


5-15-2008

Back to the Basics: Looking Again to State Constitutions for Guidance on Forming a More Perfect Vice Presidency

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Recommended Citation

Jamin Soderstrom *Back to the Basics: Looking Again to State Constitutions for Guidance on Forming a More Perfect Vice Presidency*, 35 Pepp. L. Rev. 4 (2008)
Available at: <http://digitalcommons.pepperdine.edu/plr/vol35/iss4/3>

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Back to the Basics: Looking Again to State Constitutions for Guidance on Forming a *More Perfect Vice Presidency*

- I. INTRODUCTION
- II. FOUNDATIONS OF THE VICE PRESIDENCY
 - A. *State Constitutions as Temporal Predecessors to the Federal Constitution*
 - B. *State Constitutions as Textual Predecessors to the Federal Constitution*
 - 1. State Constitutions' Pervasive Influence and Impact on the Federal Constitution
 - 2. State Constitutions' Specific Influence and Impact on the Vice Presidency
 - C. *A Missed Opportunity to Form a More Perfect Vice Presidency from the Start*
- III. THE EVOLUTION OF THE INSTITUTION
 - A. *A Quick Descent Through the Founding Period*
 - B. *A Useless Century Followed by "Gradually Increasing Prominence"*
 - C. *The Twenty-Fifth Amendment, the Modern Era, and the Future of the Office*
- IV. WHERE THE DEBATE STANDS TODAY
 - A. *Proposal One: The Vice President Should be Elected Separately*
 - B. *Proposal Two: The Vice President Should Hold a Separate Office*
- V. WHAT SAY THE STATES?
 - A. *The States on Selection*
 - B. *The States on Additional Duties*
 - C. *The Results of this Methodology*
- VI. CONCLUSION

I. INTRODUCTION

Years of thought, several volumes of text, and dozens of articles such as this one have been dedicated to the American vice presidency.¹ In fact, most of the literature on this topic was produced in the last half century.² While each work has had its own particular focus and purpose, collectively there have been several dominant themes: individual Vice Presidents and their contributions (or lack thereof) to the office;³ constitutional amendments and their effects on the vice presidency;⁴ the state of the vice presidency at a certain point in history;⁵ and the evolution of the vice presidency over time.⁶ Almost every work contains at least a brief discussion of the position's origins, but most simply repeat as a truism the conventional wisdom that the ultimate design of the vice presidency was borrowed from the state constitutions of the 1770s and 1780s, particularly the New York Constitution.⁷ While this is an accurate description of the original design of the Federal Constitution, drafted in 1787 at the Constitutional Convention and subsequently ratified in 1788, it is nonetheless incomplete. Even those scholars who have delved below the surface on this matter have failed to fully document the manifold comparisons and differences between the early state constitutions and the ultimate design of the vice presidency.

Part II of this Article describes the connection between the early state constitutions drafted in the decade preceding the Constitutional Convention and the Federal Constitution, paying particular attention to the vice presidency and its state counterparts.⁸ To accomplish this, the discussion begins with a general comparison between the earlier drafted state constitutions and the text of the Federal Constitution, including its

1. See, e.g., JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY* (1982) [hereinafter GOLDSTEIN, *MODERN V.P.*]; IRVING G. WILLIAMS, *THE RISE OF THE VICE PRESIDENCY* (1956); BIRCH BAYH, *ONE HEARTBEAT AWAY* (1968); Vikram David Amar, *The Cheney Decision—A Missed Chance to Straighten Out Some Muddled Issues*, 2004 CATO SUP. CT. REV. 185; Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505 (1995) [hereinafter Goldstein, *Constitutional V.P.*]; Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913 (1992); Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811 (2005); Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703 (1988).

2. See *supra* note 1.

3. See CAROLE CHANDLER WALDRUP, *VICE PRESIDENTS: BIOGRAPHIES OF THE 45 MEN WHO HAVE HELD THE SECOND HIGHEST OFFICE IN THE UNITED STATES* (2006).

4. See GOLDSTEIN, *MODERN V.P.*, *supra* note 1; BAYH, *supra* note 1.

5. See Amar, *supra* note 1; Goldstein, *Constitutional V.P.*, *supra* note 1.

6. See Albert, *supra* note 1.

7. See *infra* notes 59-63 and accompanying text.

8. See *infra* Part II.

companion Bill of Rights adopted in 1791.⁹ This is an important foundation from which to start because most law students (and probably many lawyers and professors) are unaware of the true and most fundamental source of the Federal Constitution's text—the collective early state constitutions.¹⁰ Indeed, a simple review of several popular constitutional law textbooks and secondary materials quickly proves that law students are much more likely to be taught and to believe that the delegates at the Constitutional Convention mainly had Montesquieu, Locke, and Hobbes on their minds and copies of the *Prohibitions Del Rey* and Aristotle's *Politics* in their hands.¹¹ In truth what is more likely is that while these historical thinkers and documents were indeed influential in the *general design* of the new American Government, it was the individual state constitutions that were actually the primary sources for the delegates' most important *specific ideas* ultimately included in the Federal Constitution—a reality that seems to have been “overwhelmed” ever since.¹² Part II's discussion then moves to the

9. See *infra* notes 31-58 and accompanying text; U.S. CONST. amends. I-X. In this area, it is appropriate to connect the Constitution and Bill of Rights because: (1) they were drafted very close in time; (2) much of the language in the state constitutions is strikingly similar to the text of the Bill of Rights (perhaps even more so than the text of the Constitution); and (3) several accounts of the ratification debates in individual states reveal that ultimate ratification by several essential states hinged on the ultimate inclusion of such rights through the amendment process. See Roger A. Bruns, *A More Perfect Union: The Creation of the U.S. Constitution*, http://www.archives.gov/national-archives-experience/charters/constitution_history.html.

10. Professor Akhil Reed Amar pointed this fact out several times during a two-week intensive lecture and discussion class at Pepperdine University in August of 2006, and these discussions were the impetus for this Article. The class and discussions focused on his recent book. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005). When asked, students in the class listed historical events and documents and famous political theorists as the primary influences on the Constitution's framers, but none named the several state constitutions as a primary, let alone the most influential, source of the Constitution's form and text.

11. One popular constitutional law textbook dedicates over the first one hundred pages to many historical persons and documents, while not one state constitution is mentioned. See DOUGLAS W. KMIEC ET AL., *THE HISTORY, PHILOSOPHY, AND STRUCTURE OF THE AMERICAN CONSTITUTION* 1-115 (2d ed. 2004) (discussing John Winthrop, Aristotle's *POLITICS*, Cicero's *DE LEGIBUS*, Saint Augustine, Bracton, Sir Edward Coke, *Prohibitions Del Rey*, Thomas Hobbes, John Milton, John Locke's *SECOND TREATISE OF GOVERNMENT*, The Declaration of Independence, and *THE FEDERALIST* as influences on the founders). Moreover, even Professor Amar's popular constitutional law textbook does not discuss the influence of the state constitutions on the Federal Constitution. See generally PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (5th ed. 2006).

12. Justin Long, *Intermittent State Constitutionalism*, 34 *PEPP. L. REV.* 41, 50 (2006). Writing about the study and interpretation of state constitutions compared to the Federal Constitution, Long noted:

Although state constitutionalism came before the Federal Constitution in time, the federal document has utterly overwhelmed those of the states in mainstream legal discussion. Law schools teach entire courses on “Constitutional Law” without ever mentioning the

specific connection between the state constitutions and the sections of the Federal Constitution that deal directly with the structure and powers of the Vice President.¹³ Clause by clause this Article analyzes the relationship between the language describing the vice presidency included in the original Constitution and the parallel language found in early state constitutions.¹⁴ This lays the necessary foundation for the proposed methodology for analyzing several suggested changes in the vice presidency that is the principal purpose of this Article.

Moving forward in time, Part III gives a brief description of the evolution of the vice presidency from 1787 through the modern era.¹⁵ Any meaningful discussion of the vice presidency would be incomplete without a description of the constitutional changes and the distinct historical periods of the vice presidency in order to orient the reader to a modern discussion.

Part IV introduces several prominent modern vice presidential scholars and describes their ideas and suggestions regarding the second office.¹⁶ Professors Richard D. Friedman, Akhil Reed Amar and Vik Amar stand on the side of active change—they each believe that the vice presidency remains a flawed office and they each propose ways in which it may be improved.¹⁷ Professor Joel K. Goldstein stands on the side of common law change¹⁸—in essence he believes that the modern vice presidency “fulfills well” its role in today’s American Government and suggests the proposed changes would do little to “enhance the office or [the American] system of government.”¹⁹ Under his “common law” concept of the modern vice presidency, change to the office will occur naturally and over time rather than through direct advocacy and active scholarly lobbying for change.²⁰

fifty constitutions complementing, and in some cases predating, the one written in Philadelphia. Academic commentators blithely discuss constitutional verities without a passing word for the often different situation in the states.

Id. (internal citations omitted). While this Article addresses a different topic, the comment remains appropriate. This Article attempts to bring renewed focus to what state constitutions can bring to discussions over the vice presidency and to limit the result of “overwhelm[ing]” state constitutions. *See id.*

13. *See infra* notes 59-121 and accompanying text.

14. *See infra* notes 65-119 and accompanying text.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See* Friedman, *supra* note 1; Amar & Amar, *supra* note 1.

18. Goldstein, *Constitutional V.P.*, *supra* note 1, at 560. “Common law” is law that develops over time through the process of judges deciding cases, as opposed to natural law or positive law (statutes or other written law). Professor Goldstein maintains that the development of the office of Vice President that has occurred since the founding era “continues today and holds the promise of further evolution of the office.” *Id.* This mode of change is in direct contrast with Professor Friedman and the Amars’ suggestions for either a constitutional amendment or a more immediate and active change process. *See generally* Friedman, *supra* note 1; Amar & Amar, *supra* note 1.

19. Goldstein, *Constitutional V.P.*, *supra* note 1, at 559.

20. *Id.* at 560.

Where Professor Friedman and the Amars think the country must walk in the spirit of the Constitution's Preamble and actively make changes that will result in a *more perfect* vice presidency, Professor Goldstein thinks the vice presidency will develop and evolve toward the same perfection in its own good time.²¹ The purpose of the remainder of the article is to decide which side is right from the perspective of the current state constitutions.²²

Part V puts the article's proposed methodology to work.²³ The proposal is simple: to determine whether the vice presidency needs to actively be changed, we must go back to the basics; to wit, we must go back to the state constitutions where the idea of the vice presidency was born.²⁴ The fact is that, while the Supreme Court has highlighted the "role of States as laboratories" several times over the past century,²⁵ their role as hotbeds of experimentation began in the decade before the Constitution was even written. Interestingly, the most prevalent scholars in the field have devoted little time or attention to the early state constitutions' influence and impact on the original Federal Constitution,²⁶ and now they devote an equally small amount of time and text to the modern state constitutions' potential to guide possible changes in the form and duties of the vice presidency.²⁷ With most

21. See U.S. CONST. pmbl. The Preamble reads:

We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Id. "More perfect" is of course a goal America has always and must continue to strive for, and the vice presidency is no exception. Which path toward perfection should be taken, however, is less certain.

22. See *infra* Part V.

23. See *infra* Part V.

24. See *infra* notes 59-121 and accompanying text.

25. *Gonzalez v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting that a "[s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

26. See *infra* note 27 and accompanying text.

27. The Amars are the only scholars that appear to have performed even a perfunctory review of state constitutions vis-à-vis this topic, and the extent of their consideration appears in one footnote:

A number of states constitutionally bind the election of their top executive officials. See FLA. CONST. art. 4, § 5; HAW. CONST. art. 5, § 2; ILL. CONST. art. 5, § 4; IND. CONST. art. 5, § 4; IOWA CONST. art. 4, § 3; KAN. CONST. art. 1, § 1; MD. CONST. art. II, § 1B; MASS. CONST. amend. art. LXXXVI; MICH. CONST. art. 5, § 21; MINN. CONST. art. V, § 1; MONT. CONST. art. VI, § 2(2); N.M. CONST. art. V, § 1; N.Y. CONST. art. IV, § 1; N.D. CONST. art. V, § 4; OHIO CONST. art. III, § 1a; PA. CONST. art. 4, § 4; S.D. CONST. art. IV, § 2; UTAH CONST. art. VII, § 2; WIS. CONST. art. 5, § 3. Several states bind the elections of governor and lieutenant governor through statute. See ALASKA STAT. §

of the fifty states designing their governments in a Governor/Lieutenant Governor model, similar to the Federal President/Vice President model, the state constitutions seem to be the natural places to start, especially because they are where the Framers started.²⁸ So the first question is whether there is a better place to look when considering any changes in the Executive Branch of the Federal Government than to the executive branches of the state governments? This can be quickly answered “no.”²⁹ The second question, however, is not as simple: after reviewing the fifty executive branches of the state governments and learning from their experiences, are there any reasons why the vice presidency should be changed? If the answer is yes, there is no better time for change than this moment in history.³⁰ If the answer is no, at least we have answered the question for the present time.

II. FOUNDATIONS OF THE VICE PRESIDENCY

A. *State Constitutions as Temporal Predecessors to the Federal Constitution*

On January 5, 1776, following the recommendation of the Continental Congress that the people of the several colonies form independent state governments,³¹ New Hampshire became the first American state to frame a

15.15.030(5) (1988); COLO. REV. STAT. § 1-4-204 (1973); CONN. GEN. STAT. § 9-181 (1958).

Amar & Amar, *supra* note 1, at 915 n.5. This one footnote merely cited these state provisions, and the Amars’ argument did not rely on the general methodology of looking to state practices for guidance.

28. See *infra* notes 59-121 and accompanying text.

29. Ideals such as democracy, frequently cited by those who propose one change or another, are theoretically wonderful but are probably too flexible to carry as much weight as their proponents would like them to have. See Amar & Amar, *supra* note 1, at 914 (looking to “theory, policy, and history” but not to current practice). For instance, the United States is a representative democracy (a republic) rather than a pure democracy in the mold of classic Greece. It uses an electoral college and often requires more than a majority of votes for a certain measure to pass. See, e.g., U.S. CONST. art. I, § 1; U.S. CONST. amend. XII. Relying solely upon the principle of democracy is a flawed approach because it extends from the mistaken viewpoint that the United States is a democracy first and foremost, which it is not.

30. Now is a good time in history to make any necessary changes for several reasons. First, there is no present constitutional crisis. See Albert, *supra* note 1, at 896 (quoting former Senator and Twenty-Fifth Amendment drafter in saying “do it now before there is a crisis, when you can do it dispassionately and non-controversially”). Second, if there is a clear flaw in the American system of government there is no reason for “inertia” to be a roadblock on the path toward improvement. See Amar & Amar, *supra* note 1, at 943-44. Finally, the 2008 presidential and vice presidential elections are approaching, and a new Vice President will presumably be taking office. Changing the vice presidency now would cause less conflict.

31. See AMAR, *supra* note 10, at 23 (“[T]he [Continental] Congress styled its most important statement yet not as an ‘order’ or ‘instruction,’ but as a ‘recommend[ation]’ that individual colonies adopt new governments wherever the old Crown-linked regimes had lapsed.”).

written constitution.³² Three more states—South Carolina,³³ Virginia,³⁴ and New Jersey³⁵—quickly followed suit, each drafting its own constitution before the Continental Congress formally declared American independence on July 4, 1776.³⁶ Eight additional states joined the ranks of independent states with written constitutions between 1776 and 1780: Delaware (1776),³⁷ Maryland (1776),³⁸ Pennsylvania (1776),³⁹ North Carolina (1776),⁴⁰ Georgia (1777),⁴¹ New York (1777),⁴² and Massachusetts (1780).⁴³ In sum, eleven of the original thirteen colonies drafted written state constitutions between 1776 and 1780, declaring themselves to be free and independent.⁴⁴ Two states, Connecticut⁴⁵ and Rhode Island,⁴⁶ continued to govern themselves under their original colonial charters of 1662 and 1663.

Each of these thirteen newly independent states, while self-governing under their individual state constitutions, sought immediately to loosely unite themselves into a larger whole by ratifying the Articles of Confederation in 1781.⁴⁷ The Articles, purporting to bind the thirteen states in a “perpetual Union” and “firm league of friendship,” soon proved to be unmanageable and inadequate.⁴⁸ Following several unsuccessful attempts at

32. N.H. CONST. (1776).

33. S.C. CONST. (1776). Interestingly, South Carolina drafted a second state constitution just two years later, preempting the earlier one and still coming well before the Constitutional Convention. S.C. CONST. (1778). Be careful to note that both constitutions are referenced in this Article.

34. VA. CONST. (1776).

35. N.J. CONST. (1776).

36. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

37. DEL. CONST. (1776).

38. MD. CONST. (1776).

39. PA. CONST. (1776).

40. N.C. CONST. (1776).

41. GA. CONST. (1777).

42. N.Y. CONST. (1777).

43. MASS. CONST. (1780).

44. Vermont is an interesting case because it drafted two constitutions, one in 1777 and another in 1786, but was not admitted as the fourteenth state of the Union until 1791 because both New York and New Hampshire maintained claims over the region called Vermont until that date. *See* VT. CONST. (1777); VT. CONST. (1786); 50states.com, <http://www.50states.com/statehood.htm>. This Article does not consider either of the Vermont constitutions.

45. CONN. CHARTER (1662).

46. R.I. CHARTER (1663).

47. THE ARTICLES OF CONFEDERATION (1781).

48. THE ARTICLES OF CONFEDERATION pmbl.; THE ARTICLES OF CONFEDERATION art. III; *see* Bruns, *supra* note 9. The Preamble of the Articles states:

To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

improvement, a Constitutional Convention was called in the summer of 1787.⁴⁹ The Convention was composed of delegates representing twelve of the thirteen newly independent states.⁵⁰ While several eminent personages of the Revolutionary Era were notably missing,⁵¹ the assemblage was nonetheless impressive.⁵² Each man was prominent in his own right, most having studied law, served in a colonial or state legislature, or served in Congress.⁵³ Most were also well-versed in the renowned philosophical and political theories of government expounded by Locke, Montesquieu, and others.⁵⁴ It is also proper to assume, without exception, each man must have also arrived in Philadelphia in May 1787 and departed in September 1787 knowing every letter of his respective state's constitution.

Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts-bay Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

THE ARTICLES OF CONFEDERATION pmbl. Article III of the Articles provides:

The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

THE ARTICLES OF CONFEDERATION art. III. The years of "political and economic dilemmas" seen in America following the 1781 ratification of the Articles proved the "futility and weakness of confederacies of independent states." Bruns, *supra* note 9. Some of the identified weaknesses were that "the central government . . . had insufficient power to regulate commerce . . . could not tax . . . was generally impotent in setting commercial policy . . . could not effectively support a war effort . . . [and] had little power to settle quarrels between states." *Id.* The federal government under the Articles was essentially "impotent" and "weak." *Id.*

49. See Bruns, *supra* note 9.

50. See *id.* Playing the part of the black sheep, as was its general custom in the founding era, Rhode Island refused to participate in the Convention it considered to be a "conspiracy to overthrow the established government." *Id.*

51. See *id.* The "towering figures" of John Adams and Thomas Jefferson were absent as they were assigned to foreign missions across the Atlantic in England and France, respectively. *Id.* John Jay remained in New York in the Foreign Office. *Id.* On a slightly different bent, Patrick Henry had "suspicions" that the delegates "had in mind the creation of a powerful central government and the subversion of the authority of the state legislatures." *Id.* He was correct, of course, and refused to attend the Convention. *Id.*

52. See *id.* Those in attendance included George Washington, James Madison, Benjamin Franklin, Alexander Hamilton, James Wilson, John Dickinson, Gouverneur Morris, Oliver Ellsworth, Edmund Randolph, William Paterson, John Rutledge, Elbridge Gerry, Roger Sherman, Luther Martin, and Charles Cotesworth Pickney. *Id.*

53. See *id.*

54. See *id.*

B. State Constitutions as Textual Predecessors to the Federal Constitution

1. State Constitutions' Pervasive Influence and Impact on the Federal Constitution

The role the original state constitutions played in the framing of the Federal Constitution is greatly underreported and underappreciated.⁵⁵ A simple yet careful examination of the text of each of the early state constitutions can quickly prove their collective and substantial influence and impact on the subsequent Federal Constitution. Many of the most well-known ideas and clauses found in the Federal Constitution first appeared in one or several state constitutions—some even verbatim. The following chart⁵⁶ connects ideas and clauses of the Federal Constitution drafted in 1787 and the Bill of Rights adopted in 1791 with parallel ideas and clauses found in at least one, and sometimes several or most, early state constitutions.

55. See *supra* note 11 (describing major constitutional law textbooks' failure to mention state constitutions and lack of consideration of state constitutions in legal discussions).

56. These twenty-seven comparisons are a thorough but not exclusive list of parallel language found in the federal and state constitutions. Some of the language used in the Federal Constitution is found verbatim in earlier drafted state constitutions; other language shows very clearly the same idea and intent, but does not use the exact language. Compare N.C. DECL. OF RIGHTS art. X ("Excessive bail *should* not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."), with U.S. CONST. amend. VIII ("Excessive bail *shall* not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.") (emphases added). Additional examples beyond this list of close comparisons between language and ideas found first in one or several state constitutions will quickly become evident upon further examination. The purpose of this list is twofold: first, to highlight the best examples and the best-known clauses; and second, to give the reader a strong sense of the reliance placed on state constitutions by the drafters of the Federal Constitution, without shifting too much focus away from the main topic of the vice presidency. More comparisons were available, and fewer comparisons probably would have sufficed, but this chart should impress upon the reader an appreciation of the point without being overly burdensome. Additionally, this list includes both the Federal Constitution and the Bill of Rights because there is strong evidence that the original Constitution would not have been ratified by some states if it had not been immediately followed by amendments listing such individual rights as were included in 1791. See *Bruns, supra* note 9.

FEDERAL CONSTITUTION
& BILL OF RIGHTS

Bicameral Congress – art. I, § 1

Impeachment Power – art. I, § 2, cl. 5

Selection of Legislative Officers – art. I, § 2,
cl. 5; art. I, § 3, cl. 5

Senator Classification – art. I, § 3, cl. 2

Trial of Impeachment – art. I, § 3, cl. 6

Congressional Adjournment – art. I, § 5, cl. 4

Revenue Bills Originate in the House of
Representatives – art. I, § 7, cl. 1

Bicameral Passage / Presentment and
Presidential Veto / Congressional Override –
art. I, § 7, cl. 2 and 3

Bills of Attainder and Ex Post Facto Laws –

STATE CONSTITUTIONS

N.H. CONST. (1776)

VA. CONST. (1776)

N.J. CONST. art. III (1776)

DEL. CONST. art. 2 (1776)

MD. CONST. art. I (1776)

N.C. CONST. art. I (1776)

N.Y. CONST. art. II (1777)

S.C. CONST. art. II (1778)

MASS. CONST. pt. 2, ch. 1, § 1, art. I (1780)

VA. CONST. (1776)

DEL. CONST. art. 23 (1776)

PA. CONST. § 22 (1776)

N.Y. CONST. art. XXXIII (1777)

S.C. CONST. art. XXIII (1778)

S.C. CONST. art. IX (1776)

N.J. CONST. art. V (1776)

DEL. CONST. art. 5 (1776)

N.C. CONST. art. X (1776)

MASS. CONST. pt. 2, ch. 1, § 2, art. VII
(1780)

VA. CONST. (1776)

DEL. CONST. art. 4 (1776)

PA. CONST. § 19 (1776)

N.Y. CONST. art. XI (1777)

S.C. CONST. art. XXIII (1778)

MASS. CONST. pt. 2, ch. 1, § 2, art. VIII
(1780)

N.H. CONST. (1776)

N.Y. CONST. art. XIV (1777)

S.C. CONST. art. XVII (1778)

S.C. CONST. art. VII (1776)

VA. CONST. (1776)

N.J. CONST. art. VI (1776)

DEL. CONST. art. 6 (1776)

MD. CONST. art. X (1776)

S.C. CONST. art. XVI (1778)

MASS. CONST. pt. 2, ch. 1, § 3, art. VII
(1780)

N.Y. CONST. art. III (1777)

MASS. CONST. pt. 2, ch. 1, § 1, art. II (1780)

MD. DECL. OF RIGHTS art. XV; art. XVI

art. I, § 9, cl. 3; art. I, § 10, cl. 1	(1776) N.C. DECL. OF RIGHTS art. XXIV (1776) MASS. CONST. pt. 1, art. XXIV (1780)
Presidential Vesting Clause – art. II, § 1, cl. 1	S.C. CONST. art. XXX (1776) N.Y. CONST. art. XVII (1777) S.C. CONST. art. XI (1778)
Oath or Affirmation of Office – art. II, § 1, cl. 7; art. VI, § 1, cl. 3	S.C. CONST. art. XXXIII (1776) N.J. CONST. art. XXIII (1776) DEL. CONST. art. 22 (1776) PA. CONST. §§ 10 and 40 (1776) N.C. CONST. art. XII (1776) GA. CONST. art. XXIV (1777) S.C. CONST. art. XXXVI (1778) MASS. CONST. pt. 2, ch. 6, art. I (1780)
Commander in Chief Clause – art. II, § 2, cl. 1	S.C. CONST. art. III (1776) DEL. CONST. art. 9 (1776) PA. CONST. § 20 (1776) N.C. CONST. art. XVIII (1776) GA. CONST. art. XXXIII (1777) N.Y. CONST. art. XVIII (1777) S.C. CONST. art. III (1778) MASS. CONST. pt. 2, ch. 2, § 1, art. VII (1780)
Nomination and Appointment of Officers – art. II, § 2, cl. 2	S.C. CONST. art. XXV (1776) S.C. CONST. art. XXXII (1778) MASS. CONST. pt. 2, ch. 2, § 1, art. IX (1780)
Take Care Clause – art. II, § 3	PA. CONST. § 20 (1776) N.Y. CONST. art. XIX (1777)
Establishment Clause – amend. I	N.J. CONST. art. XVIII (1776) DEL. CONST. art. 29 (1776) N.C. CONST. art. XXXIV (1776)
Free Exercise Clause – amend. I	VA. DECL. OF RIGHTS § 16 (1776) N.J. CONST. art. XVIII (1776) PA. DECL. OF RIGHTS art. II (1776) MD. DECL. OF RIGHTS art. XXXIII (1776) N.C. DECL. OF RIGHTS art. XIX (1776) GA. CONST. art. LVI (1777) MASS. CONST. pt. 1, art. II (1780)
Freedom of Speech – amend. I	PA. DECL. OF RIGHTS art. XII (1776)
Freedom of the Press Clause – amend. I	VA. DECL. OF RIGHTS § 12 (1776) PA. DECL. OF RIGHTS art. XII (1776) MD. DECL. OF RIGHTS art. XXXVIII (1776)

	N.C. DECL. OF RIGHTS art. XV (1776)
	GA. CONST. art. LXI (1777)
	S.C. CONST. art. XLIII (1778)
	MASS. CONST. pt. 1, art. XVI (1780)
Assemble and Petition Clause – amend. I	PA. DECL. OF RIGHTS art. XVI (1776)
	MD. DECL. OF RIGHTS art. XI (1776)
	N.C. DECL. OF RIGHTS art. XVIII (1776)
	MASS. CONST. pt. 1, art. XIX (1780)
Well-Regulated Militia / Right to Bear Arms Clause – amend. II	VA. DECL. OF RIGHTS § 13 (1776)
	PA. DECL. OF RIGHTS art. XIII (1776)
	MD. DECL. OF RIGHTS art. XXV (1776)
	N.C. DECL. OF RIGHTS art. XVII (1776)
	MASS. CONST. pt. 1, art. XVII (1780)
No Quartering of Soldiers Clause – amend. III	MD. DECL. OF RIGHTS art. XXVIII (1776)
	MASS. CONST. pt. 1, art. XXVII (1780)
No Unreasonable Searches and Seizures / Warrants – amend. IV	VA. DECL. OF RIGHTS § 10 (1776)
	PA. CONST. art. X (1776)
	MD. DECL. OF RIGHTS art. XXIII (1776)
	N.C. DECL. OF RIGHTS art. XI (1776)
	MASS. CONST. pt. 1, art. XIV (1780)
No Compelled Witness Against Self / Deprived of Life, Liberty or Property Without Due Process / Takings – amend. V	VA. DECL. OF RIGHTS § 8 (1776)
	PA. CONST. art. IX (1776)
	MD. DECL. OF RIGHTS art. XIX; art. XX (1776)
	N.C. DECL. OF RIGHTS art. VII; art. XII (1776)
	S.C. CONST. art. XLI (1778)
	MASS. CONST. pt. 1, art. X; art. XII (1780)
Right to a Speedy and Public Trial / Impartial Jury / Informed of the Nature and Cause of Accusation / Confronted With Witnesses / Obtain Favorable Witnesses / Assistance of Counsel – amend. VI	VA. DECL. OF RIGHTS § 8 (1776)
	PA. CONST. art. IX (1776)
	MD. DECL. OF RIGHTS art. XIX (1776)
	N.C. DECL. OF RIGHTS art. VII (1776)
	MASS. CONST. pt. 1, art. XII (1780)
Right to Trial by Jury Preserved – amend. VII	VA. DECL. OF RIGHTS § 11 (1776)
	N.J. CONST. art. XXII (1776)
	PA. DECL. OF RIGHTS art. XI (1776)
	PA. CONST. § 25 (1776)
	N.C. DECL. OF RIGHTS art. XIV (1776)
	GA. CONST. art. LXI (1777)
	MASS. CONST. pt. 1, art. XV (1780)
No Excessive Bail / Excessive Fines / Cruel and Unusual Punishment – amend. VIII	VA. DECL. OF RIGHTS § 9 (1776)
	PA. CONST. § 29 (1776)
	N.C. DECL. OF RIGHTS art. X (1776)
	GA. CONST. art. LIX (1777)
	MASS. CONST. pt. 1, art. XXVI (1780)
Powers Reserved to the States – amend. X	MASS. CONST. pt. 1, art. IV (1780)

While not purporting to be comprehensive, the ideas and clauses listed in the chart above clearly show striking similarities between the original Federal Constitution and Bill of Rights and many of the state constitutions.⁵⁷ Moreover, the length of the list is meant to impress upon the reader the pervasive influence the state constitutions had on the Convention delegates who obviously borrowed liberally in all areas. A similar review of the Articles of Confederation would create a much shorter list, as far fewer phrases and ideas were borrowed from the Articles for use in the Constitution.⁵⁸ Therefore it stands to reason that, after one founding document failed, the delegates returned to the sources with which they were most familiar and which were in fact the original American documents purporting to ordain and establish new and independent governments. In effect, the delegates returned to their respective state constitutions, the laboratories of independent, democratic government design, and in so returning they carefully selected from a wide variety of ideas and clauses the structure of government and the individual rights that reflected the highest ideals of the nascent nation.

2. State Constitutions' Specific Influence and Impact on the Vice Presidency

Much has already been written on the creation and inclusion of the vice presidency in the Federal Constitution and, in truth, where the *idea* of a second-highest office in government came from is already "clear": "the office of Vice-President of the United States was the national counterpart of the lieutenant governor—a familiar, traditional state official."⁵⁹ The idea

57. Indeed, a quick count reveals that each of the eleven original state constitutions included at least one phrase, clause, or idea that was later used in the Federal Constitution.

58. ARTICLES OF CONFEDERATION (1781).

59. WILLIAMS, *supra* note 1, at 20. It is the *who* that is unclear. Four general "schemes of government" were offered during the 1787 summer by four notable delegates, and none of the original schemes were clearly the progenitor of the ultimate plan to include a Vice President in the design of the new government. *Id.* at 14-15. It was in the Committee of the States in late August and early September where "some unknown member or group of members established the vice-presidency of the United States essentially as formulated in the final draft." *Id.* at 18. While Alexander Hamilton's plan appears to be the closest to the ultimate design, there is no pinpoint source to point to for the exact creation of the structure and purpose of the vice presidency. *Id.* Hamilton's proposed sketch of government was presented to the Convention on June 18, 1787, but was never formally voted upon. *Id.* at 16. It was from this presentation that the vice presidency seemed to grow. *Id.*

behind the vice presidency “was to apply nationally the system prevailing in . . . New York and nine other states. All had either a Lieutenant-Governor or (as in Pennsylvania) a Vice-President who, in most instances, was also the presiding officer of the upper house.”⁶⁰ But while it is clear that the designs of the state governments directly influenced the vice presidency in its original form, what degree of impact did they have? And how many states were actually considered?

Professor Akhil Amar, after describing “the selection rules for the Constitution’s second-highest office [as] an evident democratic improvement on American colonial practice,”⁶¹ expounded on the state executive branch leadership systems that existed at the time, as they related to the new federal position:

Whether the vice-presidential selection system represented an advance over the best systems devised by state constitutions in the decade after independence was more doubtful. In most states, lieutenant governors hardly mattered because governors themselves had few real powers and no independent electoral base. In Massachusetts and New York, where statewide voters picked powerful governors, the electorate chose lieutenant governors by separate ballot. By contrast, Article II did not allow federal electors to vote separately for vice president.⁶²

Professor Richard Albert gave even more credit to the New York State Constitution for the design and powers of the vice presidency:

[I]n fashioning the Vice Presidency, the Founders did not operate in vacuity, devoid of any conception of political and practical workability. Quite the reverse, in fact, for before them stood the existing 1777 Constitution of the State of New York, which featured a lieutenant governorship—an executive office bearing a striking resemblance to the very office the Founders ultimately enshrined in the U.S. Constitution as the Vice Presidency. Indeed, the New York lieutenant governorship served as a model for the Founders—

60. *Id.*

61. AMAR, *supra* note 10, at 167. According to Professor Amar, “[i]n royal and proprietary colonies, lieutenant or deputy governors customarily enjoyed no more democratic legitimacy than governors themselves. Both sets of officers were picked by English monarchs or aristocrats rather than chosen by the people or their representatives.” *Id.* In the newly independent states there was definitely democratic improvement with regards to having more popular elections for state executives. See, e.g., S.C. CONST. art. III (1778) (providing that members of both the Senate and House of Representatives would jointly elect a governor); N.Y. CONST. art. XVII (1777) (providing that freeholders would elect the governor).

62. AMAR, *supra* note 10, at 167.

namely those writing to the citizens of New York under the penname *Publius* urging ratification of the proposed federal Constitution—in elaborating their own rendering of a second-in-command.

Specifically, the American Vice President shares similarities with the New York lieutenant governor on each of the three bases that were determinative in shaping the Vice Presidency: (1) selection; (2) vacancy; and (3) Senate leadership These three issues in particular . . . appear to have catalyzed the creation of the Vice Presidency.⁶³

These acknowledgments by Professors Amar and Friedman are both accurate and appropriate in terms of the ultimate design of the vice presidency, but they do not go far enough in discussing the probable influence and impact, albeit less than New York and Massachusetts, that the other state constitutions also must have had on the formation of the vice presidency.⁶⁴ As further review demonstrates, the similarity between the state and Federal constitutions shown in the chart above is also true of the designs for the early state executive branches and the vice presidency.

In 1787, the Founders “said little about [the vice presidency] in the Constitution itself.”⁶⁵ In fact, the Federal Constitution mentions the office of Vice President in only five clauses.⁶⁶ The vice presidency appears two

63. Albert, *supra* note 1, at 815-16.

64. Neither professor seems to have paid any particular attention to the other state constitutions vis-à-vis the vice presidency. See generally AMAR, *supra* note 10, at 167-70; Albert, *supra* note 1, at 815-16. Professor Akhil Amar did carefully review the early state constitutions for other comparisons to the Federal Constitution, but did not extend his analysis directly towards consideration of the second-highest office. See AMAR, *supra* note 10, at 555-56.

65. Goldstein, *Constitutional V.P.*, *supra* note 1, at 510. The general duties could actually be summed up in a short paragraph.

The initial Constitution provided only the following with regard to the vice president: that he would be President of the Senate “but shall have no vote” except in case of a tie; that he would be elected to serve during the same term as the President by electors in a single competition for President in which the runner-up would be installed in the second office; that he would succeed to or act as President following presidential vacancy; and that, along with the President and “all civil officers of the United States,” he could be removed from office upon impeachment and conviction.

Id. (internal citations omitted).

66. See U.S. CONST. art. I, § 3, cl. 4; art. I, § 3, cl. 5; art. II, § 1; art. II, § 1, cl. 6; art. II, § 4. Professor Goldstein gives an explanation as to why so little was said about the Vice President in the constitutional text:

The relatively cryptic references to the vice presidency in the original Constitution, supplemented by comment during the founding period, suggest a vision of the office as it

times in Article I, the article dedicated to the legislative branch.⁶⁷ The first appearance of the vice presidency is found in Section Three, Clause Four and reads: “The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”⁶⁸

This clause is notable for two reasons: first, it gives the vice presidency its only real “employment” beyond staying alive to succeed the president;⁶⁹ and second, it cuts against the founding principle of separation of powers.⁷⁰ But while it was one of the most debated issues surrounding the creation of the vice presidency during the Constitutional Convention, it was not a wholly unprecedented design in the founding era.⁷¹

The New York State Constitution was indeed the principal mold that formed the vice presidency, and a comparison of the language used in each constitution shows the parallel framework.⁷² It provides, in language almost mirroring the federal clause, that the “lieutenant-governor shall, by virtue of his office, be president of the senate, and, upon an equal division, have a casting voice in their decisions, but not vote on any other occasion.”⁷³ New York was not, however, the only state constitution that designed a leadership

initially existed. First, the founders did not view the Vice President as terribly important to the business of government. On the contrary, some expressed misgivings about the office. “Such an officer as Vice President was not wanted,” said Williamson, a member of the Committee of Eleven. Elbridge Gerry opposed creating the office he would later be the fifth to hold. Hamilton acknowledged that some viewed “appointment of an extraordinary person” to be Vice President as superfluous. No comment from the Constitutional Convention reflected enthusiasm for the vice presidency. The failure of the founders to provide for filling a vice presidential vacancy speaks volumes regarding their view of the office. They had no doubt the country could survive the loss of a Vice President. Someone else would assume his functions; the office would remain vacant.

Goldstein, *Constitutional V.P.*, *supra* note 1, at 515 (internal citations omitted).

67. See U.S. CONST. art. I, § 3, cl. 4; art. I, § 3, cl. 5.

68. U.S. CONST. art. I, § 3, cl. 4 (emphasis added).

69. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 537 (Max Farrand ed., 1966) (quoting Roger Sherman saying the Vice President “would be without employment” if he was not President of the Senate).

70. In fact, “[t]he framers created the vice presidency as something of a constitutional hybrid between the executive and legislative branches.” See Goldstein, *Constitutional V.P.*, *supra* note 1, at 515. Professor Amar, describing the election process for president and vice president and offering one reason for the position breaking the separation of powers principle, explained:

To discourage electors from warping the system by wasting their out-of-state votes on frivolous candidates—thereby reverting to a fractured contest among local favorites—the framers provided that the runner-up in the presidential race would serve as vice president. Not only would this runner-up stand a proverbial heartbeat away from the presidency itself, but he would also preside over the Senate and break its tie votes. The nation’s first vice president would end up tipping the Senate balance on twenty separate occasions. Electors thus had good reason to take their out-of-state votes seriously.

AMAR, *supra* note 10, at 167-68.

71. See WILLIAMS, *supra* note 1, at 14-20.

72. Compare U.S. CONST. art. I, § 3, cl. 4, with N.Y. CONST. art. XX (1777).

73. N.Y. CONST. art. XX (1777).

system that violated the purist idea of separation of powers.⁷⁴ Three other states also created systems of government that specifically allowed for the person who would succeed the state governor or president to be a member or leader of a legislative body.⁷⁵ New Jersey, for example, allowed for the legislative “Council” to “choose a Vice-President who shall act as [governor] in the absence of the Governor.”⁷⁶ Delaware required that the “speaker of the legislative council for the time being shall be vice-president . . . and shall have the powers of a president”⁷⁷ And the North Carolina Constitution provided that the “Speaker of the Senate for the time being . . . shall exercise the powers of government”⁷⁸ Other states specifically reject a violation of the separation of powers principle in their constitutions,⁷⁹ but overall the idea of a legislative officer (or quasi-legislative in the cases of the New York Lieutenant-Governor and ultimate Federal Vice President) being the immediate successor was not wholly

74. The idea of separating the legislative, executive, and judicial functions stemmed from the writings of the political theorist Montesquieu and was adopted to some extent by each of the newly independent states. See KMIEC, *supra* note 11, at 105-09; see, e.g., MASS. CONST. (1780); N.Y. CONST. (1777); S.C. CONST. (1778). A separation of powers purist would disallow any crossover functions between any of the three governmental branches. For example, an executive officer could appoint any subordinate executive officer without the advice and consent of the Senate, or the judiciary could not hold a legislative act to be unconstitutional.

75. There is a discrepancy between this Article’s review of the early state constitutions and Professor Williams’ statement included above that the idea for the vice presidency “was to apply nationally the system prevailing in . . . New York and nine other states. All had either a Lieutenant-Governor or (as in Pennsylvania) a Vice-President who, in most instances, was also the presiding officer of the upper house.” See WILLIAMS, *supra* note 1, at 16. By my calculation six of the nine states Professor Williams counts had their successor come from an executive body—usually some type of council—rather than a legislative body. See GA. CONST. art. XIX (1777) (“executive council”); MASS. CONST. pt. 2, ch. 2, § 3, art. II (1780) (“council”); MD. CONST. art. XXVI (1776) (“Council to the Governor”); PA. CONST. § 19 (1776) (“executive council”); S.C. CONST. art. V (1776) (“privy council”); VA. CONST. (1776) (“Privy Council, or Council of State”); see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776 – 1787, at 138-39 (saying that in most colonial governments, but not in early revolutionary state constitutions, the upper branch of the legislature also served as the governor’s council). This Article proceeds upon the idea that only New York, New Jersey, Delaware, and North Carolina fit my working definition of a violation of separation of powers.

76. N.J. CONST. art. VII (1776).

77. DEL. CONST. art. VII (1776).

78. N.C. CONST. art. XIX (1776).

79. GA. CONST. art. I (1777) (“The legislative, executive, and judiciary departments shall be separate and distinct”); MASS. CONST. pt. 1, art. XXX (1780) (“In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.”).

unprecedented or novel enough to shock any of the delegates at the Convention.

The other mention of the Vice President in Article I is in Section Three, Clause Five, which provides: “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.”⁸⁰

What is notable here is that the Constitution itself anticipates the Vice President being frequently absent from presiding over the Senate.⁸¹ The language conveys the idea that the Vice President will have reasons for his absences, including but not limited to exercising the “Office of President.”⁸² The Constitution’s silence on when and how the Vice President will exercise or succeed to the presidency has of course led to many interpretations of the Vice President’s role in the Executive Branch.⁸³

Somewhat parallel to the “Absence” and “exercise” Clause, Article II, Section One, Clause Five delineated the presidential succession principle by providing for times when the Vice President would in fact discharge Presidential powers and duties:

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.⁸⁴

This clause gave the Vice President his primary purpose in the federal government—as a “presidential understudy” or “stand-in.”⁸⁵

Several state constitutions also used language that, like the Federal Constitution in Article I, Section Three, Clause Five, and Article II, Section One, Clause Five, seemed both to anticipate absences in the second-highest office and to anticipate the occasional succession to “exercise” the highest

80. U.S. CONST. art. I, § 3, cl. 5 (emphasis added).

81. See Goldstein, *Constitutional V.P.*, *supra* note 1, at 516 (“It was altogether appropriate that the Vice President be of high stature, as the framers anticipated that he would ‘occasionally become a substitute for the President.’”) (quoting THE FEDERALIST NO. 68, at 415 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

82. U.S. CONST. art. I, § 3, cl. 5.

83. For instance, it remains uncertain whether the Vice President is a constitutional executive officer. See Amar, *supra* note 1, at 200-07.

84. U.S. CONST. art. II, § 1, cl. 6 (emphasis added).

85. Albert, *supra* note 1, at 814.

office either temporarily or permanently.⁸⁶ The New York Constitution again stood as the chief, but not only, model for these federal clauses.⁸⁷ The New York Constitution first provided that “whenever the government shall be administered by the lieutenant-governor, or he shall be unable to attend as president of the senate, the senators shall have power to elect one of their own members to the office of president of the senate, which he shall exercise *pro hac vice*.”⁸⁸ And second, the New York Constitution provided that upon “impeachment of the governor, or his removal from office, death, resignation, or absence from the State, the lieutenant-governor shall exercise all the power and authority appertaining to the office of governor until another be chosen, or the governor absent or impeached shall return or lie acquitted”⁸⁹ This language detailing the succession procedure is very similar to the language found in eight other state constitutions, which also used the terms “death,” “inability,” “absence,” “removal,” and “resignation” for succession purposes.⁹⁰

86. U.S. CONST. art. I, § 3, cl. 5; art. II, § 1, cl. 6; *see also* Friedman, *supra* note 1, at 1707-08 (“Constitutionally, there is very little to it at all. The vice-president is officially the presiding officer of the Senate, but that has long meant little; even the Framers anticipated that this would be a no-show job. He casts a deciding vote if the Senate is tied, but the vote cannot truly be considered his own . . .”).

87. N.Y. CONST. art. XX (1777).

88. N.Y. CONST. art. XXI (1777). No other state constitution had language similar to this clause because in 1787 New York was the only state that had made the Lieutenant-Governor also the President of the Senate. *See* Albert, *supra* note 1, at 815-16.

89. N.Y. CONST. art. XX (1777).

90. *See* DEL. CONST. art. VII (1776) (“And on [the president or chief magistrate of the state’s] death, inability, or absence from the state, the Speaker of the Legislative Council for the time being shall be Vice President, and in case of his death, inability, or absence from the state, the Speaker of the House of Assembly shall have the powers of a President”); GA. CONST. art. XXIX (1777) (“The president of the executive council, in the absence or sickness of the governor, shall exercise all the powers of the governor.”); MASS. CONST. pt. 2, ch. 2, § 2, art. III (1780) (“Whenever the chair of the governor shall be vacant, by reason of his death, or absence from the commonwealth, or otherwise, the lieutenant governor, for the time being, shall, during such vacancy, perform all the duties incumbent upon the governor, and shall have and exercise all the powers and authorities, which by this constitution the governor is vested with, when personally present.”); MD. CONST. art. XXXII (“That upon the death, resignation, or removal out of this State, of the Governor, the first named of the Council for the time being shall act as Governor, and qualify in the same manner”); N.C. CONST. art. XIX (1776) (“And on [the Governor’s] death, inability, or absence from the State, the Speaker of the Senate for the time being -- (and in case of his death, inability, or absence from the State, the Speaker of the House of Commons) shall exercise the powers of government after such death, or during such absence or inability of the Governor (or Speaker of the Senate,)”); N.J. CONST. art. VII; art. VIII (1776) (“[T]hat the council themselves, shall choose a vice president, who shall act as [Governor] in the absence of the governor[;]” and “[t]hat the governor, or, in his absence, the vice president of the council, shall have the supreme executive power”); S.C. CONST. art. X (1778) (“That in case of the absence from the seat of government or sickness of the governor and lieutenant-governor, any one of the privy council may be empowered by the governor,

The two remaining times the Vice President is mentioned in the Constitution both also come in Article II, the Executive Branch article.⁹¹ In Section One, Clause One of that article the manner of selection is revealed: “The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected as follows”⁹²

The clause continued on to describe in detail the original method of election: utilizing an Electoral College system, having the Vice President preside over the vote-counting, and sending tie or minority votes to the

under his hand and seal, to act in his room”); S.C. CONST. art. XIV (1776) (“That in case of the death of the president and commander-in-chief, or his absence from the colony, the vice-president of the colony shall succeed to his office, and the privy council shall choose out of their own body a vice-president of the colony, and in case of the death of the vice-president of the colony, or his absence from the colony, one of the privy council (to be chosen by themselves) shall succeed to his office”); VA. CONST. (1776) (“A Privy Council . . . shall annually choose, out of their own members, a President, who, in case of death, inability, or absence of the Governor from the government, shall act as Lieutenant-Governor.”).

91. U.S. CONST. art. II, § 1, cl. 1; art. II, § 4.

92. U.S. CONST. art. II, § 1, cl. 1. The original language (now superseded by Amendment XII) provided:

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

U.S. CONST. art. I, § 1, cls. 1-3, *amended* by U.S. CONST. amend. XII.

House of Representatives or the Senate.⁹³ The Vice President's term also paralleled that of the President, providing for similar four-year leadership tenures.⁹⁴

The three state constitutions of New York, South Carolina, and Massachusetts also provided for the concurrent selection of both the Governor and the Lieutenant Governor.⁹⁵ New York's election procedure was the closest to the original federal election system, yet it did differ in certain respects.⁹⁶ It provided "[t]hat a lieutenant-governor shall, at every election of a governor, and as often as the lieutenant-governor shall die, resign, or be removed from office, be elected in the same manner with the governor, to continue in office until the next election of a governor"⁹⁷ While the first and last parts have corresponding federal counterparts, the middle part providing for the immediate election of a new Lieutenant Governor when necessary, was not paralleled by the federal clause.⁹⁸ Rather, the original Federal Constitution in this respect more closely followed the wordings of the constitutions of South Carolina⁹⁹ and Massachusetts,¹⁰⁰ both of which did not provide for immediate election if a new Lieutenant Governor became necessary.¹⁰¹ As for the electoral college system, while it is true that no state at that time had designed or utilized a similar system, reasons unique to a national and federalism-based government were the basis for that particular departure from previously implemented state systems.¹⁰²

93. *See id.* Following the Twelfth Amendment the election procedure changed. U.S. CONST. amend. XII. The major change was the elimination of double balloting—electors were now to distinguish who was being selected for President and who was being selected for Vice President on distinct ballots. *Id.* This effectively created the tied-ticked election process, which was due to the emergence of political parties. *See AMAR, supra* note 10, at 168.

94. U.S. CONST. art. I, § 1, cls. 1-3, *amended by* U.S. CONST. amend. XII.

95. MASS. CONST. pt. 2, ch. 2, § 2, art. I (1780); N.Y. CONST. art. XX (1777); S.C. CONST. art. III (1778).

96. *See* N.Y. CONST. art. XX (1777).

97. N.Y. CONST. art. XX (1777).

98. *Compare* N.Y. CONST. art. XX (1777), *with* U.S. CONST. art. II, § 1.

99. S.C. CONST. art. III (1778) ("[C]hoose by ballot . . . a governor and commander-in-chief, [and] a lieutenant-governor, both to continue for two years . . .").

100. MASS. CONST. pt. 2, ch. 2, § 2, art. I (1780) ("There shall be [annually] elected a lieutenant governor . . . in the same manner with the Governor . . .").

101. U.S. CONST. art. II, § 1, cl. 6.

102. *See WILLIAMS, supra* note 1, at 18-19 (describing the debates over the Electoral College). Professor Akhil Amar described the purpose of the Electoral College system for federal elections:

The idea behind [the original Federal Constitution's] intricate double-ballot system was to generate support for continental candidates. Many framers fretted that if given only one vote, each elector would likely support his home state's leading candidate at the

The final mention of the Vice President in the Constitution appears in Article II, Section Four—the Removal Clause: “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”¹⁰³ This clause provided an important restraint on the Executive Branch, balancing the broad and largely undefined executive power with a bicameral legislative check.¹⁰⁴

This federal clause also has its preceding state equivalents. The New York,¹⁰⁵ South Carolina,¹⁰⁶ and Massachusetts¹⁰⁷ constitutions all provided for the possibility that a Lieutenant Governor could be removed upon impeachment, just as the Federal Constitution provided that the Vice President as well as President could be “removed from Office on Impeachment”¹⁰⁸ New York,¹⁰⁹ South Carolina,¹¹⁰ and Massachusetts¹¹¹ likewise placed the impeachment power in the most populous branch of their legislatures, heralding the later federal language and form of impeachment.¹¹² Moreover, like the Federal Constitution, both South Carolina¹¹³ and Massachusetts,¹¹⁴ though not New York, provided that

expense of candidates with broader national appeal. Double balloting promised to cure this problem by inducing each elector to give one vote to a local candidate and the other vote to a more national figure. Ideally, second votes would settle on men who might be everyone’s second choice—broadly acceptable leaders of wide geographic repute. To discourage electors from warping the system by wasting their out-of-state votes on frivolous candidates—thereby reverting to a fractured contest among local favorites—the framers provided that the runner-up in the presidential race would serve as vice president. Not only would this runner-up stand a proverbial heartbeat away from the presidency itself, but he would also preside over the Senate and break its tie votes. The nation’s first vice president would end up tipping the Senate balance on twenty separate occasions. Electors thus had good reason to take their out-of-state votes seriously.

AMAR, *supra* note 10, at 167-68 (footnote omitted).

103. U.S. CONST. art. II, § 4 (emphasis added).

104. See U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6.

105. N.Y. CONST. art. XXXIII (1777) (“[T]he power of impeaching all officers of the State . . . be vested in the representatives of the people in assembly . . .”).

106. S.C. CONST. art. XXIII (1778) (“[T]he form of impeaching all officers of the State . . . be vested in the house of representatives . . .”).

107. MASS. CONST. pt. 2, ch. 1, § 3, art. VI (1780) (“The house of representatives shall be the grand inquest of this commonwealth . . .”); pt. 2, ch. 1, § 1, art. VIII (“[A]ll impeachments made by the house of representatives, against any officer or officers of the commonwealth . . .”).

108. U.S. CONST. art. II, § 4.

109. N.Y. CONST. art. XXXIII (1777).

110. S.C. CONST. art. XXIII (1778).

111. MASS. CONST. pt. 2, ch. 1, § 3, art. VI (1780).

112. U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”).

113. S.C. CONST. art. XXIII (1778) (“That the senators and such of the judges of this State as are not members of the house of representatives, be a court for the trial of impeachments . . .”).

114. MASS. CONST. pt. 2, ch. 1, § 2, art. VII (1780) (“The senate shall be a court with full authority to hear and determine all impeachments made by the house of representatives, against any

the Senate be a trial court for all impeachment proceedings.¹¹⁵ The primary difference between the Federal Constitution and these several state constitutions on impeachment matters was the language describing on what charges an officer such as the Vice President could be impeached and tried. The New York¹¹⁶ and South Carolina¹¹⁷ Constitutions both used the phrase “for mal and corrupt conduct in their respective offices,” and Massachusetts¹¹⁸ used the phrase “for misconduct and mal-administration in their offices” for impeachable offenses. The delegates at the Convention considered these alternatives under which the House of Representatives could bring impeachment proceedings, and ultimately chose the similar phrasing: “Impeachment for . . . Treason, Bribery, or other high Crimes and Misdemeanors.”¹¹⁹

Ultimately, the evidence confirms the conventional wisdom that New York’s design of the lieutenant governorship was the primary model for the vice presidency, but the evidence also goes further than others have been

officer or officers of the commonwealth . . . [t]heir judgment [not extending] further than to removal from office . . .”).

115. U.S. CONST. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”).

116. N.Y. CONST. art. XXXIII (1777).

117. S.C. CONST. art. XXIII (1778).

118. MASS. CONST. pt. 2, ch. 1, § 2, art. VIII (1780).

119. U.S. CONST. art. II, § 4. Professor Akhil Amar explained why the Federal Constitution decided upon this specific language:

In America, by contrast [to the English system which had no system to oust a monarch], the head of state [and Vice President] could be ousted whenever he committed any “high Crimes [or] Misdemeanors” that warranted his immediate removal. In context, the words “high . . . Misdemeanors” most sensibly meant high misbehavior or high misconduct, whether or not strictly criminal. Under the Articles of Confederation, the states mutually pledged to extradite those charged with any “high misdemeanor,” and in that setting the phrase apparently meant only indictable crimes. The Constitution used the phrase in a wholly different context, in which adjudication would occur in a political body lacking general criminal jurisdiction or special criminal-law competence. Early drafts in Philadelphia had provided for impeachment in noncriminal cases of “mal-practice or neglect of duty” and more general “corruption.” During the ratification process, leading Federalists hypothesized various noncriminal actions that might rise to the level of high misdemeanors warranting impeachment, such as summoning only friendly senators into special session or “giving false information to the Senate.” In the First Congress, Madison contended that if a president abused his removal powers by “wanton removal of meritorious officers” he would be “impeachable . . . for such an act of maladministration.” Consistent with these public expositions of the text, House members in the early 1800s impeached a pair of judges for misbehavior on the bench that fell short of criminality. The Senate convicted one (John Pickering) of intoxication and indecency, and acquitted the other (Samuel Chase) of egregious bias and other judicial improprieties.

AMAR, *supra* note 10, at 200.

willing to admit.¹²⁰ It demonstrates that not just one or two, but many state constitutions were considered during deliberations as the delegates were drafting the federal office of the Vice President.¹²¹ Indeed, the delegates surveyed the model governments that had been working before their eyes for the prior decade, reflected on their recent experiences in their home states, and selected different designs and phrasings according to their sometimes similar and other times unique national purposes.

C. *A Missed Opportunity to Form a More Perfect Vice Presidency from the Start*

But even with eleven state constitutions to review and consider,¹²² coupled with the delegates' strong grasp of political philosophy and history,¹²³ the Convention's final draft of the new nation's founding document remained imperfect. The principal reason for imperfection is unquestionably that the delegates drafting the Constitution during the summer of 1787 were merely continuing the great experiment of representative democracy on a grand scale and pursuing the "Glorious Cause" of independence started in 1775 and embodied in the Declaration of Independence in 1776.¹²⁴ They were attempting to form a type of government unique in the history of mankind, and had only limited experience with state governments, guesswork, and good intentions to guide them.¹²⁵

While the Constitution has endured some criticism over the years, the vice presidency in particular has been singled out for an uncommon amount of criticism and ridicule,¹²⁶ mostly because it was saddled with more than its

120. *See supra* notes 59-119 and accompanying text.

121. *See supra* notes 59-119 and accompanying text.

122. *See supra* notes 32-46 and accompanying text.

123. *See supra* notes 11, 50-54 and accompanying text.

124. *See* JEFF SHAARA, *THE GLORIOUS CAUSE* (2003) (a historical novel about the American Revolutionary War which borrowed its name from the term which was the popular description of the fight for independence).

125. Consider that state constitutions had only existed and their governments had only been operating under them for between four and eleven years before 1787. *See supra* notes 32-46 and accompanying text.

126. Many jokes have been made at the vice presidency's expense. "Once there were two brothers: one ran away to sea, the other was elected Vice-President—and nothing was ever heard from either of them again." Attributed to Thomas R. Marshall, Twenty-Eighth Vice President, available at http://www.brainyquote.com/quotes/authors/t/thomas_r_marshall.html. "The Vice-Presidency is sort of like the last cookie on the plate. Everybody insists he won't take it, but somebody always does." Attributed to Bill Vaughan, journalist, available at <http://www.sccs.swarthmore.edu/users/01/kyla/quotations/v.html>. Moreover, many former Vice Presidents have been vocal in criticizing their former office. *See* Albert, *supra* note 1, at 831 ("John Nance Garner [Vice President under Franklin D. Roosevelt] remarked that accepting the vice presidential nomination was 'the worst damn fool mistake I ever made.' And Also that the job wasn't worth 'a bucket of warm

fair share of baggage from the very start. While uniqueness can excuse some of the flaws inherent in the position as it appeared in the original 1787 text, it cannot excuse all of them. A closer look immediately reveals the primary reason the vice presidency was a disproportionately imperfect part of the Constitution—it was essentially a constitutional “afterthought.”¹²⁷

The records from the Constitutional Convention paint a fairly disappointing picture of the time and consideration spent on the topic of the vice presidency by the delegates. Though slightly foreshadowed by Alexander Hamilton’s June 18, 1787, address before the Convention, neither the precise form nor even the idea of a specific successor to the chief executive officer was raised during the early summer.¹²⁸ In fact, as of August 6, over two months into the Convention, the successor of the President was the “President of the Senate, himself a Senator and chosen by the Senate itself as presiding officer.”¹²⁹ Delegates still opposed many parts of the succession scheme, however, and debate of the issue was further delayed.¹³⁰ Finally, on August 31, a Committee of the States was established that formed the ultimate design for the vice presidency.¹³¹ Debate on the office of Vice President did not occur until September 7, however, but the ultimate form was already set by the Committee.¹³² Several delegates felt the office either unnecessary or grossly violative of the

spit.”) (internal citations omitted); *id.* at 832 (“In the 1960s, President John F. Kennedy said that his Vice President, Lyndon B. Johnson, had ‘the worst job in Washington.’ When Johnson later succeeded to the Presidency, he could not help but follow Kennedy’s example of debasing the Vice Presidency.”) (internal citation omitted); *id.* (“As recently as the 2004 presidential election, Senator John McCain conveyed a similar lack of enthusiasm, likening the vice presidential nomination to being ‘fed scraps.’”) (internal citation omitted). The list could go on and on.

127. WILLIAMS, *supra* note 1, at v (calling the office an “after-thought”); Albert, *supra* note 1, at 812, 815 (describing “the Vice Presidency as little more than a postscript to the text of the Constitution, an afterthought whose eventual creation was virtually accidental” and an office that “merited little attention at the Constitutional Convention of 1787. Only near the close of the Convention was the office even considered, raised as an option, and subsequently introduced for debate and discussion.”); Goldstein, *Constitutional V.P.*, *supra* note 1, at 510 (calling it an “afterthought” and saying “[t]he founders apparently took the office seriously for the first time late in the Constitutional Convention,” yet “they said little about it in debate or in the Constitution itself.”); GOLDSTEIN, *MODERN V.P.*, *supra* note 1, at 3 (saying the office was “not suggested until the closing days of the Constitutional Convention”).

128. See WILLIAMS, *supra* note 1, at 16.

129. *Id.* at 17.

130. *Id.* at 16-18.

131. *Id.* at 18.

132. *Id.* at 19 (“[T]he Convention turned on September 7 . . . [to] discussion on whether to establish the office of Vice-President.”). It appears that September 7, 1787, was essentially the only day the office of the Vice President, as it ultimately was found in the Federal Constitution, was a primary issue of debate. *Id.* at 17-20.

separation of powers principle, and listed the office of Vice President as one of the reasons they would not support the Constitution in final draft form.¹³³ Ultimately, in the individual state ratification debates, only three states even discussed the office and no state convention proposed any amendment.¹³⁴ Over time, however, the vice presidency has earned more than its fair share of attention for the brief amount of time spent on it in 1787 and 1788.

III. THE EVOLUTION OF THE INSTITUTION

Since the creation of the vice presidency in the Federal Constitution there have been several distinct periods through which the office has traveled. From the very beginning, it seemed the vice presidency was a position destined to be a proverbial thorn in the nation's side. As a thorn, it began festering in 1789 and still bothers some today, over two hundred years and four constitutional amendments later.¹³⁵

A. *A Quick Descent Through the Founding Period*

The festering started immediately, beginning with the office's first occupant. John Adams was one of the founding era's leading men.¹³⁶ With

133. Professor Williams describes some of the comments against establishing the vice presidency: Paradoxically, Elbridge Gerry, who alone among the delegates to the Constitutional Convention would be elected Vice-President, opposed making that official the President of the Senate and, indeed, was "against having any vice-President We might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President & vice-president makes it absolutely improper." To which Gouverneur Morris made his oft-quoted rejoinder: "The vice president then will be the first heir apparent that ever loved his father. If there should be no vice president, the President of the Senate would be temporary successor, which would amount to the same thing."

Sherman, also a member of the Committee of the States, remarked that "if the vice-President were not to be President of the Senate, he would be without employment"; moreover, he pointed out, if a Senator occupied this position he would "be deprived of his vote, unless when an equal division . . . might happen." But on this proposition, Gerry was joined by Randolph, Williamson, and Mason. Randolph objected on general principles; Williamson felt that the "officer . . . was not wanted"; Mason contended that the vice-presidency "mixed too much the Legislative and Executive, which, as well as the Judicial departments, ought to be kept as separate as possible." The latter suggested that a Council act as regency on all occasions calling for the succession.

The issue finally came to a vote and the proposal that the Vice-President be the President of the Senate was carried, eight states to two.

Id. at 19.

134. *Id.* at 20.

135. Four constitutional amendments have been drafted and ratified to get the position to where it stands today, an imperfect but greatly improved second office. See U.S. CONST. amend. XII; U.S. CONST. amend. XX; U.S. CONST. amend. XXII; U.S. CONST. amend. XXIV.

136. See generally DAVID MCCULLOUGH, JOHN ADAMS (2001); TO THE BEST OF MY ABILITY: THE AMERICAN PRESIDENTS 22-27 (James M. McPherson ed. 2000) (hereinafter TO THE BEST OF MY ABILITY); DAVID C. WHITNEY, THE AMERICAN PRESIDENTS 17-25 (8th ed. 1996)

revolutionary credentials third, perhaps, only to His Excellency George Washington and the illustrious Benjamin Franklin,¹³⁷ Adams entered the office not having been part of the Constitutional Convention.¹³⁸ Nobody knew exactly what the Vice President was supposed to do vis-à-vis both his relationship to the President and as President of the Senate, Adams included.¹³⁹ Known equally for his great ability and his volatile temperament,¹⁴⁰ he felt his way through his first term with varying degrees of success.¹⁴¹ Though he at times counseled with President Washington,¹⁴² the “only regular constitutional duty of the vice-presidency [was] to preside over the Senate” and being at once the vain, passionate and witty man that he was, he “early stamped the [Senate] chamber as his plaything” and took an active role in Senate proceedings.¹⁴³ However, before the end of his first

137. See JOSEPH ELLIS, *HIS EXCELLENCY* (2004) (biography of George Washington); H.W. BRANDS, *THE FIRST AMERICAN: THE LIFE AND TIMES OF BENJAMIN FRANKLIN* (2002).

138. See WILLIAMS, *supra* note 1, at 22 (“[Adams’] three years as American envoy to England, a thankless task in view of British coldness and unwillingness to negotiate, kept him abroad at the time the Constitution was drafted.”); Bruns, *supra* note 9.

139. President George Washington

established a clear-cut rule of conduct for himself with regard to his heir apparent . . . [saying he] would most certainly treat [the Vice President] with perfect sincerity and the greatest of candour in every respect. [He] would give him [his] full confidence, and use [his] utmost endeavors to cooperate with him”

WILLIAMS, *supra* note 1, at 22-23. This initial “formula could well serve as a model for relations between President and Vice-President. There was nothing to indicate from these beginnings that the latter [office] would shrink into the ‘forgotten man’ of American politics.” *Id.* at 23.

140. See *TO THE BEST OF MY ABILITY*, *supra* note 136, at 22. John Adams was “insecure, volatile, impulsive, irritable, suspicious, self-pitying, self-righteous, and filled with often combustible rage.” *Id.* Adams was also considered “‘the most vain, conceited, impudent, arrogant Creature in the World,’ yet others could describe him as having ‘the clearest head and finest heart.’” *Id.* Moreover, “[o]f all the Founders, [Adams] was the wittiest, most loving, most passionate, and, because of his robust sense of humor, among the most companionable.” *Id.*

141. See WILLIAMS, *supra* note 1, at 22 (“When Adams assumed the vice-presidency, he seemed to be much concerned with etiquette and leaned toward monarchical pomp,” yet “[n]o future Vice-President was to be more significant as a partner in government. Adams enjoyed the personal esteem of the President and was frequently consulted by him in those social and diplomatic affairs that were considered his specialties.”). But opinions were somewhat varied:

In performing his official duties as presiding officer of the new United States Senate, Adams took part in discussions and tried to guide the deliberations of the body. His ten years abroad in the capitals of kings had led him to respect pomp and protocol, but his efforts to introduce in the new government what he regarded as a proper ceremoniousness merely won him an undeserved reputation as a monarchist.

WHITNEY, *supra* note 136, at 22.

142. See WILLIAMS, *supra* note 1, at 23.

143. *Id.* John Adams had a large personality and “the personality of the presiding officer was a major factor in [the deliberations of the Senate, which at that time averaged a working membership of twenty-two].” *Id.* “From the first he refused to be the impartial chairman” but later “he tended to

term, Adams was entirely frustrated with the position and wrote his wife Abigail that “[m]y country has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived”¹⁴⁴ The frustration caused by having great men occupy a “meaningless” office was the first sign of imperfection in the office.¹⁴⁵

Thomas Jefferson was the second Vice President.¹⁴⁶ Another great man of the generation, Jefferson seemed to feel much differently about the office than his predecessor did.¹⁴⁷ He wrote that “[a] more tranquil and unoffending station could not have been found for me . . . the second office of the government is honorable and easy, the first is but a splendid misery.”¹⁴⁸ But like his predecessor, he also became a frustrated spectator of national policy and events, though this was mostly due to the emergence of national parties and the fact that President was a Federalist, while he himself was a Democratic Republican.¹⁴⁹ Ultimately Jefferson considered his four years in the second office a “period of ‘semi-retirement.’”¹⁵⁰ The Vice President being at odds with and virtually independent of the President was the office’s second sign of imperfection.¹⁵¹

retreat into silence during debates which he was powerless to affect.” *Id.* at 23-24.

144. Letter from John Adams, Vice President of the United States, to Abigail Adams (1793). This was by no means the limit of his frustrations. See WHITNEY, *supra* note 136, at 22 (Adams wrote that the office “requires rather severe duty, and it is a kind of duty which, if I do not flatter myself too much, is not quite adapted to my character—I mean it is too inactive and mechanical”). John Adams’ wife Abigail is a notable figure in American history in her own right:

Abigail Adams was considered sharper than a woman ought to be; she also read more than a woman was supposed to and spoke out even when the custom of her time and gender called for silence. In a famous March 1776 letter, she beseeched her husband to “remember the ladies” when making laws for the new republic: “Do not put unlimited power in the hands of husbands,” she wrote. “Remember, all men would be tyrants if they could.”

TO THE BEST OF MY ABILITY, *supra* note 136, at 24.

145. GOLDSTEIN, MODERN V.P., *supra* note 1, at 3.

146. See WILLIAMS, *supra* note 1, at 24-30; TO THE BEST OF MY ABILITY, *supra* note 136, at 28-35; WHITNEY, *supra* note 136, at 26-38.

147. See WILLIAMS, *supra* note 1, at 25 (“On his part, Adams on the eve of inauguration visited Jefferson to ask him if he would go to France as a special presidential emissary to bring about better relations with the revolutionary government there. Jefferson declined to do this on the theoretical grounds that it was outside his constitutional domain and on the practical side that it was not his responsibility to lighten his opponent’s burden.”).

148. See WHITNEY, *supra* note 136, at 35. Jefferson “did not disdain the second place; in view of the squalls he saw coming he could think of no other office he would have preferred.” WILLIAMS, *supra* note 1, at 26.

149. WHITNEY, *supra* note 137, at 35. In fact, Professor Williams describes Adams as President and Jefferson as Vice President as “the first test of political incompatibles in the two chief national offices [resulting] in practical mutual non-intercourse and embargo.” WILLIAMS, *supra* note 1, at 25.

150. WILLIAMS, *supra* note 1, at 26.

151. See *id.* at 25-26 (detailing how Adams and Jefferson could not work together like

The election of 1800 proved to be the third strike against the original design and performance of the vice presidency, and led to the “fateful” tie in the electoral college and the first “constitutional crisis.”¹⁵² Ultimately, the Constitution had not been drafted foreseeing an electoral tie,¹⁵³ and in Aaron Burr’s defense, did not require the party favorite to step aside.¹⁵⁴ After thirty-six ballots the first crisis was averted, and the first major flaw in the Constitution relating to the vice presidency was exposed.¹⁵⁵ The first major improvement to the structure of the vice presidency followed this crisis when in 1804 the Twelfth Amendment was passed as “a response to an embarrassing logical omission” and “inherent mechanical flaws” in the constitutional election scheme.¹⁵⁶

*B. A Useless Century Followed by “Gradually Increasing Prominence”*¹⁵⁷

Several members of Congress made an attempt to abolish the vice presidency prior to the passage of the Twelfth Amendment, but it failed to

Washington and Adams had, and describing the “whole affair” as a precursor to the lack of “availability” for vice presidential assignments).

152. *Id.* at 26-27.

153. There was always the possibility of an electoral tie, but the process of “sloughing” votes—one party having one or several electors vote for a different candidate in order to prevent a tie—was meant to avoid that result. Amar & Amar, *supra* note 1, at 922.

154. See WILLIAMS, *supra* note 1, at 27 (stating “[n]o one doubted that Jefferson was the first choice of the Republicans and that Burr had been chosen merely for the vice-presidency, but the Constitution did not recognize this distinction”). Professor Williams described the scene:

Since Jefferson and Burr were tied with 73 votes each, the issue was thrown into the House of Representatives for decision, where the vote would be by states. However, the “lame-duck” House with its strong Federalist bloc had no interest in easing the tasks or solving the problems of the victorious Republicans. Through 35 ballots, a decision was delayed while the House defied the popular mandate and Jeffersonian stalwarts threatened that “ten thousand republican swords will instantly leap from their scabbards” if their hero were cheated out of the White House. Throughout this crisis, Burr remained in Albany, watchful and waiting, contenting himself with avowing in a letter that, given a tie between Jefferson and himself, he would wish his friends to prefer the former.

Id.

155. See *id.* (“Burr could well have had the Federalist support necessary for the presidency if he had cared to become a hostage of the conservatives; he declined to do so On the thirty-sixth ballot, Thomas Jefferson was elected the third President of the United States”)

156. See U.S. CONST. amend. XII; Lawrence Lessig, *The Limits of Lieber*, 16 CARDOZO L. REV. 2249, 2256 n.25 (1995); Brett W. King, *The Use of Supermajority Provisions in the Constitution: The Framers, The Federalist Papers and the Reinforcement of a Fundamental Principle*, 8 SETON HALL CONST. L.J. 363, 381 (1998). The Twelfth Amendment ultimately “brought the presidency closer to the voters” but, at the same time, “reinforced slavocrats’ unfair advantage in the electoral college.” AMAR, *supra* note 10, at 315.

157. Albert, *supra* note 1, at 832.

pass in either the House of Representatives or the Senate, and the position moved forward into the nineteenth century.¹⁵⁸ It did so after prophetic claims that the office would plummet in esteem and the office holders would decline in caliber.¹⁵⁹ Indeed, the common perception among vice presidential scholars is that the experiences of the first full century of the office “gave reason to rue [its] creation”¹⁶⁰ The credentials and abilities of many Vice Presidents were paltry at best.¹⁶¹ Their contributions to the office and the nation tended to be even worse.¹⁶² While several noteworthy Vice Presidents did inhabit the office between 1800 and 1900, they proved to be exceptions to the rule.¹⁶³

Theodore Roosevelt proved to be the most capable and prominent man to become Vice President since Adams and Jefferson over one hundred years earlier, but the office could not truly claim him as its own.¹⁶⁴ Ultimately he

158. See GOLDSTEIN, *MODERN V.P.*, *supra* note 1, at 6-7 (noting that the vote failed “19 to 12 in the Senate and 85 to 27 in the House of Representatives”).

159. *See id.*

160. *Id.* at 7.

161. Professor Goldstein commented on the generally poor quality of nineteenth century Vice Presidents:

Some prominent men still did accept the second office. John C. Calhoun and Martin Van Buren were among the early Vice Presidents. More often, however, the vice-presidential nomination was awarded as a consolation prize to a defeated faction of a party. The credentials of some nominees were ludicrous. George Clinton, Elbridge Gerry, and Rufus King were in advanced years and failing health. Others had scant experience. The prior public service of Chester A. Arthur consisted of seven years as collector of customs for the port of New York. Garret A. Hobart had never held a post higher than state legislator in New Jersey. Six of the twenty-three Vice Presidents in the century were not nominated to seek another term with the Chief Executive. Six others died in office. On four occasions nineteenth-century Vice Presidents succeeded to the nation’s top job following the death of the elected Chief Executive. Their administrations were largely undistinguished. None was nominated to seek another independent full term.

Id.

162. The Vice Presidents were often more trouble in their office than they were worth:

[They] posed problems for many Chief Executives. Jefferson ignored Adams’s entreaties to undertake diplomatic missions, viewing such activity as inconsistent with his leadership of the opposition party. Burr was no more helpful to Jefferson. Clinton refused to attend Madison’s inauguration; Andrew Johnson came to that of Abraham Lincoln but in a state of advanced inebriation. Calhoun cast the decisive vote against Jackson’s nomination of Van Buren as ambassador to Great Britain, exacerbated tensions in the administration over the Peggy Eaton affair, and split with the President on states’ rights. Arthur denounced President James Garfield to a newspaper editor.

Nor did Vice Presidents always meet a high standard of behavior. Burr killed Hamilton in a duel and was later charged with, though acquitted of, treason for allegedly conspiring to “liberate” the Louisiana Territory from the United States. Richard Johnson seemed more interested in presiding over his tavern than over the Senate. John Breckinridge became a Confederate general and later Secretary of War after his term ended. Schuyler Colfax was nearly impeached for improper financial dealings.

Id. at 7-8.

163. *See id.*

164. Roosevelt’s ascent to the office of Vice President was actually the Republican party and

served fewer than six months in the office, only five days of which were while Congress was in session.¹⁶⁵ To the nation's benefit, Roosevelt succeeded to become President when William McKinley was shot by an assassin.¹⁶⁶ It is amusing but ultimately fruitless speculation as to how Roosevelt would have affected the vice presidency, as his larger-than-life persona and talents were incontrovertibly more suited for the role of President.¹⁶⁷

After the century of intermittent participation and influence in the Executive Branch, the office began to gradually "advance toward and ultimately into influential circles."¹⁶⁸ Although Vice Presidents occasionally consulted with and participated in Executive Branch activities during the nineteenth century, it was not until 1921, when Vice President Calvin Coolidge attended Cabinet meetings as an official member at President Warren G. Harding's request, that the profile of the vice presidency started

President McKinley's attempt to hide him in an office where he would not upset the establishment:

By early 1900 it had become apparent that the Republicans of New York would like to get rid of this young governor [Theodore Roosevelt] that they could not control. They began to talk of pushing him upstairs into the vice presidency. Promptly, in February 1900, Roosevelt issued a statement: "under no circumstances could I or would I accept the nomination for the Vice-Presidency" When he made one of the seconding speeches for the renomination of McKinley, the [Republican National Convention] went wild and nominated him as McKinley's running mate by acclamation, although Mark Hanna, the Republican national chairman, was not pleased. "Don't any of you realize that there's only one life between this madman and the White House?"

WHITNEY, *supra* note 136, at 209. Roosevelt never sought the vice presidency; rather his party was trying to get him out of the way. *Id.*

165. *Id.* at 209-10; *see also* WILLIAMS, *supra* note 1, at 81 ("Roosevelt had had no experience in presiding over a legislative body and seems not to have tried to prepare himself for his one certain duty beyond poring over 'back files of the *Congressional Record*' for a few days. As a matter of fact, he was to preside only for five days, (March 5 to 9, 1901) . . .").

166. *See* TO THE BEST OF MY ABILITY, *supra* note 136, at 180; WILLIAMS, *supra* note 1, at 83; WHITNEY, *supra* note 136, at 209-10. While the assassination of a President could usually be considered a horrible and tragic event, I describe it as a benefit to the nation primarily because the Republican party was trying to hide Theodore Roosevelt in an office where it hoped he would ultimately become a non-entity in national politics, a result that would have deprived the nation of one of its brightest stars. *See supra* note 164.

167. Two tremendous volumes describe in great detail the many skills and talents of Theodore Roosevelt. *See* EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* (1979); EDMUND MORRIS, *THEODORE REX* (2002). Theodore Roosevelt's brief experience in the office made a large but negative impression on him. *See* WILLIAMS, *supra* note 1, at 83 ("It was little wonder that T.R. felt 'the vice-presidency is an utterly anomalous office (one which I think ought to be abolished).'"). Moreover, he is widely considered one of the five greatest American Presidents. *See* Historical Rankings of United States Presidents, http://en.wikipedia.org/wiki/Historical_rankings_of_United_States_Presidents (hereinafter *Historical Rankings*) (compiling twelve surveys of presidential scholars and listing Theodore Roosevelt at an average rank of 4.83).

168. *See* Albert, *supra* note 1, at 832.

to turn a corner.¹⁶⁹ President Franklin D. Roosevelt went even further in the 1930s and early 1940s by assigning major responsibilities to two of his Vice Presidents—John Nance Garner as a legislative liaison and Henry Wallace as chair of the Economic Defense Board.¹⁷⁰ Perhaps his failure in keeping his third Vice President, Harry Truman, “apprised of such critical information as the existence of an atomic bomb” was his largest contribution to the office’s growth in prominence and influence, because Truman’s experience ultimately “catalyzed a historic broadening of the vice presidential mandate.”¹⁷¹

Harry Truman may be the fourth greatest man to hold the office of Vice President, but like Theodore Roosevelt, the office can hardly claim him.¹⁷² His tenure as Vice President was even more short-lived than Theodore Roosevelt’s, as Franklin Roosevelt died less than three months into his fourth presidential term.¹⁷³ Truman’s succession to the presidency was both to the nation’s benefit and to the vice presidency’s benefit.¹⁷⁴ Understandably troubled by his lack of knowledge of the creation and testing of the atomic bomb, Truman established the National Security Council and made the Vice President an *ex officio* member.¹⁷⁵ Truman’s experience in the second office, while brief, made him realize the need for the Vice President to be adequately prepared in the event of unexpected succession.¹⁷⁶

169. *See id.*

170. *See id.*

171. *See id.* at 832-33 (Truman pledged that “no Vice President would ever be as inadequately prepared as he had himself been under Roosevelt . . .”). Professor Williams described Truman’s official relationship with President Franklin D. Roosevelt:

Truman . . . was to say: “I don’t think I saw Roosevelt but twice as Vice-President except at Cabinet meetings.” [George E.] Allen is correct in asserting, “Truman settled inconspicuously into the Vice-Presidency Like other Vice-Presidents before him, he was forgotten by most Americans until the day death made him President of the United States.”

WILLIAMS, *supra* note 1, at 219.

172. *See* Historical Rankings, *supra* note 167 (listing Harry S. Truman as consistently in the top seven Presidents and with an average rank of 7.18).

173. *See* WHITNEY, *supra* note 136, at 283 (noting that Truman’s vice presidential tenure lasted less than one hundred days: January 20 to April 12, 1945); WILLIAMS, *supra* note 1, at 219 (“Truman was to be Vice-President for only 82 days, during which time he conscientiously carried out his senatorial, Cabinet and legislative liaison duties.”).

174. *See* Albert, *supra* note 1, at 833; WHITNEY, *supra* note 136, at 283; TO THE BEST OF MY ABILITY, *supra* note 136, at 234-41; *see generally* DAVID MCCULLOUGH, TRUMAN (1992).

175. *See* Albert, *supra* note 1, at 833.

176. *See id.*

What did the American people get when Vice-President Harry S. Truman became President on April 12, 1945? They got a man who, if uninformed about details of war and diplomacy, let existing policies work themselves out The new President found out what existing policies were and then made decisions in keeping with them. When new situations arose, not covered by existing plans or policies, Truman would make his

The Dwight D. Eisenhower administration also provided a “great leap” in the vice presidency’s status, both domestically and internationally.¹⁷⁷ Two-term Vice President Richard M. Nixon was “masterful” in his role and his success in the vice presidency became the standard for future meaningful participation in an administration.¹⁷⁸ The 1960s also saw an “accelerated . . . institutionalization” of the vice presidency, including:

(1) in 1961, vice presidential offices moved from Capitol Hill to the executive compound, closer to the White House; (2) the executive budget for the first time, in 1969, listed a line item for the Vice President under “Special Assistance to the President,” a formulation that has survived to this day; (3) in 1974, the Vice President was given a distinct support staff, freed from relying on White House administrative support; and, among others; (4) vice presidential offices again moved, this time in 1977, from the executive compound into the West Wing, an indication of the Vice Presidency’s growing cachet.¹⁷⁹

Part of the stimulus driving all of the institutional changes of the vice presidency in the nineteenth century were three constitutional amendments, each affecting the office and each occurring within a thirty-five year span.¹⁸⁰

own determinations (as, for instance, the decision to use the atom bomb in the war against Japan).

WILLIAMS, *supra* note 1, at 223-24. But with regards to the vice presidency, Truman championed a bill in Congress that changed its shape permanently:

[T]he most significant event of [Truman’s Vice President Alben Barkley’s] tenure was [Barkley’s] becoming the first Vice-President to sit on the National Security Council (Act of August 10, 1949).

Of all the legal powers and duties conferred on Vice-Presidents since the establishment of the office, none was remotely so significant as this statutory membership. As the highest counselling body to the Chief Executive, the NSC comprises the top echelon of presidential policy assistants. And the Vice-President was not merely a courtesy member, but a full legal participant. Since the NSC is charged by law with “the integration of domestic, foreign, and military policies relating to national security” no important aspect of national administration was outside the purview of the Vice-President.

Id. at 233-34.

177. *Id.*

178. *Id.*; see also WHITNEY, *supra* note 136, at 335 (“During his eight years as Vice President, from 1953 to 1961, Nixon took a more active role in the government than had any previous holder of the office.”).

179. Albert, *supra* note 1, at 834.

180. U.S. CONST. amend. XX; amend. XXII; amend. XXV. The Twelfth Amendment had been passed in 1804 following the Jefferson/Burr debacle, and while it had changed the face of the vice

The Twentieth Amendment, the “lame duck amendment,” was ratified in 1933 and provided protection against undemocratic “machinations” of an outgoing Congress and Executive.¹⁸¹ This amendment had a double effect on the vice presidency: first, it changed the end of a term to noon on January 20 for the President and Vice President, shortening a possible lame duck period; and second, it created contingency plans for presidential succession.¹⁸² The Twenty-Second Amendment, ratified in 1951, was a check on the idea of an “imperial executive” and was in direct response to the unprecedented four terms of Franklin D. Roosevelt.¹⁸³ Its two primary effects on the second office were to limit any possible “imperial Vice Presidency” and also to “liberate [] a second-term Vice President to openly seek her party’s nomination”¹⁸⁴ Finally, and arguably the most significant amendment concerning the vice presidency, is the Twenty-Fifth Amendment ratified in 1967.¹⁸⁵ This amendment, more than any other, both vaulted the office of Vice President into “modern significance” and helped cement the position as one of critical importance in the modern era.¹⁸⁶

C. *The Twenty-Fifth Amendment, the Modern Era, and the Future of the Office*

The ratification of the Twenty-Fifth Amendment forcefully made the important statement that “vice presidential vacancies are no longer tolerable.”¹⁸⁷ It “responded to the need for reliable presidential leadership in the nuclear age, in which the timetable for military action, whether offensive or defensive, was compressed into a matter of mere minutes.”¹⁸⁸ As a

presidency, it did not lead to institutional growth. See U.S. CONST. amend. XII.

181. See U.S. CONST. amend. XX; Albert, *supra* note 1, at 836, 845-46.

182. See Albert, *supra* note 1, at 845-53.

183. See U.S. CONST. amend. XXII; Albert, *supra* note 1, at 853-59.

184. Albert, *supra* note 1, at 856-57.

185. See U.S. CONST. amend. XXV; Albert, *supra* note 1, at 859-65; Goldstein, *Constitutional V.P.*, *supra* note 1.

186. Albert, *supra* note 1, at 859; see Goldstein, *Constitutional V.P.*, *supra* note 1.

187. Albert, *supra* note 1, at 859.

188. *Id.* at 860. Senator Birch Bayh, the Chairman of the Senate Judiciary Subcommittee on Constitutional Amendments and person directly responsible for crafting the Twenty-Fifth Amendment, described the dilemmas he dealt with in the wake of the Kennedy assassination in 1963:

Now, I thought, Lyndon Johnson was President; he was assuming an office whose burdens were enormous even without their having been increased by the tragedy [of the Kennedy assassination] that had descended upon all of us. Like many of my fellow countrymen, I prayed—for this man as well as for his predecessor.

Yet in the midst of my misery, I reflected on the distinguished credentials of the man who was to take over the reins of government in this crisis. He had been a congressman, a senator, Majority Leader, then Vice President—over thirty years of service in the highest echelons of government. No other man had come to the Presidency with such

“vision of the vice presidency . . . as an integral part of American government,” the Amendment was a decisive step towards fixing the role as one of prominence, deserving of the nation’s second-highest office.¹⁸⁹ Although the Amendment was not a perfect one, it made the vice presidency *more perfect*, and catapulted the “resurgence and redevelopment” of the office into what it always could have been.¹⁹⁰

In addition to this monumental amendment, the Walter Mondale vice presidency in the Jimmy Carter administration really “set in motion the contemporary transformation” of the office.¹⁹¹ From 1977 through 1981, the Mondale model made permanent the Vice President as an “active participant in executive government.”¹⁹² This model included frequent access, growing influence, and a high level of operating independence within the Executive Branch, all movements towards greater importance that have only accelerated in subsequent administrations.¹⁹³ Vice President Al Gore began

experience. As Vice President, he had been uniquely suited to contribute to the making of important governmental decisions. Now he would be the one to make those decisions, seeking in turn the counsel of *his* Vice President. But there I sat up sharply. *There was no Vice President now!* The thoughts came flooding to my mind: I remembered the 1948 Presidential Succession Act, which provided for a line of succession in case the President and Vice President died at the same time, or in case the President died and there was no Vice President. But, at this moment, the United States had no Vice President, and to make matters worse there was absolutely *no way* to fill the vacancy in that office. For almost a hundred years, members of Congress and scholars had been trying to find a way to solve the dilemma of Presidential succession: so far they had not been able to do so.

BAYH, *supra* note 1, at 6.

189. Goldstein, *Constitutional V.P.*, *supra* note 1, at 526.

190. *Id.* at 529. Professor Albert summarized some of the “shortcomings” Professor Goldstein admits are still present in the second section of the amendment:

Section two of the Twenty-Fifth Amendment exhibits several shortcomings: (1) there is no accepted standard for congressional ratification of the President’s nomination; (2) Representatives and Senators may be tempted to put partisanship ahead of national interest and therefore delay or otherwise disrupt the vice presidential appointment process; (3) the confirmation process delves into the nominee’s personal life; and (4) the procedure allows a vice presidential nominee to be confirmed and perhaps subsequently ascend to the Presidency via succession without validation from the electorate.

Albert, *supra* note 1, at 864. On this final point, President Gerald R. Ford was an example of an appointed Vice President who succeeded to the presidency without ever being elected to any office higher than a congressional representative. See WHITNEY, *supra* note 137, at 372-74.

191. Albert, *supra* note 1, at 834; see Robert A. Rankin, Editorial, *Gore Expands Role of Vice Presidency*, MIAMI HERALD, Dec. 5, 1993, at M1 (describing Mondale as the Vice President who “set the model for the modern vice presidency as the president’s senior advisor on virtually everything”).

192. Albert, *supra* note 1, at 834; see Judith Yates Borger, *Mondale: “I am So Proud of this State”*, DULUTH NEWS TRIB., Nov. 7, 2002, at A5 (stating Mondale changed “the vice presidency to a position of participating in governing”).

193. Albert, *supra* note 1, at 834 (stating that the changes begun with the Carter/Mondale

his campaign for the office alongside President Bill Clinton, both men touting a partnership of almost “co-Presidents.”¹⁹⁴ Gore’s eight years in office and his accomplishments during that time served to “further augment[] the power and prestige of America’s understudy,” in effect taking the office into the twenty-first century.¹⁹⁵

The current Vice President, Richard B. Cheney, has played probably the most extensive role of any office holder in American history, wielding more influence and having a greater impact on a wider spectrum of policy matters than any of his predecessors.¹⁹⁶ One major factor in this result is of course President George W. Bush and his tendency to delegate heavily and rely equally as much on those close to him whom he trusts.¹⁹⁷ Cheney’s history and relationship with the President was one not before seen in a

administration appear to be permanent).

194. *See id.*

195. *See id.* at 835. Vice President Al Gore brought even more power to the vice presidency during his eight years than Mondale had in his four years. *Id.* at 835-36 n.143-44.

196. *See* Kenneth T. Walsh et al., *The Cheney Factor*, U.S. NEWS & WORLD REPORT, Jan. 23, 2006, at 40; Peter S. Canellos, *Cheney Wields the Real Power*, ALBANY TIMES UNION, Apr. 6, 2006, at A15. Some commentators first saw Cheney as a Vice President who would “invigorate” the office and give it real power:

Historically, the vice president has functioned like the second son in a royal family. He generally has maintained a high sense of status, indulged in a few helpful projects, and, in most instances, stayed ready to assume power in the event of the president’s death or resignation. In most administrations, the vice president has been kept on a short leash. (President Lyndon Johnson had a characteristically crude term for describing his dominance over his veep, Hubert Humphrey.)

So when Cheney, who had already been White House chief of staff under President Ford, emerged as a dominant player in the Bush administration, many people expressed relief that someone had found a way to invigorate one of the most famously underpowered positions in American politics.

Id.

197. *See* Walsh et al., *supra* note 196. In fact, some commentators now believe Cheney has obtained too much power for his position:

Cheney’s power went beyond even the strongest chiefs of staff, as he appointed former aides and allies to key positions, and sought to ride herd over the State, Defense and Justice departments. Cheney’s office coordinated the case for war with Iraq, and it was Cheney who recently delivered the ultimatum that the United States would never allow Iran to obtain nuclear weapons. As he would with a chief of staff, Bush acceded to Cheney’s moves, willingly placing the vice president at the top of the White House flow chart.

But while it may be logical that the second-most clout in the country should go to the elected vice president rather than a Cabinet secretary or staff mountebank, the disadvantages of such a power structure are becoming apparent. For while statements and policies crafted by staff members or Cabinet secretaries can be disavowed and the official sent packing, the vice president can’t be dismissed.

Even if Bush wanted to marginalize Cheney, and there’s no evidence that he does, he would have to remove all the Cheney loyalists from the defense secretary on down and still wake up to Cheney sitting in the West Wing every morning. Only Congress can remove a vice president, and only then for “high crimes and misdemeanors.”

Canellos, *supra* note 196.

President/Vice President combination, and this undoubtedly affected the role he played in the administration in ways that might not be replicated or extended.¹⁹⁸ But what is undeniable is that the vice presidency has now been “elevated . . . to its apex as a veritable ganglion of political influence and authority” with few places to go (if anywhere) from here.¹⁹⁹

So the question now becomes, where can the vice presidency go? Should it go there? Would it be an improvement or merely a change? What methodology should we use to decide?

IV. WHERE THE DEBATE STANDS TODAY

Several leading vice presidential scholars remain critical of the vice presidency and have proposed certain changes—they insist improvements—to the structure and powers of the office.²⁰⁰ Across the board, every idea submitted has two themes upon which it stands: first, the founding principle of *popular legitimacy* and democratic choice of the people,²⁰¹ and second, the imperative that the candidates with the greatest *ability* be attracted to and elected to the nation’s second-highest office, particularly in today’s global and nuclear age.²⁰² Considering popular legitimacy, Professor Richard Albert reviewed the “modern . . . democratization of the American polity and American public institutions” and stated:

Consider the Constitution’s vision for the popular legitimacy of public officials, as evidenced by the authorization of separate ballots for electing the President and Vice President [in the Twelfth Amendment], the solicitation of public input to fill vice presidential vacancies [in the Twenty-Fifth Amendment], and the direct election of United States Senators [in the Seventeenth Amendment]. Or the Reconstruction Amendments, which abolish slavery, extend the equal protection of the laws to all individuals, and authorize citizens of all ethnicities to exercise their franchise.²⁰³

198. See Walsh et al., *supra* note 196.

199. See Albert, *supra* note 1, at 836.

200. See Friedman, *supra* note 1; Amar & Amar, *supra* note 1.

201. See Albert, *supra* note 1, at 869-96 (saying popular consent is a major feature of the vice presidency and positing that the position may have popular legitimacy problems in its current state); see also Amar & Amar, *supra* note 1, at 938, 944; Friedman, *supra* note 1, at 1726 (calling this principle his “Democracy Postulate”).

202. See WILLIAMS, *supra* note 1, at v.

203. Albert, *supra* note 1, at 880-81 (footnotes omitted).

Ultimately, Professor Albert advocates that “any reform [of the vice presidency] must fit squarely within this distinctive and distinguishing motif of democratic and popular legitimacy.”²⁰⁴ A similar motif drove the Constitutional Convention delegates with regards to ability:

The idea of the Founding Fathers was that the Vice-President should be the man next best qualified in the country to be President, surely a notably wise concept. It was implemented by an arrangement under which the Vice-President was to be the man to get the second highest vote for President in the Electoral College. But this could only work if there was no party system; and when that was introduced the Constitution was amended [through the Twelfth Amendment] to provide a separate vote for Vice-President. This amendment threw the high office of Vice-President into the dust of party politics, where it has remained for most of our subsequent history.²⁰⁵

But while these two principles of the American ideal stand prominently in plans to actively transform the vice presidency, are they alone enough to necessitate this change?

The following two proposals for the continued reform of the vice presidency have been submitted relatively recently by notable vice presidential scholars.²⁰⁶ Each proposal has been responded to by equally distinguished scholars who point out certain flaws and drawbacks of the proposals.²⁰⁷ None of the proposals or responses, however, have used the methodology this Article submits as the appropriate means for analyzing and applying any potential constitutional change regarding the vice presidency.²⁰⁸ No scholar has yet to perform a comprehensive review of the state constitutions and apply those results to the scales weighing for or against change. After mapping the landscape of the modern vice presidential debate, this Article will do just that.²⁰⁹

204. See Albert, *supra* note 1, at 881.

205. WILLIAMS, *supra* note 1, at v.

206. See Friedman, *supra* note 1; Amar & Amar, *supra* note 1.

207. See Goldstein, *Constitutional V.P.*, *supra* note 1, at 550-54, 556-57; Albert, *supra* note 1, at 880-83.

208. See *supra* notes 10, 11, 27, 23-24 and accompanying text.

209. See *infra* Part V.

A. *Proposal One: The Vice President Should be Elected Separately*

The first proposal for changing the vice presidency, made by Professors Richard Friedman, Akhil Reed Amar and Vik Amar, is that the Vice President should be elected separately from the President.²¹⁰ Friedman states his belief plainly: “[w]ho shall be president and who shall be vice-president are two separate questions, and the best candidates are not necessarily on the same ticket.”²¹¹ The Amars concur, arguing that “significant benefits might accrue” if this proposal was implemented.²¹²

The current process is essentially controlled by laws in the fifty states which govern the structure of presidential/vice presidential voting ballots.²¹³ Ticket-tying ballot designs and write-in candidate rules in most states make it difficult, if not impossible, for a voter to register a preference for a certain combination of major political party candidates for President and Vice President, thereby forcing the voter to vote for the unified party ticket or a combination of obscure candidates.²¹⁴ While Professor Friedman calls for a constitutional amendment to put the proposal into action,²¹⁵ the Amars call the current process a “constitutional custom” and say that “neither Article II nor the Twelfth Amendment obliges persons to vote for a President and a Vice President of the same party.”²¹⁶ They maintain that freeing voters from

210. See Friedman, *supra* note 1, at 1726-30; see generally Amar & Amar, *supra* note 1.

211. Friedman, *supra* note 1, at 1726. Professor Friedman called it “likely” that in at least the 1956 and 1968 elections “voters would have split their tickets, had they been given the simple democratic option to do so.” *Id.*

212. Amar & Amar, *supra* note 1, at 945. The Amars argue using surveys comparing public acceptance of Vice President Dan Quayle with his Democratic opponent Senator Lloyd Bentsen. *Id.* at 916-18. Their premise is that the surveys “strongly suggest [] that a Bush/Bentsen option would have been attractive to voters in 1988, had they been free to split their executive tickets” and also that “voters might welcome a ticket-splitting option” in future elections. *Id.* at 918.

213. See *id.* at 925-27. The Amars explain:

Election codes in some states provide for vote tying between the offices of President and Vice President on the general election ballot. Other states do not explicitly codify vote tying in their election codes. Apparently, the decision to tie presidential and vice-presidential votes in these states is made by the executive agencies charged with designing the ballot.

Id. at 925 n.50 (internal citations omitted).

214. See *id.* at 926 n.54 (“Requiring voters to ‘write in’ certain options also raises the relative cost of these options vis-à-vis other options that can be voted for with less effort. At the margins, this increased cost appears to affect voter behavior.”).

215. Friedman, *supra* note 1, at 1726-29.

216. Amar & Amar, *supra* note 1, at 919-20, 924 (“Indeed, the Twelfth Amendment’s decoupling of the selection of the President and Vice President, at least at first blush, seems more consistent with a regime in which those who cast ballots—electoral collegians and, ultimately, the citizen voters who today de facto stand behind them—are free to select the two candidates independently.

obligatory ticket-tying and providing them with the option of ticket-splitting would better serve the overarching principles of *democracy* and *ability* that have been the objective of the American form of government since its founding.²¹⁷

Democratically, “[i]f the electorate is more interested in the character and leadership abilities of its executives than in their ideologies, it is no business of the constitution-makers to dictate that they must sacrifice quality in order to guarantee ideological continuity.”²¹⁸ A major benefit that would accrue is that an incoming Vice President would have “tenable claim to electoral legitimacy” rather than be seen as a “mere coattail clutcher.”²¹⁹ Moreover, an untied election of the President and Vice President would be in harmony with the current law and practice in many other areas of voting, where the electorate is not compelled to vote only for one particular party slate at the expense of another.²²⁰ As to ability and competence, permitting voters to split their tickets would place a premium on “experience and competence” in the second office.²²¹ Separate elections would ensure that vice presidential candidates have “sufficient stature to face the electorate on their own, [and] that the winner is truly the voter’s choice,”²²² and “[i]f parties know that the vice-presidential candidate must compete directly against the opposing party’s vice-presidential candidate, they will be less likely to put forth weak candidates for that office.”²²³ Additionally, a split

Nor do the circumstances surrounding the adoption of the Twelfth Amendment dictate a contrary result. In fact, the concerns underlying the amendment of Article II had little to do with the potential for a ‘split’ executive.”).

217. See Amar & Amar, *supra* note 1, at 920. Interestingly, the Amars addressed the state practice of “embracing winner-take-all rules [in presidential/vice presidential elections in order to] maximize the clout of the state’s median voters” *Id.* at 928. This practice makes it “much more likely that a presidential candidate could win a majority of the nation’s popular votes, yet lose in the electoral college.” *Id.* The Amars call that possibility a “true democratic nightmare.” *Id.* Thus, neatly in their argument for changing the vice presidential selection system, they seem to slip in a much larger and perhaps more controversial issue which it appears they would also support—eliminating the Electoral College altogether in the name of democracy. On this point remember two things: first, that the Bush/Gore election of 2000 fit the “democratic nightmare” definition, yet the nation survived and politics are as vigorous as ever; and second, that this nation has never attempted to be a pure democracy, as it has honored yet undemocratic institutions such as the U.S. Senate (two senators per state regardless of population). Thus, the Amars’ argument for a more democratically selected Vice President is just a smaller part of a larger argument for recasting many of the nation’s founding institutions as more democratic.

218. Friedman, *supra* note 1, at 1727.

219. See Amar & Amar, *supra* note 1, at 937; Friedman, *supra* note 1, at 1726.

220. See Amar & Amar, *supra* note 1, at 914-16. “Voters may, for example, vote for federal executive candidates of one party and federal legislative candidates of another. Citizens likewise are free to cross party lines in electing federal legislators—say by voting for a Republican for the U.S. Senate and a Democrat for the U.S. House of Representatives.” *Id.* at 914.

221. See *id.* at 940.

222. See Friedman, *supra* note 1, at 1726.

223. See Amar & Amar, *supra* note 1, at 945.

election would give the American people a “watchdog” in the administration, and perhaps a bona fide “leader of the opposition.”²²⁴ In the end, focusing on whether the Vice President is truly seen as “qualified” to become President in the case of unelected succession leads to the strong suggestion that, at least occasionally, split tickets could be attractive to voters and that they should be provided with that option.²²⁵

Professor Joel Goldstein and Professor Richard Albert have each responded to the call for separate elections and an end to ticket-tying.²²⁶ While Professor Goldstein admits that “all else being equal, it would be preferable for a Vice President to be elected by the people based on his or her fitness to be President,” he goes on to highlight some negative consequences that could be the actual effect of separate presidential and vice presidential elections and possible split-ticket results.²²⁷ He first argued that the theme of democracy is balanced by other competing values in many areas of government.²²⁸ Fixed terms without midterm recall, term limits, and appointment of department heads are examples of undemocratic yet popularly accepted restraints inherent in the Constitution.²²⁹ Also, the ability of the electorate to select a Vice President is “constrained but not totally denied.”²³⁰ The presidency would be impaired because the vice presidency would gain a new, higher status, either as an “opposition leader” or “an alternative leader [in the same party] with [his own] national constituency.”²³¹ These possibilities would create a “loose cannon” effect.²³² Additionally, an independent Vice President in an administration

224. *See id.* at 933; Friedman, *supra* note 1, at 1726.

225. *See* Amar & Amar, *supra* note 1, at 917-18.

226. *See* Goldstein, *Constitutional V.P.*, *supra* note 1, at 550-54; Albert, *supra* note 1, at 878-93.

227. *See* Goldstein, *Constitutional V.P.*, *supra* note 1, at 550-54.

228. *See id.* at 551.

229. *See id.* Senators are fixed to six year terms. U.S. CONST. art. I, § 3, cl. 1. Representatives are fixed to two year terms. U.S. CONST. art. I, § 2, cl. 1. Presidents can appoint, with advice and consent of the Senate, almost anybody they choose. U.S. CONST. art. II, § 2, cl. 2; § 2, cl. 3. Each of these examples show how there are already built-in limits to the American system of democracy.

230. *See* Goldstein, *Constitutional V.P.*, *supra* note 1, at 551. If the voters really disliked a vice presidential candidate they could easily choose to not vote, petition their political party, or vote for another party. *See id.* The media and the political system are strong weapons to fight a disliked candidate for any office including the vice presidency.

231. *See id.* at 552.

232. *See id.* (“[The Vice President’s] electoral success would ensure his independence . . . [He] would be a loose cannon waiting to unload, potentially on the President. To be sure, previous Vice Presidents have on occasion done what they could to embarrass the President. That occurred, however, in another age when the vice presidency was a different office described by an older vision. Modern Vice Presidents have observed a different etiquette that demands public deference.”). The Amars responded to the loose cannon argument, saying “loose cannons have

could also make the vice presidency suffer and undermine the recent growth in the stature of the office.²³³ Campaigns would likely be more independent, and electoral victories would not be a joint effort for which the Vice President could be rewarded with first-rate assignments.²³⁴ The current record, Professor Goldstein suggests, “stacks up pretty well” in terms of qualified candidates.²³⁵ Furthermore, Professor Albert focuses on the “stability” problem.²³⁶ Internal inconsistency within an administration and the potential for a sharp turn in ideology upon unexpected succession could cool the presently warm relationships recent Vice Presidents and Presidents have had.²³⁷ Separate presidential and vice presidential elections, in the end, may ultimately have downsides more troublesome than they would be worth.²³⁸

B. Proposal Two: The Vice President Should Hold a Separate Office

Professor Friedman makes a second argument that changing the vice presidency so that an elected Vice President “be allowed to hold another political office . . . a preexisting job of real power and importance”—that is, being Vice President should not be a bar to other high-ranking positions.²³⁹ He argues not for a set job for every Vice President; rather, he believes that the President “should be allowed to select a job suited to the talents of the particular vice-president, who should be appointed to the position in the

existed under the current system. Indeed, the current system may affirmatively tend to create loose cannons . . .” See Amar & Amar, *supra* note 1, at 938-39.

233. See Goldstein, *Constitutional V.P.*, *supra* note 1, at 553 (saying “[t]he vice presidency would also suffer from separate elections” because “the place of the Vice President in the executive branch would be diminished” and the “enhanced role of recent Vice Presidents in the administration has come largely from their relationship with the President Separate election would place these gains at risk.” *Id.* Moreover, “[t]he situation would be much exacerbated if the Vice President belonged to the opposition party.” *Id.*

234. See *id.*

235. See *id.* at 551-52 (“During the past half-century since presidential candidates have chosen their running mates, the vice presidential candidates on virtually all tickets which had some reasonable chance of winning have been people of some accomplishment and talent.”).

236. See Albert, *supra* note 1, at 882-83.

237. See *id.*; Goldstein, *Constitutional V.P.*, *supra* note 1, at 553. But see BRUCE A. ACKERMAN, WE THE PEOPLE 84 (1991) (describing the occasional discontinuity following vice presidential successions). Professor Ackerman also believes “ideological instability is a systematic consequence” of modern vice presidential election systems. *Id.* at 333 n.7.

238. See Goldstein, *Constitutional V.P.*, *supra* note 1, at 554.

239. See Friedman, *supra* note 1, at 1714-15. The reason is that “[f]or all the newfound influence of the office, vice presidential power is still largely a function of the president’s willingness to confer it.” *Id.* at 1709 n.22 (quoting Hubert Humphrey, *Changes in the Vice Presidency*, 67 CURRENT HIST. 58, 59 (1974)).

same manner that anyone else would be.”²⁴⁰ Examples of possible positions are “a Cabinet office, or head of OMB [Office of Management and Budget], or the White House Chief of Staff.”²⁴¹ The benefits that would flow from such a claim are: fulfillment of the capacity of a Vice President’s talents, better preparation for being President by making him an “integral member of the administration,” and increased attractiveness for candidates who otherwise may not want to take the role.²⁴² Moreover, once one President has named a Vice President to a “genuine executive position,” other Presidents would have difficulty not doing the same in subsequent administrations.²⁴³

Professor Friedman believes that two possible obstacles could also be easily handled—a constitutional objection based on the Incompatibility Clause²⁴⁴ and possible political costs that could result.²⁴⁵ First, it is uncertain whether the Vice President’s official position of President of the

240. See Friedman, *supra* note 1, at 1714-15. Professor Friedman contends that “without the institutionalization that comes from a formal assignment to a well-defined job, the vice-presidency cannot be relied upon as a genuine training ground for the presidency.” *Id.* at 1715 n.46.

241. See *id.* at 1714. In fact, eight future Presidents first served as Cabinet secretaries: Thomas Jefferson (Secretary of State under George Washington); James Madison (Secretary of State under Thomas Jefferson); James Monroe (Secretary of State under James Madison); John Quincy Adams (Secretary of State under James Monroe); Martin Van Buren (Secretary of State under Andrew Jackson); James Buchanan (Secretary of State under James K. Polk); Ulysses S. Grant (Secretary of War under Andrew Johnson); and Herbert Hoover (Secretary of Commerce under Warren G. Harding). WHITNEY, *supra* note 136, at 494-520. Additionally, several Vice Presidents first served as Cabinet secretaries: Thomas Jefferson (Secretary of State under George Washington and Vice President under John Adams); John C. Calhoun (Secretary of War under James Monroe, Vice President under John Quincy Adams and Andrew Jackson); Martin Van Buren (Secretary of State and Vice President under Andrew Jackson); Henry A. Wallace (Secretary of Agriculture and Vice President under Franklin D. Roosevelt); and Richard Cheney (Secretary of Defense under George H.W. Bush and Vice President under George W. Bush). *Id.*

242. See Friedman, *supra* note 1, at 1714-16.

243. See *id.* at 1716 n.48 (“[O]nce one vice-president were given a formal and visible position, such as head of a Cabinet department, succeeding presidents who did not do likewise would appear to have no confidence in the vice-president.”).

244. U.S. CONST. art. I, § 6, cl. 2. The Clause states:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Id. While this federal clause does not limit state officers from holding federal office, state constitutions often include similar clauses that prohibit Governors from holding a federal office. See *infra* note 250.

245. See Friedman, *supra* note 1, at 1719-22.

Senate would be a constitutional obstacle to this proposed change.²⁴⁶ A constitutional amendment could eliminate the “[l]egislative vestige,” but may not be necessary.²⁴⁷

The Vice President should already be considered an “Office under the United States” and not a “Member” of the Senate; therefore, there would not be a compatibility problem, and a President should be able to appoint the Vice President to a Cabinet post or other top position without an amendment.²⁴⁸ As to possible political problems connected to a President having a department head he could fire but who would remain his successor, Professor Friedman contends there are “virtually none” and that they would be just “ordinary type[s] of political problem[s], [and not] sufficient reason[s] to keep the vice-president from having meaningful responsibility in the first place.”²⁴⁹ Overall, he believes both purpose and precedent call for giving the Vice President more substantial duties.²⁵⁰

Professor Goldstein responds to Professor Friedman by saying that adding another substantive job to the vice presidency would not result in a net improvement to the vice presidency.²⁵¹ First, while “formally the President would remain responsible and able to remove the Vice President from his Cabinet position, as a practical matter his ability to retain control over the sphere delegated to the Vice President would be circumscribed.”²⁵² Also, the idea of having a high official whom he could not freely replace could lead to an uncomfortable position of either not firing a Cabinet secretary who is underperforming, or having an unhappy Vice President whom he can only replace at the end of a first term, if at all.²⁵³ Finally, the

246. *See id.*

247. *See id.* at 1714.

248. *See id.* at 1719-22. The President would probably still be required to get advice and consent from the Senate before appointing the Vice President, however. *See* U.S. CONST. art. II, § 2, cl. 2.

249. *See id.* at 1716-17.

250. *See id.* at 1714-18. Professor Friedman also suggests this may extend to the Vice President taking state political jobs such as Governor. *Id.* at 1724-25. The major obstacles to such a change, however, will most likely be the state constitutions themselves, as many of them specifically state that no state official may hold a federal office. *See, e.g.,* ARK. CONST. art. 6, § 11 (“No member of Congress, or other person holding office under the authority of this State, or of the United States, shall exercise the office of Governor, except as herein provided.”).

251. *See* Goldstein, *Constitutional V.P.*, *supra* note 1, at 556-57.

252. *See id.* at 556 (footnote omitted). Professor Friedman in response calls such a situation one that is “not inevitable, and neither should it be intimidating.” Friedman, *supra* note 1, at 1717. Friedman cites to when President Franklin D. Roosevelt made his Vice President Henry Wallace head of the Economic Defense Board during World War II, and after a dispute removed Wallace “without suffering a debilitating political blow.” *Id.* at 1717-18. Of course, *any* political blow may be enough to make a President pause before assigning future Vice Presidents to a similar executive position.

253. *See* Goldstein, *Constitutional V.P.*, *supra* note 1, at 556-57. It could be very difficult for a President to attempt to drop a first term Vice President for a new vice presidential running mate, potentially fueling an attack from an opponent for having run a bad first administration.

role of recent Vice Presidents as “generalists” may be preferable for purposes of both preparation for succession and for flexibility on both the President and Vice President’s parts.²⁵⁴ The institutional duties that would be added to the duties of the Vice President would, in the end, not contribute positively to either the position or the administration.²⁵⁵

The foregoing arguments are but a sample of numerous suggestions for improvement that have been circulated in the public arena.²⁵⁶ It is beyond the purpose of this Article to delve into every possible method of change proposed for the vice presidency; this Article merely attempts to survey several prominent issues in this area and apply a different methodology to the matter at hand. It is clear that both sides of each issue have strong points and that considerable thought and experience went into the proposals and rebuttals. But none of the scholars have performed an extensive review to see whether separate election or additional duties at all reflects the present state of the second-highest office in each of the states today.²⁵⁷ This Article believes such a review is necessary. So the logical next question becomes: What say the States?

V. WHAT SAY THE STATES?

Where there were thirteen independent states and eleven state constitutions during the summer of 1787 when Convention Delegates met in Philadelphia to draft the Federal Constitution,²⁵⁸ today there are fifty states, each with its own constitution, its own executive branch design, and its own ideals for organizing a democratic and representative democracy.²⁵⁹ While it can be properly presumed that the ideals of *popular legitimacy* and *ability* that permeate the federal design also hold true for the several states, it is also reasonable that in a federalism-based society such as the United States, these

254. *See id.*

255. *See id.*

256. *See, e.g.,* Albert, *supra* note 1, at 883-95 (describing several ideas for change: “New Hampshire Vice Presidential Primary;” “Vice Presidential Primary;” “Nominating Convention;” “Post-Election Vice Presidential Selection;” “Congressional Confirmation;” and “National Ratification”).

257. *See supra* note 27 and accompanying text (surveying the extent previous scholarly works have reviewed and addressed the design of state constitutions in this area of government structure).

258. *See supra* notes 32-46 and accompanying text.

259. The Federal Constitution requires states to maintain a “Republican Form of Government,” but the exact design is not specified and states are permitted latitude in their particular formations of executive, legislative and judicial branches of government. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

American ideals may be realized in different and equally effective ways. Therefore, before changing a national institution such as the vice presidency, one that was in fact based off of the early designs of state government and succession models,²⁶⁰ it is entirely appropriate to consult the current status of the original molds of the position. If the state constitutions seem to support the proposal of separate elections for the two highest offices, perhaps the Federal Constitution should reflect that reality. Additionally, if state constitutions seem to encourage or defend the idea of giving more formalized duties or other executive jobs to the second-highest officers, maybe the Federal Constitution should do likewise. On the other hand, if the states are not collectively inclined to separate the elections of their top officers, this may be a strong indication that either the citizens prefer tied-ticket elections or they are simply content with the status quo.²⁶¹ Also, if the states are not giving their second-highest executives duties beyond what is comparable with the vice presidency's current federal duties, there may be no compelling reason to expand the role from its current state of existence.

A. *The States on Selection*

Fifty states out of fifty have designed their constitutions to include an executive branch with a chief executive who is popularly elected by the citizens whom he serves.²⁶² Not all fifty states, however, have created systems with a lieutenant governor as the second-highest officer of the state.²⁶³ Additionally, states with and without lieutenant governors provide

260. See *supra* notes 59-121 and accompanying text.

261. The Amars responded to this idea, calling it "inertia—blind inertia, stupid inertia . . ." See Amar & Amar, *supra* note 1, at 944. Of course, if the status quo is not flawed there is no reason to change. Also, with little success historically in electing split-party candidates, there is no guarantee a change will be an improvement. See *supra* notes 147-51 and accompanying text. Moving closer to a pure democracy may not necessarily be what the people want or the nation needs.

262. See generally ALA. CONST. art. V, §§ 112-37; ALASKA CONST. art. III; ARIZ. CONST. art. V; ARK. CONST. art. 6; CAL. CONST. art. V; COLO. CONST. art. IV; CONN. CONST. art. 4; DEL. CONST. art. III; FLA. CONST. art. IV; GA. CONST. art. V; HAW. CONST. art. V; IDAHO CONST. art IV; ILL. CONST. art. V; IND. CONST. art. 5; IOWA CONST. art. IV; KAN. CONST. art. 1; KY. CONST. §§ 69-95; LA. CONST. art. IV; ME. CONST. art. V; MD. CONST. art. II; MASS. CONST. pt. 2, ch. 2, § 1; MICH. CONST. art. V; MINN. CONST. art. V; MISS. CONST. art. V; MO. CONST. art. IV; MONT. CONST. art. VI; NEB. CONST. art. IV; NEV. CONST. art. V; N.H. CONST. pt II, art. 42-59; N.J. CONST. art. V; N.M. CONST. art. V; N.Y. CONST. art. IV; N.C. CONST. art. III; N.D. CONST. art. V; OHIO CONST. art. II; OKLA. CONST. art. VI; OR. CONST. art. V; PA. CONST. art. IV; R.I. CONST. art. IX; S.C. CONST. art. IV; S.D. CONST. art. IV; TENN. CONST. art. III; TEX. CONST. art. IV; UTAH CONST. art. VII; VT. CONST. ch. II, §§ 20-27; VA. CONST. art. V; WASH. CONST. art. 3; W. VA. CONST. art. VII; WIS. CONST. art. V; WYO. CONST. art. 4.

263. A total of seven states have either a non-executive branch officer or an executive officer such as a Secretary of State who acts as first successor. See ARIZ. CONST. art. V, § 1A (Secretary of State); ME. CONST. art. V, § 14 (President of the Senate who is not an executive officer); N.H. CONST. pt. 2, art. 49 (the President of the Senate who is not an executive officer); OR. CONST. art. V, § 8a (Secretary of State); TENN. CONST. art. III, § 12 (Speaker of the Senate who is not an executive

for the popular election of up to seven executive officials who each have constitutional duties assigned to them and who each are accountable to the electorate.²⁶⁴ While state governors are similar to the President in that they are the state's highest ranking official with often-times broad executive powers,²⁶⁵ in many states they differ in that, rather than appointing their Cabinet-equivalent officers (such as Secretaries of State or the Treasury) whom they may fire at will,²⁶⁶ they must work with executive officers who, while lower ranking, were themselves directly elected.²⁶⁷ But the executive branches in many states are also organized with a clearly stated chief officer and a clearly stated second officer, following models that are similar to, if not exactly like, the federal design.²⁶⁸ Thus, the analysis must lead to the consideration of comparisons between the nation's second-highest office and the states' second-highest offices.

A review of the fifty state systems of electing their top executives reveals that three forms are employed. The first form is the most similar to the familiar federal system described above, less the electoral college.²⁶⁹ In

officer); W. VA. CONST. art. VII, § 16 (President of the Senate who is not an executive officer); WYO. CONST. art. 4, § 6 (Secretary of State).

264. See, e.g., IDAHO CONST. art. IV, § 1 (listing "governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general and superintendent of public instruction" as elected executive officers).

265. Compare U.S. CONST. art. II, § 1 cl. 1 ("The executive Power shall be vested in a President . . ."), with ALA. CONST. art. V, § 113 ("The supreme executive power of this state shall be vested in a [Governor] . . ."); compare U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief . . ."), with CAL. CONST. art. V, § 7 ("The Governor is commander-in-chief of a militia . . ."); compare U.S. CONST. art. II, § 3 ("he shall take Care that the Laws be faithfully executed . . .") with ME. CONST. art. V, § 12 ("[The Governor] shall take care that the laws be faithfully executed . . .").

266. See U.S. CONST. art. II, § 2, cl. 3; *Myers v. United States*, 272 U.S. 52, 53 (1926) (holding the President has the absolute authority to fire a principle executive officer).

267. See IDAHO CONST. art. IV, § 1.

268. In total, forty-three states have a Governor/Lieutenant Governor organizational scheme. See ALA. CONST. art. V, § 112; ALASKA CONST. art. III, §§ 1, 7; ARK. CONST. art. 6, § 1; CAL. CONST. art. V, §§ 1, 9; COLO. CONST. art. IV, § 1; CONN. CONST. art. 4, § 1; DEL. CONST. art. III, §§ 1, 19; FLA. CONST. art. IV, §§ 1-2; GA. CONST. art. V, § 1; HAW. CONST. art. V, §§ 1-3; IDAHO CONST. art. IV, § 1; ILL. CONST. art. V, § 1; IND. CONST. art. 5, §§ 1-2; IOWA CONST. art. IV, §§ 1-2; KAN. CONST. art. 1, § 1; KY. CONST. §§ 69-82; LA. CONST. art. IV, § 1(A); MD. CONST. art. II, §§ 1, 1A; MASS. CONST. pt. 2, ch. 2, §§ 1-2; MICH. CONST. art. V, §§ 1, 21; MINN. CONST. art. V, § 1; MISS. CONST. art. V, §§ 116, 128; MO. CONST. art. IV, §§ 1, 10; MONT. CONST. art. VI, § 1; NEB. CONST. art. IV, § 1; NEV. CONST. art. V, §§ 1, 17; N.M. CONST. art. V, § 1; N.Y. CONST. art. IV, §§ 1, 6; N.C. CONST. art. III, § 2; N.D. CONST. art. V, § 2; OKLA. CONST. art. VI, § 1A; PA. CONST. art. IV, § 1; R.I. CONST. art. IX, § 1; S.C. CONST. art. IV, §§ 1, 8; S.D. CONST. art. IV, §§ 1-2; TEX. CONST. art. IV, § 1; UTAH CONST. art. VII, § 1; VT. CONST. ch. II, § 20; VA. CONST. art. V, §§ 1, 13; WASH. CONST. art. III, § 1; WIS. CONST. art. V, § 1.

269. All of the states have popular democratic elections for their top executive officials. See

total, twenty-four states have a Governor and Lieutenant Governor who are both popularly elected, but who both run on a single party tied-ticket that is required by the state constitution.²⁷⁰ The Hawaii Constitution in Article V, Section Two offers a common example of such a provision:

There shall be a lieutenant governor who shall have the same qualifications as the governor. The lieutenant governor shall be elected at the same time, for the same term and in the same manner as the governor; provided that the votes cast in the general election for the nominee for governor shall be deemed cast for the nominee for lieutenant governor of the same political party.²⁷¹

Other state constitutions have provisions with the same effect but with slightly different phrasings.²⁷² Moreover, the constitutions of several states go as far as to organize and govern the pre-election candidate nomination and running-mate selection procedures within the state, something on which the Federal Constitution is silent.²⁷³ For instance, the Maryland Constitution provides:

Each candidate who shall seek a nomination for Governor, under any method provided by law for such nomination, including primary elections, shall at the time of filing for said office designate a candidate for Lieutenant Governor, and the names of the said candidate for Governor and Lieutenant Governor shall be listed on the primary election ballot, or otherwise considered for nomination jointly with each other. No candidate for Governor may designate a candidate for Lieutenant Governor to contest for the said offices jointly with him without the consent of the said candidate for Lieutenant Governor, and no candidate for Lieutenant Governor may designate a candidate for Governor, to contest jointly for said offices with him without the consent of the said candidate for

supra note 262 and accompanying text.

270. See ALASKA CONST. art. III, § 8; COLO. CONST. art. IV, § 3; CONN. CONST. art. IV, § 3; FLA. CONST. art. IV, § 5(a); HAW. CONST. art. V, § 2; ILL. CONST. art. V, § 4; IND. CONST. art. V, § 4; IOWA CONST. art. IV, § 3; KAN. CONST. art. I, § 1; KY. CONST. § 70; MD. CONST. art. II, § 1B; MICH. CONST. art. V, § 21; MINN. CONST. art. V, § 1; MONT. CONST. art. VI, § 2; NEB. CONST. art. IV, § 1; N.J. CONST. art. V, § 1, para. 4; N.M. CONST. art. V, § 1; N.Y. CONST. art. IV, § 1; N.D. CONST. art. V, § 3; OHIO CONST. art. III, § 1a; PA. CONST. art. IV, § 4; S.D. CONST. art. IV, § 2; UTAH CONST. art. VII, § 2(2); WIS. CONST. art. V, § 3.

271. HAW. CONST. art. V, § 2.

272. See, e.g., ALASKA CONST. art. III, § 8 (“In the general election the votes cast for a candidate for governor shall be considered as cast also for the candidate for lieutenant governor running jointly with him.”); CONN. CONST. art. IV, § 3 (“In the election of governor and lieutenant-governor, voting for such offices shall be as a unit.”).

273. See FLA. CONST. art. IV, § 5(a); KAN. CONST. art. I, § 1; MD. CONST. art. II, § 1B; MICH. CONST. art. V, § 21; MONT. CONST. art. VI, § 2; N.J. CONST. art. V, § 1, para. 4.

Governor, said consent to be in writing on a form provided for such purpose and filed at the time the said candidates shall file their certificates of candidacy, or other documents by which they seek nomination.²⁷⁴

Six of the twenty-four states employing this method provide for nomination procedures or primaries preceding a tied-ticket general election in their constitutions, while the other eighteen commit the nominations to state statute or intra-party decisions.²⁷⁵ The New Jersey Constitution goes as far as providing that “[t]he candidate of each political party for election to the office of Lieutenant Governor shall be selected by the candidate of that party nominated for election to the office of Governor.”²⁷⁶

The second most prevalent form of selecting the two highest officers in a state is similar to the proposal advocated by Professor Friedman and the Amars—separate elections for the governor and lieutenant governor.²⁷⁷ A typical state constitutional provision reads as follows: “A Lieutenant-Governor shall be chosen at the same time, in the same manner, for the same term, and subject to the same provisions as the Governor; he shall possess the same qualifications of eligibility for office as the Governor”²⁷⁸

The Texas Constitution is perhaps the most explicit, providing specifically that “[t]he voters shall distinguish for whom they vote as Governor and for whom as Lieutenant Governor,” in sharp contrast to the constitutional language describing tied-ticket voting procedures: “the votes cast for a candidate for governor shall be considered as cast also for the candidate for lieutenant governor running jointly.”²⁷⁹ This voting process of course permits split-party election results as often as the electorate so chooses.²⁸⁰ A total of nineteen state constitutions organize the election

274. MD. CONST. art. II, § 1B.

275. See *supra* note 273.

276. N.J. CONST. art. V, § 1, para. 4.

277. See *supra* notes 210-38 and accompanying text.

278. DEL. CONST. art. III, § 19.

279. Compare TEX. CONST. art. IV, § 16(a) (amended 1999), with ALASKA CONST. art. III, § 8.

280. Statistics showing whether and how often a state electorate actually chooses a Governor from one party and a Lieutenant Governor from another party have not been calculated for the purposes of this Article. If such an analysis were performed and it showed the states that allow split tickets actually have elections with split winners, this may favor a split-ticket system if it showed a pattern of popular acceptance of such results and a good working relationship between the two party leaders. The only historical example of federal split-party election is when John Adams was a Federalist President and Thomas Jefferson was a Democratic-Republican Vice President in 1796. See *supra* notes 147-51 and accompanying text.

procedures of their executive branch in the “untied” manner suggested by Professor Friedman and the Amars.²⁸¹

The third form of selection is the least prevalent, where the constitutions in seven states follow neither the tied-ticket nor the untied ticket voting procedures described above.²⁸² The constitutions of Arizona, Oregon and Wyoming each have a Secretary of State rather than a Lieutenant Governor as the constitutional successor to the governor.²⁸³ The constitutions of Maine, New Hampshire, Tennessee, and West Virginia each have a single elected executive branch official, a governor who appoints all other executive officers in a manner similar to the federal nomination and appointment procedure.²⁸⁴ In these four states, the President of the Senate (who is not also the Lieutenant Governor of the state) is the successor to the Governor.²⁸⁵

When the two election systems for Governor and Lieutenant Governor are balanced against each other, the scale tilts in favor of a tied-ticket popular election system—twenty-four tied against nineteen untied.²⁸⁶ Thus, fifty-six percent of states who have organized their executive branch in a

281. See ALA. CONST. § 114; ARK. CONST. art. VI, § 3; CAL. CONST. art. V, § 11; DEL. CONST. art. III, § 19; GA. CONST. art. V, § 1, para. 3; IDAHO CONST. art. IV, § 2; LA. CONST. art. IV, § 3(A); MASS. CONST. pt. 1, ch. 2, §§ 2, art. I; MISS. CONST. art. V, § 128; MO. CONST. art. V, § 17; NEV. CONST. art. V, § 17; N.C. CONST. art. III, § 2(1); OKLA. CONST. art. VI, § 5; R.I. CONST. art. IX, § 1; S.C. CONST. art. IV, § 8; TEX. CONST. art. IV, § 16(a) (amended 1999); VT. CONST. § 20; VA. CONST. art. V, § 13; WASH. CONST. art. III, § 1; see also *supra* notes 210-38 and accompanying text.

282. See *infra* notes 283-84 and accompanying text.

283. See ARIZ. CONST. art. V, § 1A (Secretary of State); OR. CONST. art. V, § 8a (Secretary of State); WYO. CONST. art. IV, § 6 (Secretary of State). The primary difference in having a Secretary of State as the first successor to a Governor rather than having a lieutenant governor is that the Secretaries of State have more specific constitutionally or statutorily defined duties. Any disruption due to succession may serve to create a larger gap in the executive branch for a time where the lieutenant governor would have stepped right in and not necessarily left certain constitutionally prescribed duties unattended.

284. ME. CONST. art. V, § 14 (President of the Senate who is not an executive officer); N.H. CONST. art. III, § 49 (the President of the Senate who is not an executive officer); TENN. CONST. art. III, § 12 (Speaker of the Senate who is not an executive officer); W. VA. CONST. art. VII, § 16 (President of the Senate who is not an executive officer).

285. See *supra* note 284. This design also violates the separation of powers principle in that it allows a legislative officer to succeed an executive officer.

286. Compare ALASKA CONST. art. III, § 8; COLO. CONST. art. IV, § 3; CONN. CONST. art. IV, § 3; FLA. CONST. art. IV, § 5(a); HAW. CONST. art. V, § 2; ILL. CONST. art. V, § 4; IND. CONST. art. V, § 4; IOWA CONST. art. IV, § 3; KAN. CONST. art. I, § 1; KY. CONST. § 70; MD. CONST. art. II, § 1B; MICH. CONST. art. V, § 21; MINN. CONST. art. V, § 1; MONT. CONST. art. VI, § 2; NEB. CONST. art. IV, § 1; N.J. CONST. art. V, § 1, para. 4; N.M. CONST. art. V, § 1; N.Y. CONST. art. IV, § 1; N.D. CONST. art. V, § 3; OHIO CONST. art. III, § 1a; PA. CONST. art. IV, § 4; S.D. CONST. art. IV, § 2; UTAH CONST. art. VII, § 2(2); WIS. CONST. art. V, § 3; with ALA. CONST. § 114; ARK. CONST. art. VI, § 3; CAL. CONST. art. V, § 11; DEL. CONST. art. III, § 19; GA. CONST. art. V, § 1, para. 3; IDAHO CONST. art. IV, § 2; LA. CONST. art. IV, § 3(A); MASS. CONST. pt. 1, ch. 2, §§ 2, art. I; MISS. CONST. art. V, § 128; MO. CONST. art. III, § 17; NEV. CONST. art. V, § 17; N.C. CONST. art. III, § 2(1); OKLA. CONST. art. VI, § 5; R.I. CONST. art. IX, § 1; S.C. CONST. art. IV, § 8; TEX. CONST. art. IV, § 16(a) (amended 1999); VT. CONST. § 20; VA. CONST. art. V, § 13; WASH. CONST. art. III, § 1.

manner similar to the federal system have provided in their constitutions for tied-ticket elections.²⁸⁷ The question is then whether the remaining forty-four percent of the states who untie their elections demonstrate enough popular acceptance or even popular demand for changing the Presidential/Vice Presidential election system to reflect the collective will of the American people.²⁸⁸ Untying elections may be a more purely democratic form of selecting leaders, but do the advantages explained by Professor Friedman and the Amars and recognized by thirty-eight percent of the nation outweigh the disadvantages described by Professor Goldstein and recognized by forty-eight percent of the nation?²⁸⁹ Neither camp has attracted a majority of the states.²⁹⁰ But unlike the federal election system where state laws governing ballot design have led to tied-ticket elections,²⁹¹ twenty-four states have seen fit to constitutionalize their ticket-tying election systems.²⁹² Placing such measures in a constitution responds directly to the idea that citizens are crying out for more options at the ballot box. They are not.²⁹³ Therefore, the reasonable deduction from this analysis is that there is no overriding reason such as a popular mandate or trend towards further

287. Twenty-four states with tied-ticket elections for Governor/Lieutenant Governor out of forty-three total states with the Governor/Lieutenant Governor system.

288. It is indeed possible that nineteen states have the better system. Remember that the Framers of the original Constitution did not go with the most popular scheme generally when looking at multiple executive branch organizational schemes, which would have been some type of executive council over which the President would have presided. *See supra* note 75. Just because an election system has a minority of followers does not mean it is the worst system.

289. Nineteen out of fifty states equals thirty-eight percent of the nation; twenty-four out of fifty states equals forty-eight percent of the nation. *See also supra* notes 210-37.

290. The trend appears to be heading in the opposite direction from what Professor Friedman and the Amars would like to see. When the Amars briefly noted which states had tied elections in their 1992 article, there were nineteen states that included tied elections in their constitutions and another three that tied elections statutorily. *See Amar & Amar, supra* note 1. Today the three states that tied their elections statutorily—Alaska, Colorado, and Connecticut—now include tied elections in their respective constitutions. *See supra* note 27. Moreover, two new states have now tied their elections that had not done so in 1992—Kentucky and Nebraska. *Supra* note 27. Massachusetts appears to be the only state that has moved toward having untied elections. *Supra* note 27.

291. *See supra* note 213-17.

292. *See supra* note 270.

293. That is, for states to constitutionalize a ticket-tying system shows a stronger adherence to the practice than merely having statutes on the books or agency practices that could be rewritten or repealed at any time. *See supra* notes 213-17. This fact gives greater weight to Professor Goldstein's position—untying the ballots is not a change that is being supported by the majority of the states, and moreover the states are firmly behind the practice. *See Goldstein, Constitutional V.P., supra* note 1, at 554.

democratization to change the vice presidency again by providing for an election separate from the President.²⁹⁴

B. *The States on Additional Duties*

A review of the duties of the forty-three state Lieutenant Governor positions reveals a variety of formal functions and duties assigned to the second officer of each state whether or not the selection was based on a tied-ticket or untied-ticket election process.²⁹⁵ Sometimes the constitutional delegation of duties to the Lieutenant Governors is very similar to the delegation of duties to the Vice President in the Federal Constitution, while other times it is not at all similar.²⁹⁶ The delegation of duties to the lieutenant governors falls into four nonexclusive categories: 1) Lieutenant Governor as President of the Senate; 2) duties delegated to the Lieutenant Governor from the Governor; 3) duties provided by law and by the constitution, and 4) holding a separate office.²⁹⁷ Some lieutenant governors fit into multiple categories, while others fit only one category.²⁹⁸

The President of the Senate function is not an anomaly in American government.²⁹⁹ Just as Article I, Section Three, Clause Four provides that the Vice President is President of the Senate but may only cast a vote if the Senate is “equally divided,” twenty-four state constitutions provide that “[t]he Lieutenant Governor is President of the Senate”³⁰⁰ Multiple

294. There is no sign of a trend toward untying Governor/Lieutenant Governor elections, and in fact the opposite appears to be true. *See supra* notes 27, 290. If several states did change their systems from tied to untied elections, it is possible that the practice would reach a tipping point and soon a majority of states would have untied elections and there would be increased pressure on the federal government to implement the changes at least similar to those proposed by Professor Friedman and the Amars. This is not the reality Professor Friedman and the Amars are arguing from, however.

295. There appears to be no correlation between whether a Lieutenant Governor is given expanded or minimal duties and whether he was elected in at tied- or untied-ticket election process.

296. *See infra* notes 303-09 and accompanying text.

297. *See infra* notes 301-07 and accompanying text.

298. *See supra* notes 265-68 and accompanying text.

299. Professor Friedman calls the Vice President’s position as “President of the Senate” a “vestige of no benefit” that “should be eliminated.” *See* U.S. CONST. art. I, § 3, cl. 4; Friedman, *supra* note 1, at 1714. However, as this discussion shows, almost half of the states currently have their Lieutenant Governor acting as President of the Senate (more than half if one only counts the forty-three states with the Governor/Lieutenant Governor design). *See infra* note 300. Thus, approximately half of all Americans do not mind that there is some overlap between the executive and legislative branches.

300. *See* U.S. CONST. art. I, § 3, cl. 4; ALA. CONST. art. V, § 117; ARK. CONST. amend. VI, § 5; CAL. CONST. art. V, § 9; CONN. CONST. art. IV, § 17; DEL. CONST. art. III, § 19; GA. CONST. art. V, § 1, para. 3; IDAHO CONST. art. IV, § 13; IND. CONST. art. V, § 21; MICH. CONST. art. V, § 25; MISS. CONST. art. V, § 129; MO. CONST. art. IV, § 10; NEV. CONST. art. V, § 17; N.M. CONST. art. V, § 8; N.Y. CONST. art. IV, § 6; N.C. CONST. art. III, § 6; N.D. CONST. art. V, § 12; OKLA. CONST. art. VI, § 15; PA. CONST. art. IV, § 4; S.C. CONST. art. IV, § 10; S.D. CONST. art. IV, § 5; TEX. CONST. art. IV, § 16(b); VT. CONST. ch. II, § 19; VA. CONST. art. V, § 14; WASH. CONST. art. III, § 16.

states go beyond the clear and succinct wording of the Federal Constitution, however, and give additional descriptions of the lieutenant governors' duties as Senate President.³⁰¹ Connecticut, for example, provides that "when in committee of the whole, [the Lieutenant Governor has] a right to debate"³⁰² While the language is different from that of the Federal Constitution, it is not extraordinary; John Adams in his first term set a precedent for joining in Senate debates and actively making rulings from the chair.³⁰³ This language merely seems to reinforce the idea that the President of the Senate may indeed act as a presiding officer normally would. Several state constitutions also provide that the Lieutenant Governor has a right when the Senate is in committee of the whole not only to join in debate but "to vote on all subjects" as well as being the casting vote when there is a tie.³⁰⁴ Other states go further and allow the Lieutenant Governor, "where there is an equal division in the senate, or on a joint vote of both houses, [to] give the casting vote."³⁰⁵ The Pennsylvania Constitution, on the other hand, restricts its Lieutenant Governor's vote to any "case of a tie on any question except the final passage of a bill or [j]oint [r]esolution, the adoption of a [c]onference [r]eport or the concurrence in amendments made by the House of Representatives."³⁰⁶

Ultimately the distinctions between the Vice President's role as President of the Senate and the parallel design twenty-four states adopted for their respective Lieutenant Governors are slight. What Professor Friedman considers an unnecessary "legislative vestige" in the Federal Government is replicated by almost half of the fifty states and more than half of the states with an executive hierarchy similar to the President/Vice President model.³⁰⁷ It seems therefore that, whether or not it is a role rarely used in the Federal Government,³⁰⁸ it is not an anomaly in the greater American system.

301. See CONN. CONST. art. IV, § 17; IND. CONST. art. V, § 21; MISS. CONST. art. V, § 129; MO. CONST. art. IV, § 10; OKLA. CONST. art. VI, § 15; PA. CONST. art. IV, § 4; TEX. CONST. art. IV, § 16(b); WASH. CONST. art. III, § 16.

302. CONN. CONST. art. IV, § 17.

303. See WILLIAMS, *supra* note 1, at 23.

304. See IND. CONST. art. V, § 21; TEX. CONST. art. IV, § 16(b).

305. See MISS. CONST. art. V, § 129; MO. CONST. art. IV, § 10; OKLA. CONST. art. VI, § 15.

306. See PA. CONST. art. IV, § 4.

307. See *supra* notes 300-01 and accompanying text. Twenty-four states give the Lieutenant Governor employment as President of the State Senate: forty-eight percent of all states and fifty-six percent of Governor/Lieutenant Governor states. *Id.*

308. See Arthur M. Schlesinger, *On the Presidential Succession*, 89 POL. SCI. Q. 475, 479 (1974) (saying "the Vice President's constitutional employment soon became a farce" when it came to the President of the Senate duties); Friedman, *supra* note 1, at 1708 n.16 ("Garner was the last vice

Without an overarching reason to do away with the Senate leadership function of the vice presidency, it seems the American people are content in keeping the “amphibious” position as it has stood for almost 220 years.³⁰⁹ Whether such a reason is present today therefore depends much upon what other duties the position could be performing in place of being President of the Senate.

The second category, performing duties delegated by the higher official, is a function of the second officer that has existed since the earliest days of the Union, although the Federal Constitution is silent on delegation from the President to the Vice President.³¹⁰ History has shown great inconsistency in the frequency and importance of presidential delegations in the federal system, however: John Adams played an important role in advising George Washington;³¹¹ Thomas Jefferson felt it against the nature of the vice presidency to be delegated duties from or to assist the President when he held the office under John Adams;³¹² for over a century Vice Presidents were unimportant and unimpressive figureheads who contributed nothing to the national government;³¹³ and modern Vice Presidents have been favored with an increasing number of duties of the highest importance in governing the nation and forming national and international policy.³¹⁴ Eighteen states have expressly provided for delegation of executive duties similar to the federal system in their constitutions.³¹⁵ The typical delegation language is “[h]e shall perform such duties . . . as may be delegated to him by the governor,”³¹⁶ but other phrases such as “duties assigned by the governor,”³¹⁷ “executive duties prescribed by the governor,”³¹⁸ “[t]he lieutenant governor shall assist the governor,”³¹⁹ and “duties requested of him by the

president to fulfill the office of Senate president diligently.”) (quoting Nelson, *Background Paper*, in *A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE PRESIDENCY* 33 (1988)).

309. Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 122 n.55 (1995). “Amphibious” means that the Vice President is part of both the executive and the legislative branches in at least some respects. *Id.*

310. *See supra* notes 142-43 and accompanying text.

311. *See supra* notes 142-43 and accompanying text.

312. *See supra* notes 147, 149-51 and accompanying text.

313. *See supra* notes 157-86 and accompanying text.

314. *See supra* notes 187-99 and accompanying text.

315. *See* ALASKA CONST. art. III, § 7; FLA. CONST. art. IV, § 2; GA. CONST. art. V, § 1, para. 3; ILL. CONST. art. V, § 14; IOWA CONST. art. IV, § 18; KAN. CONST. art. I, § 12; KY. CONST. § 72; LA. CONST. art. IV, § 6; MD. CONST. art. II, § 1A; MICH. CONST. art. V, § 25; MONT. CONST. art. VI, § 4(2); NEB. CONST. art. IV, § 16; N.J. CONST. art. V, § 1, para. 10(b); N.C. CONST. art. III, § 6; N.D. CONST. art. V, § 7; OHIO CONST. art. III, § 01b; S.D. CONST. art. IV, § 5; UTAH CONST. art. VII, § 14.

316. *See* ALASKA CONST. art. III, § 7.

317. *See* FLA. CONST. art. IV, § 2.

318. *See* GA. CONST. art. V, § 1, para. 3.

319. *See* KAN. CONST. art. I, § 12.

governor,”³²⁰ are also used in various state constitutions. The twenty-five other state constitutions are silent as to the delegation of executive duties by the governor to the lieutenant governor.³²¹ Because the Federal Constitution is also silent on the point of executive delegation and assignment, the federal and state practices are not inconsistent with each other, and therefore, all forty-three states are in line with the federal system and vice versa.³²²

The third category of duties assigned to the state lieutenant governors, those provided by law or by the constitutions, essentially supplements the delegation of duties discussed above.³²³ There is no federal provision in the Constitution permitting the legislative branch to assign additional duties by statute to the Vice President;³²⁴ the Constitution assigns no duties beyond succeeding the President when necessary and acting as President of the Senate.³²⁵ The twenty-one state constitutional provisions that allow for additional duties of the Lieutenant Governor to be “prescribed by [their] constitution[s] or by law” therefore go beyond the current federal system and empower the state legislatures to assign duties other than those expressly written in the state constitutions.³²⁶ Examples of constitutional duties other than Senate leadership and delegated executive duties are being “member of the Board of Pardons,”³²⁷ being an “ex officio . . . member of each committee, board, and commission on which the governor serves,”³²⁸ being a “member of [the executive] council”³²⁹ or “council of state,”³³⁰ and being

320. See MICH. CONST. art. V, § 25.

321. See generally ALA. CONST.; ARK. CONST.; CAL. CONST.; COLO. CONST.; CONN. CONST.; DEL. CONST.; HAW. CONST.; IDAHO CONST.; IND. CONST.; MASS. CONST.; MINN. CONST.; MISS. CONST.; MO. CONST.; NEV. CONST.; N.M. CONST.; N.Y. CONST.; OKLA. CONST.; PA. CONST.; R.I. CONST.; S.C. CONST.; TENN. CONST.; TEX. CONST.; VT. CONST.; VA. CONST.; WASH. CONST.; WIS. CONST.

322. See generally U.S. CONST. art. II.

323. See *supra* notes 299-322.

324. See U.S. CONST. art. I, § 3, cl. 4.

325. See U.S. CONST. art. I, § 3, cl. 4; U.S. CONST. art. II, § 1, cl. 5, *amended by* U.S. CONST. amend. XXV.

326. See ALASKA CONST. art. III, § 7; COLO. CONST. art. IV, § 1; DEL. CONST. art. III, § 19; FLA. CONST. art. IV, § 2; GA. CONST. art. V, § 1, para. 3; HAW. CONST. art. V, § 2; IDAHO CONST. art. IV, § 1; IOWA CONST. art. IV, § 3; KAN. CONST. art. I, § 12; KY. CONST. § 72; LA. CONST. art. IV, § 6; MASS. CONST. pt. 2, ch. 2, § 2, art. II; MONT. CONST. art. VI, § 4; N.J. CONST. art. V, § 1, para. 10(b); N.C. CONST. art. III, § 6; N.D. CONST. art. V, § 7; OHIO CONST. art. III, § 01b; OKLA. CONST. art. VI, § 1A; UTAH CONST. art. VII, § 1(2)(c); VT. CONST. § 20; WASH. CONST. art. III, § 16.

327. See DEL. CONST. art. III, § 19.

328. See LA. CONST. art. IV, § 6.

329. See MASS. CONST. pt. 2, ch. 2, § 2, art. II.

330. See N.C. CONST. art. III, § 6.

“Lieutenant-General of all the [military] forces of the state.”³³¹ The possible extent of duties assigned to the Lieutenant Governor by statute are virtually limitless provided that they are not inconsistent with the constitution and duties of the state’s governor or other executive branch officials described in the state constitution.³³² This fact coupled with the fact that twenty-one states (forty-nine percent of those with lieutenant governors) expressly provide for duties to be given to the state’s second-highest officer beyond those the governor deems to delegate, seems to lean in Professor Friedman’s favor.³³³ Thus, many states appear to favor the idea of giving the second-highest officer more substantive duties in the government rather than leaving it at the whim of the Governor.³³⁴ Furthermore, the three states that have a

331. See VT. CONST. § 20.

332. See *supra* note 176.

333. This is because there are no states balancing the other way; that is, there are no states restricting the powers of the Lieutenant Governor. Every state that provides for the legislature assigning duties to the Lieutenant Governor beyond what the governor assigns brings the nation closer towards a consensus that the second-highest ranking officer should have more and substantive duties rather than act only at the behest of the top officer. The vice presidency has at least partially moved in this direction as well, although no constitutional steps have been taken. See *supra* note 176.

334. There is of course a foreign policy component to the federal executive branch that is not typically a major factor in state elections and state executive powers. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Certain foreign policy concerns are faced by the President and not any Governors and a unitary executive (one without a Vice President strengthened with duties beyond what the President deems to delegate) could cause problems in an administration. See *id.* Justice Sutherland in *Curtiss-Wright* detailed the President’s foreign policy power as such:

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As [future Chief Justice John] Marshall said [as a U.S. Representative] in his great argument of March 7, 1800, in the House of Representatives, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”

Id. at 319 (internal citation omitted); see also *KMIEC ET AL.*, *supra* note 11, at 274-75 (quoting Thomas Jefferson, saying “[t]he transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department except as to such portion of it as are specially submitted to the Senate. Arguably, too, exceptions to the theorem are to be construed strictly”). This may be an overriding concern that counterbalances any further movement towards giving the Vice President more substantive and permanent duties.

The Amars have addressed this concern, however, by speaking to the possibility of a loose cannon effect:

Internal consistency arguments counsel against a divided executive out of concern over the damage potentially done by a Vice President acting as a loose cannon—challenging, undermining, and contradicting the President’s efforts to set policy. This concern distinguishes the federal executive context from that of the states, to some extent, because a loose cannon would be most dangerous in the foreign affairs domain, where state executives play no significant part and where the President often does speak in the voice of the nation. This internal consistency concern, although plausible, does not seem to

Secretary of State as the first successor to the governor³³⁵ make their second-highest offices ones with constitutionally or statutorily assigned executive duties.³³⁶ This design also seems to lean in favor of providing Vice Presidents with their own constitutionally or statutorily assigned executive duties, but it remains a small minority.³³⁷

The fourth category of executive duties for the second-highest office directly corresponds with Professor Friedman's idea of allowing the Vice President to hold a major office in addition to the vice presidency.³³⁸ It turns out that his idea is not wholly unprecedented in the American system—the New Jersey Constitution created a Lieutenant Governor who is constitutionally allowed to be appointed to be the head of a principal department or state agency in addition to being delegated other responsibilities by the Governor.³³⁹ The relevant portion of the New Jersey Constitution reads:

The Governor shall appoint the Lieutenant Governor to serve as the head of a principal department or other executive or administrative

justify the prohibition on ticket splitting.

Amar & Amar, *supra* note 1, at 938. Indeed, they provide several examples of past loose cannons in administrations with a President and a Vice President of the same party:

Aaron Burr is, ironically, a good example. As one commentator put it, President “Jefferson ignored Burr on all matters of state and even in questions of patronage involving Burr’s home state of New York. As presiding officer of the Senate, Burr made clear he was not Jefferson’s agent, breaking one tie vote against an administration bill.” Burr is by no means the only example. Both Franklin Roosevelt’s first and second Vice Presidents, John Garner and Henry Wallace, were often at odds with the policies of the President they purported to serve.

Id. at 938 n.73 (internal citations omitted). Additionally “[t]here was little continuity when Vice Presidents John Tyler, Andrew Johnson, and Theodore Roosevelt replaced Presidents who died in office.” *Id.* at 939 n.76.

335. ARIZ. CONST. art. V, § 1A (Secretary of State); OR. CONST. art. V, § 8a (Secretary of State); WYO. CONST. art. IV, § 6 (Secretary of State).

336. ARIZ. CONST. art. V, § 9 (“The powers and duties of Secretary of State . . . shall be as prescribed by law”); OR. CONST. art. VI, § 2 (“The Secretary of State shall keep a fair record of the official acts of the Legislative Assembly, and Executive Department of the State; and shall when required lay the same, and all matters relative thereto before either branch of the Legislative Assembly. He shall be by virtue of his office, Auditor of public Accounts, and shall perform such other duties as shall be assigned him by law.”); WYO. CONST. art. IV, § 12 (“The powers and duties of the secretary of state . . . shall be as prescribed by law . . .”).

337. This design actually appears to give the greatest backing to the idea of enhancing duties delegated from the President to the Vice President with additional constitutional or statutory duties. Beyond being made a member of the National Security Counsel, the Vice President’s duties continue to depend on the decisions of individual Presidents. *See supra* notes 176, 187-199.

338. *See supra* notes 239-50.

339. N.J. CONST. art. V, § 1, para. 10(b).

agency of State government, or delegate to the Lieutenant Governor duties of the office of Governor, or both. The Governor shall not appoint the Lieutenant Governor to serve as Attorney General. The Lieutenant Governor shall in addition perform such other duties as may be provided by law Each principal department shall be under the supervision of the Governor. The head of each principal department shall be a single executive unless otherwise provided by law. Such single executives shall be nominated and appointed by the Governor, with the advice and consent of the Senate, to serve at the pleasure of the governor The Governor may appoint the Lieutenant Governor to serve as the head of a principal department, without the advice and consent of the Senate, and to serve at the pleasure of the Governor during the Governor's term of office.³⁴⁰

Perhaps this description of the Lieutenant Governor's role in the executive branch of one state government is close to what Professor Friedman had in mind for the Vice President's role in the Executive Branch of the Federal Government.³⁴¹

On the negative side for Professor Friedman, there is only one state that has seen fit to permit the Governor to appoint the Lieutenant Governor to the head of a principle department or administrative agency in the state.³⁴² Additionally, New Jersey does not assign the Lieutenant Governor the role of President of the Senate, a role which may cause problems if the vice presidency were changed to follow either New Jersey's design or Professor Friedman's design.³⁴³ On the positive side for Professor Friedman, there is at least one precedent for this Executive Branch organizational scheme, and, moreover, New Jersey felt it prudent to eliminate the advice and consent function of the Senate when the Governor appointed the Lieutenant Governor as a principle department or agency head.³⁴⁴

340. See N.J. CONST. art. V, § 1, para. 10(b); art. V, § 4, para. 2.

341. Professor Friedman did not mention the New Jersey Constitution or governmental design when discussing his proposal for giving the Vice President additional duties. See generally Friedman, *supra* note 1.

342. See N.J. CONST. art. V, § 1, para. 10(b); art. V, § 4, para. 2.

343. Professor Friedman already believes, however, that the "legislative vestige" should be eliminated. See Friedman, *supra* note 1, at 1714. Whether any benefits would accrue from eliminating the President of the Senate function remains an open question, but Friedman argues that "[w]ithout the vice-president, the Senate would simply select its own presiding officer, as does the House. On tie votes, the proposal would fail, as it does in the House. And the Republic would survive." *Id.* at 1714 n.43. Friedman also claims that "harm would arise if the vice-president's function in the Senate were held or feared to be a constitutional obstacle to the vice-president's ability to hold other political office." *Id.* at 1714 n.44. But whether it would be an improvement for the Vice President to hold an additional office remains uncertain. See *supra* notes 251-55 and accompanying text.

344. See U.S. CONST. art. II, § 2, cl. 2; see also N.J. CONST. art. V, § 1, para. 10(b); art. V, § 4, para. 2. This precedent would take away some of the political drawbacks Professor Friedman

Presently there is little reason the Federal Constitution should follow the trail-blazing State of New Jersey and provide for vice presidential appointment to a separate, major position within the Executive Branch, but at least there is now a state to watch and examine for such a change in the future. In the spirit of states as laboratories of experiment, it is imperative that Professor Friedman follow with close interest the success (or failure) of the New Jersey system and re-propose his idea for change sometime in the future with additional evidence to support his theory. Perhaps other states will see the success of New Jersey's Lieutenant Governor and create the same or similar designs to their executive branch structure, thereby giving extra weight to Professor Friedman's proposal, creating movement towards a national tipping point. That time is not yet here, however.

C. *The Results of this Methodology*

After applying this state constitution-based methodology, the results are in. As to having a separate election for Vice President, the evidence presents no compelling reason to change from the system that is currently in place.³⁴⁵ The nation as a whole is neither crying out for separate elections nor even much bothered by a slight lack of pure electoral choice.³⁴⁶ More than half of the states with a Governor/Lieutenant Governor system that parallels the federal system tie their elections and do so in the most permanent fashion possible—constitutionally.³⁴⁷ The modern rise of the vice presidency has taken the office from the mire that it wallowed in for many decades and has placed it on a pedestal where it is polished and praised with increasing enthusiasm. Without a more dramatic state trend toward untied elections, many of the second-highest office's flaws seem to be things of the past—more able men and women are being attracted to and elected for the office;³⁴⁸ Vice Presidents are being given more and more trust and

recognized and Professor Goldstein cited as problems with appointing the Vice President to a separate executive office. See Friedman, *supra* note 1, at 1716-19; Goldstein, *Constitutional V.P.*, *supra* note 1, at 556-57.

345. Ultimately, the principles of democracy seem to be operating fine, both nationally and in the several states, and the abilities of recent Vice Presidents are continuing to bring vigor and prestige to the formerly despised second office. See *supra* notes 187-199 and accompanying text.

346. The Amars' argument against "inertia" is only a strong argument if there are substantial benefits to be gained from a proposed change. See Amar & Amar, *supra* note 1, at 942-44. Any major change to a constitutional institution such as the vice presidency without a compelling reason would be as equally "stupid" and "blind" as not changing because of simple inertia. See *id.*

347. See *supra* note 270 and accompanying text.

348. Compare *supra* notes 157-63 and accompanying text, with *supra* notes 187-199 and accompanying text.

responsibilities in their administrations;³⁴⁹ and the jokes and criticisms have turned from being based on uselessness and scorn to being based on too much influence and power.³⁵⁰ The states, therefore, do not offer any compelling reason to change the present common law development of the office commended by Professor Goldstein in favor of the more formal and active changes proposed by Professor Friedman and the Amars.

The second proposal—giving the Vice President the more formal duties of a Cabinet officer or similar post to supplement the constitutional duties of Senate President and succession—appeared to have more promise on its face. Many state constitutions expressly provide for the delegation of duties to the second-highest office from the Chief Executive.³⁵¹ This goes beyond the Federal Constitution's language, but is not a novel idea because in practice the vice presidency has been increasingly favored with choice executive assignments delegated by the President.³⁵² Adding language similar to the state constitutions would seem superfluous. Even more states provide specifically for the legislature imparting additional duties in the constitution or by statute on the state's second officer.³⁵³ This has occurred at least once in the federal system when the Vice President became a statutory member of the National Security Counsel,³⁵⁴ but going further would seem to violate the separation of powers principle,³⁵⁵ and may not translate well between the plural state systems with multiple popularly elected executive officers and the unitary federal executive model.³⁵⁶

Finally, as to the specific proposal of appointing the Vice President to a Cabinet-level post in addition to his constitutional duties, there is just not enough precedent to rely upon for a President to implement such a change.³⁵⁷ While New Jersey has written into its constitution a design similar to Professor Friedman's proposal, there is no evidence at this time of its successes or failures.³⁵⁸ In time, perhaps, this model will prove to be a

349. *See supra* notes 187-199 and accompanying text.

350. *Compare supra* note 126, with *supra* notes 198-99 and accompanying text.

351. *See supra* notes 315-20 and accompanying text.

352. *See supra* notes 187-199 and accompanying text.

353. *See supra* notes 326-33 and accompanying text.

354. *See supra* note 175.

355. If Congress started assigning duties to the Vice President, an officer who historically has only performed duties as delegated by the President, there may erupt a constitutional battle over the vice presidency (which may or may not be a positive thing).

356. Many states have multiple executive officers who are popularly elected beyond the Governor and Lieutenant Governor. *See, e.g., supra* note 266. The federal government only has two: the President and the Vice President, with the President receiving all of the delegated executive power. *See* U.S. CONST. art. II, § 1; art. II, § 2, cl. 1.

357. *See supra* notes 338-44 and accompanying text, and text following note 44.

358. *See supra* notes 338-44 and accompanying text, and text following note 44.

better system for preparing future Vice Presidents for succession, but that time has yet to come.

VI. CONCLUSION

In the grand scheme of things, the form and structure of the American vice presidency pops up on people's radars, perhaps, once every four years, if they follow the Presidential election cycles and the news media devotes any amount of time to it. There is, therefore, no better time than the present to bring to the public's collective attention any issues regarding the nation's second-highest office, as the 2008 election cycle is fast approaching. It is a particularly appropriate time to examine the role the Vice President takes in governing the American polity because President George W. Bush is constitutionally ineligible for another term,³⁵⁹ and Vice President Dick Cheney claims to have no political ambitions beyond his present term,³⁶⁰ meaning it is almost a certainty there will be a new Vice President sworn in at noon on January 20, 2009.³⁶¹ But performing a careful public examination of the office does not require that any imperfections that are found be remedied immediately. Remember, the Constitution is nearing its two hundred twentieth birthday and yet it remains very similar to its original form.³⁶² Edward R. Murrow explained this point nicely:

The American system of government is revered by its people, admired by its foreign friends, respected by most of its opponents, and understood in its entirety by only a few specialists, who, however, do not always agree about it. As an organism it is complex and often obscure. Not unlike the organism of the body, its strengths and its weaknesses are not always easy to account for. The fact that the system has survived so long in a changing world, and seems likely to go on surviving, certainly proves that it is viable, and what has been said about the wisdom shown in devising it is justified. To be sure, part of the wisdom was to allow the

359. See U.S. CONST. amend. XXII (limiting Presidents to two terms).

360. See Walsh et al., *supra* note 196, at 40 (reporting that Cheney "has no plans to run for the top job himself").

361. See U.S. CONST. amend. XX, § 1 ("The terms of the President and Vice President shall end at noon on the 20th day of January . . . and the terms of their successors shall then begin.").

362. With only twenty-seven amendments in almost 220 years (ten coming immediately), there has been relatively little change to the Federal Constitution since its ratification. See U.S. CONST. amend. I-XXVII. Discounting the Bill of Rights, the Constitution has been amended less than once per decade, on average.

system to be adapted to new conditions. The Constitution has been drastically modified, and in many other ways the present form of government departs from the original design of the Constitutional Convention. But modern America differs still more from colonial America which had just won its independence, so the original plan had plenty of merit.³⁶³

With this in mind, it behooves anyone who champions any major changes through either constitutional amendment or executive policy to reflect first upon the magnitude of the imperfection, second upon the magnitude of the change suggested, and finally upon the popular outcry of the American public for or against change. This Article has attempted to do just that.

Ultimately, today's vice presidency is not the office it was in 1787, 1887, or even 1987. It has undergone perhaps more reconstructive surgery and rehabilitation than any area of the Federal Constitution, and it looks better than it ever has. It has relied upon gradual common law changes since the Twenty-Fifth Amendment in 1967, and there appears to be no reason for it to depart from the successful path it has finally found. Other scholars have suggested reasons for change and against change, and this Article now confirms that the American people, as represented through their state constitutions, see no reason for further active change. And especially with the American system of dual sovereignties, it is almost always appropriate to examine the states when examining the federal government. Why? Because they have been the best guides since 1787.

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363. See WILLIAMS, *supra* note 1, at v.

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