of experience as a source of education. Original history also focuses attention on one period whereas ongoing history may require a broader inquiry.

Finally, constitutional interpretation demands that judicial and nonjudicial actors have skill and sensitivity as historians. Although the challenges of historical inquiry differ in some respects depending on the type of historical argument involved, they all require constitutional interpreters to look backwards. That enterprise requires

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264. U.S. CONST. amend. XII ("But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.").

not simply obtaining the relevant information, but putting that data in the context of the period from which they came. Those engaged in historical inquiry must recognize both that the past looks different when refracted by the lens of succeeding periods than it did to those who lived in that time or in immediately succeeding eras and that judgments are inevitably filtered through the subjectivity of the person who is looking backwards for knowledge or guidance. Different historians find different lessons in the same data. These inherent features of historical inquiry present challenges for historians. They, at least, are trained in the enterprise and are presumably alert to the difficulties and skilled at addressing them. The problems are graver for lawyers and politicians who lack historical training and may not be aware of the limitations of their understanding. Those who engage in historical argument should be aware of the hazards and approach the enterprise with some humility.

Discussions of the use of history in constitutional interpretation in some respects parallel debates elsewhere. Experts in many fields consider the extent to which history is guided by events that occurred at a single moment or those that unfold over an extended time. The debates between the role of nature or nurture in human behavior is one such example. Those discussions involve an inquiry which divides influences between a starting point and subsequent development.

There is room for many modes of constitutional history, the original and ongoing, in interpreting the Constitution, regarding the vice presidency and all else. The challenge is to recover history, learn from it, enlist it, so we can produce constitutional doctrine and practices that will allow the Constitution we are expounding to endure for the ages.