

## THE TRANSFORMATIVE TWELFTH AMENDMENT

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### ABSTRACT

*Scholars have long treated the Twelfth Amendment as a constitutional obscurity, a merely mechanical adjustment to the electoral college—and perhaps a less than successful one at that. This consensus is mistaken. In fact, the Twelfth Amendment accomplished one of the most consequential changes to the structure of our constitutional government yet. It fundamentally altered the nature of the Executive and the Executive’s relationship to the other branches of government. The Amendment changed the Executive into something it had not been before: a political office. The presidency designed at Philadelphia was intended to be neither a policymaking nor a representative institution, but rather an apolitical office standing above partisan conflict. The Twelfth Amendment changed this design. It converted the electoral college into a form of public election, facilitating organized political competition for the presidency and linking the office to popular majorities. This revision of the electoral college had twin structural effects. First, the Amendment unified the executive branch under the political control of the President and made single-party control of the Executive a near certainty. Second, the Amendment changed the Executive’s relationship to Congress by conferring on the President new warrants for political action and a representative status it had not previously enjoyed. Together, these structural changes altered the very nature of the Executive—and along with it, the meaning of “executive power.”*

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*This Article concludes with a close analysis of the Amendment's interpretive implications for contested questions of executive power, including the President's power to remove subordinates, to conclude treaties and executive agreements, and to exercise directive authority over administrative agencies.*

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*“The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President and of the number of votes for each.... The person having the greatest Number of votes for President, shall be President, if such number a majority of the whole number of Electors appointed; and if no person have such a majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.”*

—U.S. Constitution, Amendment XII (1804).

## INTRODUCTION

It is time the Twelfth Amendment got its due. For years, the Amendment has been regarded as a constitutional nonentity—a piece of textual fiddling not worth remembering or one that, if it bears any significance at all, serves only to illustrate the irredeemable absurdity of the electoral college.<sup>1</sup> Legal scholars have all but ignored the text; historians, similarly, have given it little attention.<sup>2</sup>

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1. Typical of this view is Steven G. Calabresi, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. CHI. L. REV. 469, 475-76 (2006). Calabresi concludes the Twelfth Amendment “made one small technical change in the Founders’ machinery of government” that had little practical effect. *See id.* On this point at least, Bruce Ackerman and Calabresi agree. *See* BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 247 (2005) (arguing that the Twelfth Amendment “is the very opposite of a serious attempt” to solve the problems posed by the crisis of 1800). Others have called the Twelfth Amendment a “constitutional stupidity.” *See, e.g.*, Akhil Reed Amar, *An Accident Waiting to Happen*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 15, 15-17 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); *see also* SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 178-90 (2012). When they have bothered to pay attention to the Amendment at all, scholars and commentators have generally neglected to investigate what the Amendment’s drafters were attempting to do, thereby missing the Amendment’s true significance. *See, e.g.*, DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801-1829*, at 40-41, 64 (2001); GARRY WILLS, “NEGRO PRESIDENT”: JEFFERSON AND THE SLAVE POWER 106-13 (2003).

2. Although there have been over 1,200 articles published in academic legal journals analyzing the electoral college in the context of the disputed 2000 presidential election,

The conclusion that the Amendment is inconsequential is prevalent and well-established. It is also wrong. Contrary to decades' worth of conventional wisdom, the Twelfth Amendment is in fact a transformative constitutional text that fundamentally altered the structure of American government by altering the character of the presidency and its relationship to the government's other branches. Indeed, the Twelfth Amendment is in many senses responsible for

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Journal and Article Search for Presidential Election, WESTLAW NEXT, <http://westlawnext.com> (searching for "2000 presidential election" and "electoral college"), only two full-length law review articles have addressed themselves to the Twelfth Amendment. The first is Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 925-26 (2001). That article is far more interested in *Bush v. Gore* than in the Amendment itself, however. *See id.* at 955-56. More recently, David Fontana has noticed the Twelfth Amendment's significance for the modern separation of powers. *See* David Fontana, *The Second American Revolution in the Separation of Powers*, 87 TEX. L. REV. 1409 (2009). Fontana is principally interested in the political homogeneity the Twelfth Amendment helped introduce to the executive branch, in contrast to the heterogeneity typical in many European governments and other "presidentialist" systems. *Id.* at 1409-10, 1418. This is an important insight. Fontana does not notice, however, that the political homogeneity the Twelfth Amendment helped produce is in fact only one element of the broader structural transformation the text achieved—namely, the conversion of the presidency into a political office. *See id.* at 1429 (explaining that his conclusion focuses solely on the homogeneity of executive power). Nor does Fontana show any interest in the significance of the Amendment for the meaning and practice of executive power. *Id.* One scholar who has recognized the connection between the Twelfth Amendment and presidential practice is the political scientist Jeremy Bailey. *See* JEREMY D. BAILEY, THOMAS JEFFERSON AND EXECUTIVE POWER 195-224 (2007). But Bailey again misses the structural changes the Twelfth Amendment implemented and its central role in the rise of the political presidency. *See id.* at 220-24 (explaining his research in terms of the politics of character). The Amendment has received some limited scholarly attention in book form. Tadahisa Kuroda has written an admirable account of the Amendment's ratification. *See generally* TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804 (1994) (examining the inception and history of the electoral college). Lolabel House made an early effort at exploring the Amendment's constitutional implications, particularly as they concern political parties. *See generally* Lolabel House, A Study of the Twelfth Amendment of the Constitution of the United States (1901) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with University of Michigan). More recently, Akhil Amar has recognized that the Twelfth Amendment "worked rather large changes in the basic structure of the American presidency and its relation to other parts of the American constitutional order." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 342 (2005). Amar is mostly interested, however, in the political influence the Amendment conferred on slave states. *See id.* at 345-47. For his part, Bruce Ackerman understands that the election of 1800 marked a seminal moment in the development of the American presidency, *see* ACKERMAN, *supra* note 1, at 142-62, but gives virtually no attention, and assigns no significance, to the Twelfth Amendment. In short, the Amendment awaits a full-scale analysis of its meaning, its effects, and its radical import.

the modern separation of powers and the presidency as we know it today.

The Twelfth Amendment changed the presidency by making it into something it had not been before: a political office. This change in the basic character of the Executive is a fact long overlooked by legal scholars, but one which has major import not only for the functioning of the constitutional system, but also for the meaning of the “executive power” referenced in Article II, Section 1,<sup>3</sup> as well as the other, enumerated powers of Sections 2 and 3.<sup>4</sup> The Executive designed at Philadelphia was an utterly original invention, so much that the Framers reached little consensus among themselves on how precisely it would operate.<sup>5</sup> What they did agree on was that the President was not to be a political actor.<sup>6</sup> In the Framers’ scheme, Congress was the branch that represented the people and the branch that made policy; it was Congress that stood at the center of the Madisonian plan to “refine and enlarge” popular opinion into a truly public-spirited national will.<sup>7</sup>

By contrast, the original Constitution cast the Executive as a check on congressional excess and as an enforcer of congressional laws.<sup>8</sup> Under the direction of a single President, the executive department would supply “energy” to law enforcement and enable the national government to meet emergencies with dispatch.<sup>9</sup> But beyond devising rules for consistent law administration, the President was not to advance policy on his<sup>10</sup> own.<sup>11</sup> No Framers imagined the President as the proponent of a legislative agenda, still less as the advocate of a particular political philosophy or spokesperson for political faction.<sup>12</sup> And the Framers certainly did

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3. U.S. CONST. art. II, § 1.

4. U.S. CONST. art. II, §§ 2-3.

5. *See, e.g.*, James Madison, Notes on the Constitutional Convention (June 1, 1787), reprinted in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64, 65-67 (Max Farrand ed., 1937).

6. *See infra* Part I.A-B.

7. THE FEDERALIST NO. 10, at 133-34 (James Madison) (Benjamin Fletcher Wright ed., 1961).

8. *See infra* notes 56-61 and accompanying text.

9. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 64, 65-67.

10. I use the male pronoun generically here and elsewhere when referring to the Executive.

11. *See, e.g.*, *infra* notes 152-57 and accompanying text.

12. *See, e.g.*, *infra* notes 152-57 and accompanying text.

not envision presidential election as the signal political event of the national republic, organizing the country's politics and driving its political debate.<sup>13</sup>

All those things happened after Philadelphia, and all of them were made lasting by the Twelfth Amendment. The text altered constitutional structure in critical ways. By instructing electors to designate which of their ballots was cast for President, and which for Vice-President, the Amendment facilitated organized electoral competition for the presidency, connecting the office to popular majorities in a way it had not been before.<sup>14</sup> As it made the presidency more majoritarian, this change in balloting eroded the independence of the Vice-President and denigrated that office's political significance, rendering the executive branch at once more politically homogeneous and more politically unified under presidential control.<sup>15</sup> Coupled with further changes that reduced the number of candidates referred to the House of Representatives in the event of a disputed election, the total effect of the Amendment was to make the presidency a more truly representative and more populist *political* institution.<sup>16</sup> And this internal change in the Executive's character worked an external shift in the Executive's structural relationship to the other branches. The presidency's new connection with the public conferred on the office new warrants for exerting political leadership and also conveyed new incentives to act and lead, as well.<sup>17</sup> After the Twelfth Amendment, the presidency would become and remain an active, co-equally political branch.

This mostly forgotten history has potentially broad implications for the meaning of the President's executive power and for his place in the Constitution's scheme of separated powers. This is because the content of executive authority is perhaps uniquely determined by constitutional structure. The text of Article II provides notoriously little guidance as to what executive power really consists of. Section 1's reference to "the executive power" leaves that term undefined,<sup>18</sup> and the list of discrete authorities conferred on the

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13. See THE FEDERALIST NO. 68, *supra* note 7, at 373-74 (Alexander Hamilton).

14. See *infra* Part IV.C.1.

15. See *infra* Part III.A.2.

16. See *infra* Part III.A.1.

17. See *infra* Part III.B.2.

18. U.S. CONST. art. II, § 1.

President in Sections 2 and 3 is terse, if not Delphic, and susceptible to widely divergent interpretations.<sup>19</sup> Justice Robert Jackson famously observed sixty years ago that “[j]ust what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”<sup>20</sup>

And indeed, the powers and responsibilities outlined in Article II may mean quite different things depending on the character of the office to which they belong. The President’s power to recommend to Congress “such Measures as he shall judge necessary and expedient,”<sup>21</sup> for instance, or to appoint officers of the United States<sup>22</sup> or to negotiate treaties,<sup>23</sup> appear in one light if exercised by an apolitical officer whose principal function is to facilitate congressional government, and in quite another if deployed by an elected representative of the people with authority to make policy and engage in political dispute.

By transforming the presidency from an apolitical office into a robustly political one, the Twelfth Amendment transformed the constitutional order. In the Parts that follow, I propose to examine this structural shift and its consequences. I begin in Part I with a fresh analysis of the Executive that the Framers actually designed, finding it to be notably different from the one legal scholars all too frequently presume them to have intended. When we set aside modernist assumptions about presidential power and resist the urge to read later constitutional developments back into the text, we discover that the Framers’ Executive was an institution insulated from, rather than connected to, the people. In Part II, I trace the discovery in the 1790s of the presidency’s political potential, a discovery that proved so disruptive that it threatened a constitutional crisis. That crisis led ultimately to a new conception of the presidency, developed by the Republicans and articulated by their

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19. Sections 2 and 3 confer eight or possibly nine specific powers on the Executive, depending on whether one reads Section 3’s “he shall receive Ambassadors and other public Ministers” as a power or a duty. U.S. CONST. art. II, §§ 2-3.

20. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

21. U.S. CONST. art. II, § 3.

22. U.S. CONST. art. II, § 2, cl. 2.

23. *Id.*



leader, Thomas Jefferson. And it inspired a constitutional renovation in the form of the Twelfth Amendment. In Part III, I turn to the Amendment itself, describing its path through Congress and the structural change its drafters intended it to accomplish. I conclude this Part with a close analysis of the Amendment's structural effects and their consequences.

Having thoroughly analyzed the Amendment's text, history, and structural significance, I turn in Part IV to examine the Amendment's possible legal consequences by reference to one particularly enduring question of presidential power, the President's authority to remove executive officials without congressional approval.<sup>24</sup> The removal debate is of course longstanding, stretching back to the First Congress.<sup>25</sup> It remains an open—and fiercely contested—question today. It is in some sense the paradigmatic question of executive power, implicating the meaning of the Article II Vesting Clause,<sup>26</sup> the enumerated executive powers of Article II, Sections 2 and 3; and Congress's Article I authority to structure the executive branch.<sup>27</sup>

The removal debate is also at a standstill, thanks largely to the ambivalence of the 1787 text and its associated history.<sup>28</sup> In this sense, the removal debate represents in microcosm the signature difficulties in interpreting executive power. Structural reasoning on the basis of the Twelfth Amendment has the potential to break the logjam. And this is only one possible application of the story of the Twelfth Amendment. I conclude Part IV by looking briefly at two other applications, the President's treaty power and his directive authority over administrative agencies. No doubt still more could be named. For whatever the precise application, the core point is this: to understand America's constitutional presidency, one must understand the Twelfth Amendment.

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24. See *infra* Part IV.B.

25. See *infra* notes 475-83 and accompanying text.

26. U.S. CONST. art. II, § 1.

27. U.S. CONST. art. I, § 8, cl. 18.

28. See *infra* Part IV.

## I. BEFORE THE REVOLUTION: THE PHILADELPHIA PRESIDENCY

It is an oft-told story how the delegates came to Philadelphia in the summer of 1787 to save the fledgling republic. I propose to revisit Philadelphia once more, but for a limited purpose—to notice two features of the Framers’ constitutional scheme that are often overlooked but are in fact critical for understanding their broader project and the Executive they crafted for it. First, the fact that the Framers’ program for positive government centered on Congress, and second, that this government featured an apolitical President.

To anticipate: The Philadelphia delegates envisioned Congress as the branch to represent the people, to set national policy, and to be the center of constitutional politics.<sup>29</sup> On the other hand, the Framers saw the President primarily as an officer whose purpose in the federal order was to facilitate government by legislature.<sup>30</sup> The President would do this by balancing the legislative branch with his veto, as well as his appointment and treaty powers, and by providing a steady execution of Congress’s laws.<sup>31</sup> What the Framers did *not* imagine was that the President would function as a political actor.<sup>32</sup> And thus while they conferred on the office significant administrative powers, they withheld full control over the administration and failed to spell out the reach or meaning of his executive authority.

This Part begins by examining the essentially Madisonian plan for constitutional reform that animated the delegates’ work in 1787, a vision of deliberative majority rule centered on Congress. Bringing that project to the foreground will allow us then to turn to, and better understand, the delegates’ construction of their apolitical Executive. The lesson of these labors is this: contrary to what advocates of the so-called “unitary executive” have often claimed, the Framers did not design the presidency to stand at the apex of the constitutional order.<sup>33</sup> Theirs was a more modest, and more

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29. See THE FEDERALIST NO. 10, *supra* note 7, (James Madison).

30. See *infra* notes 56-61 and accompanying text.

31. See THE FEDERALIST NO. 10, *supra* note 7, (James Madison).

32. See, e.g., *infra* notes 152-57 and accompanying text.

33. See, e.g., Calabresi, *supra* note 1, at 479-82.

deeply ambiguous office.<sup>34</sup> Yet, contrary to what others have argued, that ambiguity is best explained not by the Framers' division of executive power into "political" and "administrative" spheres,<sup>35</sup> still less by any intention to leave Article II's opacities to be resolved by George Washington,<sup>36</sup> but rather from the fact that the presidency's creators failed to imagine the institution for what it would shortly become: a political animal.

### A. *Mr. Madison's Project*

The Framers intended their new constitutional government to be a government by legislature, with the presidency cast in a supporting role.<sup>37</sup> It was James Madison who supplied the Philadelphia Convention's reform agenda and the intellectual ballast to support it. Madison's major aim was to convert the loose-knit confederal government of the Articles into a fully integrated national republic capable of protecting citizens' rights and producing sound policy.<sup>38</sup> That meant reforming the legislature, first and foremost. "In a republican government, the legislative authority, necessarily, predominates," Madison explained in Federalist No. 51.<sup>39</sup> Yet Madison and his allies at Philadelphia knew that government by legislature posed certain acute difficulties.<sup>40</sup> Their experience with the state legislatures in the decade after independence convinced them that legislatures were susceptible to capture by organized interests bent on enacting narrow parochial agendas—the famous

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34. See THE FEDERALIST NO. 68 (Alexander Hamilton).

35. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 38-39 (1994).

36. This is the claim of Akhil Amar in his recent book, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012). Amar makes this (mistaken) claim the centerpiece of his interpretation of Article II. See *id.* at 307-32.

37. See THE FEDERALIST NO. 68, *supra* note 7, at 373-74 (Alexander Hamilton).

38. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 55-56 (1996); see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 471-74 (1969).

39. THE FEDERALIST NO. 51, *supra* note 7, at 355 (James Madison).

40. 9 JAMES MADISON, *Vices of the Political System of the United States*, in THE PAPERS OF JAMES MADISON 352-57 (Robert A. Rutland et al. eds., 1975); RAKOVE, *supra* note 38, at 52-53; M. J. C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 143-145 (1967); WOOD, *supra* note 38, at 194-96.

problem of faction.<sup>41</sup> “True it is,” Madison reflected in 1785, “that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.”<sup>42</sup> The challenge was to construct a national government that avoided the diseases of majority faction but still reflected the majority will.<sup>43</sup>

Madison’s solution is familiar and justly celebrated. For our purposes, the critical point to note is the degree to which that solution centered on the legislature. In the now canonical Federalist No. 10, Madison explained that republics, as he defined them, had two principal advantages over democracies.<sup>44</sup> First, they delegated political decision making to representative bodies.<sup>45</sup> Thus freed from the need for citizens to meet and decide political matters in person, republics were able, secondly, to embrace a “greater number of citizens, and greater sphere of country.”<sup>46</sup> Madison’s political science joined these advantages together in the design of the national legislature, as reflected in the final provisions of Article I.<sup>47</sup> That Article divided the new Congress into two houses.<sup>48</sup> The lower house was to be chosen by voters arranged in districts considerably larger than those used to choose delegates to the state legislatures, for Madisonian reasons: broadening the congressional electorate was meant to prevent parochial factions from controlling congressional elections.<sup>49</sup> Senators were to be selected by state legislatures to guarantee small states equal representation with larger ones, a feature Madison did not support,<sup>50</sup> but one that was nevertheless susceptible to Madisonian justification: because the pool of senatorial candidates would encompass the entire state, Senators would

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41. 9 MADISON, *supra* note 40, at 354-57.

42. 8 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, reprinted in THE PAPERS OF JAMES MADISON, *supra* note 40, at 295-306.

43. See 9 MADISON, *supra* note 40, at 354-57.

44. See THE FEDERALIST NO. 10, *supra* note 7, at 133-34 (James Madison).

45. *Id.*

46. *Id.*

47. See, e.g., RAKOVE, *supra* note 38, at 46-56; VILE, *supra* note 40, at 153-54.

48. U.S. CONST. art. I, § 2, cl. 1.

49. WOOD, *supra* note 38, at 499-506.

50. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 37; RAKOVE, *supra* note 38, at 170-71.

be men of high reputation, accomplished, respected, and with any luck, well-educated.<sup>51</sup>

If it worked properly, this new Congress would reflect the people's preferences and shape them at the same time.<sup>52</sup> Congress would resist popular passions even as it obeyed the people's interests, elevating factional agendas and passing enthusiasms into a broad and considered public will.<sup>53</sup> It would be a government by majority rule, but anti-majoritarian in character.<sup>54</sup> It would be, in short, a deliberative government.<sup>55</sup> This was the Madisonian project.

Yet Madison and his fellow delegates were mindful that popular assemblies, however well-constructed, suffered from certain incurable defects. For one thing, they were congenitally unfit for law enforcement. Madison had lamented the Articles' lack of law-enforcement authority before the Convention began.<sup>56</sup> And the crisis of Shay's Rebellion troubled the minds of many delegates,<sup>57</sup> who concluded from the federal government's inability to put down the uprising in timely fashion that the new government needed "vigor and dispatch" in law execution, as James Wilson put it.<sup>58</sup> Then too, all legislatures tended toward what Madison called "instability and encroachments."<sup>59</sup> "The preservation of Republican Government," Madison concluded, "required some expedient," some "effectual check" for balancing the legislature as a whole and supplying its defects.<sup>60</sup>

For this, the Framers turned to an independent executive branch separated from Congress and under the charge of a single President.<sup>61</sup> Proponents of the unitary Executive have been right to see in this decision a fairly momentous break with colonial-era

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51. See 9 MADISON, *supra* note 40, at 356-57.

52. THE FEDERALIST NOS. 10, 51, *supra* note 7, (James Madison).

53. 9 MADISON, *supra* note 40, at 357.

54. See Willmoore Kendall, *The Two Majorities*, 4 MIDWEST J. POL. SCI. 317, 330-31 (1960).

55. See RAKOVE, *supra* note 38, at 44-45.

56. 9 MADISON, *supra* note 40, at 352.

57. LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 13 (1959).

58. 2 1787: DRAFTING THE U.S. CONSTITUTION 1226 (Wilbourn E. Benton ed., 1986). The phrase became a favorite of the delegates. See, e.g., *id.* at 1099 (quoting Edmund Randolph).

59. *Id.* at 1131.

60. *Id.*

61. *Id.* at 1115.

practice.<sup>62</sup> But the Philadelphia presidency was always and ever the servant of the Framers' broader experiment in Congress-centered deliberative government.<sup>63</sup> They turned to an independent Executive in order to make that government work. Indeed, even as they created the presidency, the delegates held few firm convictions about how precisely that presidency should operate. Madison notoriously confessed to George Washington on the eve of the Convention that he had not given the executive department much thought.<sup>64</sup> And really, this should come as no particular surprise. In Madison's political science, as in the text the Framers drafted, the Executive was a secondary office.

Perhaps the most promising clue to how the Framers understood the Executive comes not in their debates about the content of executive power, which were spare and few,<sup>65</sup> but in the mode of election they chose for the office. From that choice we learn the following: the Executive the delegates fashioned to complete their project in congressional government was not to be a political actor, but rather an apolitical "Patriot King."<sup>66</sup>

### *B. Making a Patriot King*

Before September, the Convention considered three primary means of presidential election: by the national legislature (or a subset of it); by the people (either directly or through electors the people chose); or by one or more of the institutions of state government.<sup>67</sup> The most consistently popular method for the duration of the Convention's meeting was selection by Congress.<sup>68</sup> This was the

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62. See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 31 (2008).

63. Which is not to say that the Executive was the servant of Congress, per se. The Framers were relatively clear on their desire to give the Executive independence from the legislative branch. See *THE FEDERALIST NO. 71*, *supra* note 7, at 460 (Alexander Hamilton) ("[I]t is certainly desirable that the Executive should be in a situation to dare to act his own opinion with vigor and decision.").

64. 9 *MADISON*, *supra* note 40, at 385.

65. RAKOVE, *supra* note 38, at 256-59 (demonstrating the Framers spent little time debating the proper extent of executive power).

66. RALPH KETCHAM, *PRESIDENTS ABOVE PARTY: THE FIRST AMERICAN PRESIDENCY, 1789-1829*, at 67 (1984).

67. See 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 5, at 68, 80-81.

68. See 2 *1787: DRAFTING THE U.S. CONSTITUTION*, *supra* note 58, at 1095.

approach proposed in the Virginia Plan<sup>69</sup> and repeatedly favored in floor votes.<sup>70</sup> And it might have won the day, had John Rutledge and the large states not attempted at the last minute to increase large-state influence in presidential selection.<sup>71</sup> That ill-timed maneuver revived small state-large state hostilities and sent the Convention into deadlock.<sup>72</sup> The electoral college emerged only at the Convention's end, as a compromise.<sup>73</sup> Yet in all the to-and-fro over presidential election, perhaps the most striking thing is what the delegates did not consider—the need to give the President democratic legitimacy.<sup>74</sup> Their presidency was not a representative institution.

A firm majority of delegates believed that popular election by the people was neither workable nor wise. James Wilson first moved to select the Executive by direct vote of the public on June 2, 1787, just four days after Edmund Randolph introduced the Virginia Plan and two days before the delegates had conclusively settled on a single rather than plural presidency.<sup>75</sup> The motion failed seven states to two.<sup>76</sup> Wilson and his principal allies on the issue, Gouverneur Morris and Daniel Carroll, would try again on four separate occasions over the ensuing two and one-half months, each time falling short.<sup>77</sup> No more than six or seven delegates—from a pool of forty-two—spoke positively of popular election during debate,<sup>78</sup> and political scientist William Riker estimates that no more than eleven to at most seventeen delegates affirmatively supported public election at any point.<sup>79</sup>

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69. *See id.*

70. The Convention voted for legislative election no fewer than three times. William Riker has carefully tabulated and analyzed every vote on the question, as well as the attendant voting cycles. *See* William H. Riker, *The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice*, 78 AM. POL. SCI. REV. 1 (1984).

71. *See id.* at 12-13.

72. *See id.*

73. *See id.* at 13-14.

74. *See generally id.*

75. *See* 2 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 58, at 1110.

76. *Id.* at 1111.

77. Wilson, Morris, or Carroll, or some combination thereof, moved for popular election on June 2, July 17, and three times on August 24. For an analysis of the votes, see Riker, *supra* note 70, at 6.

78. Those delegates were Wilson, Morris, Madison, Carroll, Dickinson, Franklin, and possibly King. *See id.* at 7.

79. *Id.*

The reasons were various. Some delegates worried that permitting the people to vote would invite demagoguery and inflame the passions of faction. “A popular election in this case is radically vicious,” Elbridge Gerry warned on July 25.<sup>80</sup> “The ignorance of the people would put it in the power of some one set of men dispersed throughout the Union and acting in Concert to delude them into any appointment.”<sup>81</sup> Charles Pinckney raised the specter of the voting public deceived “by a few active [and] designing men.”<sup>82</sup> Hamilton would later explain that the Convention found it “peculiarly desirable to afford as little opportunity as possible to tumult and disorder.”<sup>83</sup> And Madison—who at one point favored popular election at the Convention—nevertheless ultimately endorsed the alternative mode the delegates selected as likely to “render the choice more judicious.”<sup>84</sup>

But on balance, the delegates worried more that the public simply would not have sufficient information to judge the candidates for office. Hugh Williamson of North Carolina claimed that “there was the same difference between an election in this case, by the people and by the legislature, as between an appointment by lot, and by choice.”<sup>85</sup> The people were too dispersed, over too many miles and states, to know much of anything about candidates from states other than their own. “There are at present distinguished characters, who are known perhaps to almost every man,” Williamson said, thinking of Washington, but “[t]his will not always be the case.”<sup>86</sup> Most delegates agreed.<sup>87</sup> George Mason summed up the prevailing thought when he remarked that “[t]he extent of the Country renders

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80. 2 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 58, at 1153.

81. *Id.*

82. James Madison, Notes of the Constitutional Convention (June 1, 1787), *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 30.

83. THE FEDERALIST NO. 68, *supra* note 7, at 441 (Alexander Hamilton).

84. 3 THE FOUNDERS' CONSTITUTION 518 (Phillip B. Kurland & Ralph Lerner eds., 1987).

85. 2 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 58, at 1128.

86. *Id.*

87. *See, e.g.,* RAKOVE, *supra* note 38, at 259-60. Charles Pinckney offered a complementary reason: the national legislature, having written the laws, would know far better than the public what qualities were needed to enforce them. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 68 (“The National Legislature being most immediately interested in the laws made by themselves, will be most attentive to the choice of a fit man to carry them properly into execution.”).



it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.”<sup>88</sup>

These two arguments in combination proved decisive. Try as Wilson and his allies might, they could not persuade the Convention to embrace election by the populace.<sup>89</sup> And this tells us something quite important about the Philadelphia presidency—it was not an office the delegates believed required democratic sanction in order to be legitimate. Put another way, the role the delegates envisioned for their Executive did not require political, majoritarian warrants for action. Remarkably, not one delegate, not even the advocates of direct election, appeared to worry that the failure to give the people a vote would render the President impotent or presidential action somehow illegitimate.<sup>90</sup> Of the various claims Wilson and the pro-election contingent pressed, democratic legitimacy was never one.<sup>91</sup> Instead, Wilson urged public election merely to ensure that the President was sufficiently qualified, an individual of “general notoriety,”<sup>92</sup> or, as Morris put it, a person of “continental reputation.”<sup>93</sup>

When the Convention finally did abandon election by the legislature in favor of the peculiar electoral college, it did so not from a desire to give the President democratic sanction, but from a concern that legislative election would frustrate the proper workings of Congress and ruin the Madisonian project of controlling faction.<sup>94</sup> Gouverneur Morris formulated the decisive argument in mid-July when he claimed that “[i]f the Legislature elect, it will be the work of intrigue, of cabal, and of faction; it will be like the election of a

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88. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 31; *see also* 3 THE FOUNDERS’ CONSTITUTION, *supra* note 84, at 518 (“[I]t will be found impracticable to elect [the President] by the immediate suffrages of the people. Difficulties would arise from the extent and population of the states.”). In addition, there was the ever-lurking sectional divide. If the people did happen to acquire information enough to form a national majority, southern delegates feared that it would be the majority North against the minority South, on the assumption that northerners would always outnumber the free white voters of the southern slave states. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 57; *see also* RAKOVE, *supra* note 38, at 259.

89. JAMES W. CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT 75 (1979).

90. *Cf. id.*

91. *Id.*

92. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 68.

93. 2 *id.* at 29.

94. Riker, *supra* note 70, at 7-14 (providing an overview of the process by which electoral college selection was chosen by the Convention).

pope by a conclave of cardinals; real merit will rarely be the title to the appointment.”<sup>95</sup> By “intrigue” Morris meant deal-making, horse-trading, log-rolling—the sort of factional trade-offs that regularly occurred in the formation of parliamentary cabinet governments,<sup>96</sup> the sort of thing that dominated the legislatures in the states, and just what the Madisonian system was designed to prevent.<sup>97</sup> This was the argument that persuaded Madison himself, initially a supporter of congressional election, to support first popular election of the President and then an electoral college.<sup>98</sup> And it was the argument that carried the day in the Convention’s closing weeks in September, when delegates found themselves snared in a voting cycle triggered by John Rutledge.<sup>99</sup>

By late summer the Convention had, in a series of votes rejecting both popular election and election by popularly chosen electors, apparently reached consensus in favor of presidential election by the legislature.<sup>100</sup> But then on August 24, John Rutledge of South Carolina moved to elect the President by joint ballot of the two houses.<sup>101</sup> Small states balked, fearing that votes from the large states in the House of Representatives would overwhelm their votes in the Senate, thus giving the large states control of the presidency.<sup>102</sup> Suddenly neither election by legislature with joint ballot, nor election by the Senate voting singly, nor election by some type of elector could command a majority.<sup>103</sup> Fearing deadlock, the delegates referred the question to the Committee on Postponed Matters on August 31.<sup>104</sup>

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95. 2 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 58, at 1126.

96. See Riker, *supra* note 70, at 7.

97. See VILE, *supra* note 40, at 155-57; Kendall, *supra* note 54, at 331-32.

98. See Riker, *supra* note 70, at 3-5.

99. See *id.*

100. The roll call votes were 215 and 225. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 98, 118.

101. *Id.* at 401.

102. Roger Sherman, for example, argued that a joint ballot would deprive the “States represented in the Senate of the negative intended them in that house.” *Id.* And this was indeed likely Rutledge’s purpose. See Riker, *supra* note 70, at 12-13.

103. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 399 (providing data on who supported and opposed these options in roll call votes 356 and 361); see also Riker, *supra* note 70, at 12-13.

104. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 473.

Working over a single weekend in early September, the Committee devised the electoral college.<sup>105</sup> In what would become familiar language, the Committee draft provided that “[e]ach State shall appoint in such manner as its Legislature may direct, a number of electors equal to the whole number of Senators and members of the House of Representatives to which the State may be entitled in the Legislature.”<sup>106</sup> The electors thus appointed were to “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.”<sup>107</sup> The person with the most votes became President, the one with the second-most, Vice-President.<sup>108</sup> In the event of a tie, the Senate would choose between the candidates.<sup>109</sup> Should no contender receive a majority of votes, the Senate would choose from among “the five highest on the list.”<sup>110</sup>

The Convention’s reaction on September 4 was positive, or at least relieved.<sup>111</sup> Large-state delegates were pleased with their advantage in the total number of electors, which were weighted by population. Small-state delegates secured referral to the Senate in the event of a tie or indeterminate electoral vote, rather than to the House.<sup>112</sup> The only remaining hitch was the delegates’ swelling concern that the Senate’s legislative power—its say in treaty making and appointments and now its role in presidential election—would allow the Senate to dominate the government.<sup>113</sup> The problem was neatly solved when dual motions by Hugh Williamson and Roger Sherman proposed to transfer the voting in a disputed election from the Senate to the House which, to pacify small states, would cast ballots by state delegation.<sup>114</sup> The compromise took hold and the electoral college was born.

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105. See Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 51 (1986).

106. 2 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 58, at 1166.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. See *id.* at 1167-69.

112. See Riker, *supra* note 70, at 13.

113. See, e.g., 2 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 58, at 1166-69; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 522-24.

114. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 527.

One delegate to the Virginia ratifying convention would later complain that the college “seems rather founded on accident than any principle of government I ever heard of,”<sup>115</sup> but that assessment is perhaps too ungenerous. The plan did have an overarching principle, fully in keeping with the political science that animated the broader Madisonian project: to preserve the separation of the Executive from Congress in order to correct the defects of the legislative branch and avoid the “intrigue” and “cabal” that could wreck deliberative government.<sup>116</sup> What the electoral college did not do, what in fact the delegates had no concern to do, was link the President to popular majorities.<sup>117</sup>

While the finalized Article II permitted the state legislatures to designate any method for choosing the electors they liked, including public voting, the actual decision on the candidates was to rest in the first place with the electors themselves, not the people, and quite possibly with the House as an ultimate matter.<sup>118</sup> Madison explained to the Virginia ratifying convention that the delegates found it “impracticable to elect [the President] by the immediate suffrages of the people” and as a result believed that “the people [should] choose the electors.”<sup>119</sup> Hamilton elaborated the point in *Federalist No. 68*. It was “peculiarly desirable” in the election of the Executive, he wrote, “to afford as little opportunity as possible” to the sort of “tumult and disorder” that frequently accompanied public elections.<sup>120</sup> The solution was to permit “the *sense* of the people [to] operate in the choice of the person to whom so important a trust was to be confided”<sup>121</sup> while committing the actual power of election to “an intermediate body of electors.”<sup>122</sup> This arrangement would forestall the “heats and ferments” characteristic of popular voting, and prevent their “communication,” like a disease, from the people to the chief executive.<sup>123</sup> Indeed, most of the Philadelphia delegates

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115. 3 THE FOUNDERS' CONSTITUTION, *supra* note 84, at 516.

116. Morris defended the college on these terms. *See* 2 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 58, at 1167, 1175-76; Riker, *supra* note 70, at 13.

117. *See* CEASER, *supra* note 89, at 51.

118. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

119. 3 THE FOUNDERS' CONSTITUTION, *supra* note 84, at 518.

120. THE FEDERALIST NO. 68, *supra* note 7, at 441 (Alexander Hamilton).

121. *Id.* at 440 (emphasis added).

122. *Id.* at 441.

123. *Id.*

expected that it was the House that would ultimately choose the President in the normal course. They saw the electoral college as a sort of presidential primary, narrowing the field, with the House making the final decision “nineteen times in twenty.”<sup>124</sup> Either way, the President was not in any meaningful way to be elected by the public.

In fact, the office was not designed to be politically contested at all.<sup>125</sup> The mechanics of the electoral college deliberately frustrated attempts at coordinated voting. Electors were to meet on the same day to cast their ballots, but “in their respective States,”<sup>126</sup> meaning there would be no opportunity for deliberation as a “college.”<sup>127</sup> They were to vote for two candidates and could not designate which was their first choice and which second.<sup>128</sup> Once the votes were cast, the “college”—more accurately, the discrete bands of state electors—dissolved, never to assemble again.<sup>129</sup> As historian Jack Rakove has observed, “few of the framers anticipated, much less intended, that the election of the president would soon emerge as the most important stimulus for political innovation and the creation of alliances running across state lines.”<sup>130</sup> The Philadelphia system was not built for organized political competition.

And all this means that the President was not meant to be a representative of the people, at least not in any direct sense. Congress was the representative branch. George Washington captured the Framers’ understanding when he professed in 1790 to have “always believed that an unequivocally free and equal representation of the people *in the legislature*, together with an efficient and responsible executive, were the great pillars on which the preservation of American freedom must depend.”<sup>131</sup> Convention

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124. 2 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 58, at 1167 (quoting George Mason). Hamilton was of the same view. *See id.*, at 1176; RAKOVE, *supra* note 38, at 265-66.

125. *See* CEASER, *supra* note 89, at 51.

126. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend XII.

127. *See* KURODA, *supra* note 2, at 23.

128. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend XII.

129. *See* KURODA, *supra* note 2, at 23; Jack N. Rakove, *The Political Presidency: Discovery and Intervention*, in *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC* 38, 50 (James Horn et al. eds., 2002).

130. RAKOVE, *supra* note 38, at 266.

131. Letter from George Washington to Catherine Macaulay Graham (Jan. 9, 1790), in *11 THE WRITINGS OF GEORGE WASHINGTON* 461 (Worthington Chauncey Ford ed., 1891)

attendees repeatedly referred to Congress as the people's forum and members of Congress as the people's representatives.<sup>132</sup> They never spoke of the President in that manner.<sup>133</sup> To be sure, delegates did sometimes refer to the President as a "representative," but it was as a representative of the *national interest*—an agent of the common good—something the Framers hoped the President would be by virtue of his independence from the Legislature, not as a popular representative of the people.<sup>134</sup> Madison voiced this view at the Convention when he commented that "[t]he Executive Magistrate would be considered as a national officer, acting for and equally sympathising with every part of the United States."<sup>135</sup> Gouverneur Morris, in defending the President's share of the treaty power, similarly called the Executive "the general Guardian of the National interests."<sup>136</sup> James Wilson made the same point the following year, during the ratification debates. "[B]eing elected by different parts of the United States, ... [the President] will consider himself as not particularly interested for any one of them, but will watch over the whole with paternal care and affection."<sup>137</sup> It was in this sense and this sense only, as a disinterested agent of the public good, that the Framers referred to the President as a "man of the people."<sup>138</sup> The Framers' presidency, in sum, was not a popular or majoritarian office. However they envisioned the contours of executive power, the Framers did not envision it as political authority.

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(emphasis added).

132. See *supra* notes 29, 44-55 and accompanying text.

133. See *supra* notes 30-32, 66-74 and accompanying text.

134. See *id.*

135. 2 1787, DRAFTING THE U.S. CONSTITUTION, *supra* note 58, at 1241. Madison repeated this view during the Virginia ratification debates. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 487, 494 (Jonathan Elliott ed., 2d ed. 1861).

136. 2 1787; DRAFTING THE U.S. CONSTITUTION, *supra* note 58, at 1268; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 541.

137. 2 THE DOCUMENTARY HISTORY AND THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, PENNSYLVANIA 452 (John P. Kaminski & Gaspare J. Saladino eds., 2001); see also Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1805 (1996).

138. 2 1787, DRAFTING THE U.S. CONSTITUTION, *supra* note 58, at 1262-63 (quoting James Wilson); see also CEASER, *supra* note 89, at 50 ("The presidency, they thought, could be so constituted as to reach beyond the partial and selfish interests of any group within society and consult the public interest as a whole.").

The ratifiers did not anticipate a political presidency either. Once the Grand Convention disbanded and the new Constitution began to circulate “out of doors,” opponents objected to the presidency on multiple grounds, but the President’s political character was not one of them.

Some of the Constitution’s opponents objected to the President’s unitary design and connection to the military. The President, Patrick Henry forecasted with his trademark melodrama, would be an “American Dictator,”<sup>139</sup> not because he would overwhelm Congress with his political authority, but rather because he commanded the armed forces. “[T]he army will salute him monarch: your militia will leave you, and assist in making him king[:] ... and what have you to oppose this force?” Henry taunted.<sup>140</sup>

Other Antifederalists charged that the President was not strong or independent enough to resist the machinations of the Senate. “The executive is, in fact, the president *and senate* in all transactions of any importance,” the Federal Farmer complained.<sup>141</sup> “[H]e may always act with the senate, but never can effectually counteract its views.”<sup>142</sup> The Centinel letters argued the same point: “The President ... [will] be a mere pageant of state, unless he coincides with the views of the Senate.”<sup>143</sup> He will “either become the head of the aristocratic junto in that body, or its minion.”<sup>144</sup> Antifederalist criticisms were diverse, but had at least one thing in common: the failure to imagine the President as a political leader working within the Constitution’s new political system.<sup>145</sup> As Ralph Ketcham has summarized, “There was surprisingly little concentration by the Anti-federalists on executive powers as such.”<sup>146</sup>

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139. Patrick Henry, *Speeches of Patrick Henry in the Virginia Ratifying Convention*, June 9, 1788, in 5 THE COMPLETE ANTI-FEDERALIST 207, 230 para. 5.16.11 (Herbert J. Storing ed., 1981).

140. 3 THE FOUNDERS’ CONSTITUTION, *supra* note 84, at 513.

141. *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It. In a Number of Letters from Federal Farmer to the Republican, 1787*, in 2 THE COMPLETE ANTI-FEDERALIST *supra* note 139, at 214, 237 para. 2.8.29 (Herbert J. Storing ed., 1981) (emphasis added).

142. *Id.*

143. Letters of Centinel, (Oct. 1787), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 139, at 142 para. 2.7.23 (emphasis added).

144. *Id.*

145. See RAKOVE, *supra* note 38, at 268-79.

146. KETCHAM, *supra* note 66, at 82. Or as Jack Rakove has put it, “The experience and

Of all the protagonists involved in drafting and ratification, it was Alexander Hamilton who came closest to foretelling the President's future political role. Long an advocate of executive leadership,<sup>147</sup> Hamilton's *Federalist* essays described a President who would energetically administer the government.<sup>148</sup> Indeed, Hamilton appeared in some passages of those famous newspaper commentaries to regard the President as a political representative of the people. One of the few outright errors in the *Federalist* collection comes in Federalist No. 68, in which Hamilton casually remarked that "the people of each State shall choose a number of persons as electors."<sup>149</sup> Of course it was up to the state legislatures, not the people themselves, to decide how the electors would be chosen. Popular election was only one of the options. Still, the slip is significant if it reveals that Hamilton thought of the President as the people's choice.

But it likely does not. In that same essay, Hamilton explained at some length the necessity of separating the election of the President from the people, the better to insulate the chief magistrate from the "heats and ferments" of popular opinion.<sup>150</sup> When Hamilton referred to the President as the choice of the people, not only in Federalist No. 68 but also across the series of essays focused on the Executive, he meant, once again, that the President would represent the *interests* of the people.<sup>151</sup>

Hamilton never advocated a political President at the Convention or during the ratification debates. He advocated political, policy-making *administrators*. The difference is worth noting. The man who wrote that "the true test of a good government is its aptitude

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vocabulary of republican politics simply proved inadequate for conceiving the political dimensions of the presidency, and as a result the ratification debates had strikingly little to say about this novel institution." Rakove, *supra* note 129, at 39.

147. For instance, he proposed a President for life at the Convention. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 292.

148. "Energy in the Executive is a leading character in the definition of good government." THE FEDERALIST NO. 70, *supra* note 7, at 451 (Alexander Hamilton); see also THE FEDERALIST NO. 71, *supra* note 7, at 460 (Alexander Hamilton) ("[I]t is certainly desirable that the Executive should be in a situation to dare to act his own opinion with vigor and decision.").

149. THE FEDERALIST NO. 68, *supra* note 7, at 443 (Alexander Hamilton).

150. See *id.* at 440-44.

151. See *supra* notes 131-38 and accompanying text.



and tendency to produce a good administration”<sup>152</sup> wanted a professional, and perhaps permanent, cadre of civil servants to devise policy and carry it into action.<sup>153</sup> These administrators would be supervised by the President, but not necessarily directed by him.<sup>154</sup> Hamilton apparently envisioned the President as a sort of figurehead, presiding in a politically neutral fashion over a government run by powerful administrative agents.<sup>155</sup> Hamilton’s vision was for what historian Forrest McDonald has called “a permanent ministry independent of the president—or, as in the parliamentary system, one responsible to the legislative as well as the executive.”<sup>156</sup> These views were out of step with the rest of the Framers to the extent Hamilton foresaw an entity other than Congress at the center of the government, and his alternative vision would soon provoke considerable strife. But at least in 1787 and 1788, it was not a vision for a political presidency.<sup>157</sup>

To sum up: the Framers created a constitutional system geared to produce deliberative government.<sup>158</sup> They placed a renovated Congress at its center and constructed an independent executive branch under the direction of a single President to balance Congress, supply its defects, and administer its laws.<sup>159</sup> The Article II presidency was a potent office but not, critically, a political one.<sup>160</sup> The President was not connected directly to the people, was not a popular representative, and lacked democratic warrants for action.<sup>161</sup>

These are important insights because they challenge so much of the conventional wisdom about the original Article II Executive. Proponents of the unitary Executive have placed great stock in the

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152. THE FEDERALIST NO. 68, *supra* note 7, at 443 (Alexander Hamilton).

153. See Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 AM. POL. SCI. REV. 453, 459-61 (2008) (discussing Hamilton’s view of presidential removal powers).

154. See *id.*

155. See *id.*

156. FORREST McDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 131 (1979); Bailey, *supra* note 153, at 460.

157. *But see* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 38 (1994).

158. See *supra* notes 52-55 and accompanying text.

159. See *supra* notes 55-61 and accompanying text.

160. See *supra* notes 66-79 and accompanying text.

161. See *supra* note 66-79 and accompanying text.

President's supposedly representative character. John Yoo has stated matter of factly that a prominent theme in the federal Constitution is that "[t]he president is seen as the representative and protector of the people," that, indeed, the presidency was meant "as not merely an executor of legislation, but as a new institution that represented the will of the people."<sup>162</sup> On this basis, Yoo argues for an expansive interpretation of the Vesting Clause,<sup>163</sup> including the right to act beyond and sometimes contrary to the letter of the law.<sup>164</sup> Steven Calabresi also has relied on what he calls the Framers' "deliberat[e] and self consciou[s] cho[ice] to break with th[e] post-1776 preference for weak executives" and create a "powerful, plebiscitary office."<sup>165</sup> He cites this claim as one reason to read the Vesting Clause to give the President control over officers within the executive branch.<sup>166</sup> But all this turns out to be untrue—or more accurately, it turns out to be anachronistic. The presidency would *become* a representative office, but the text of 1787 did not make it one. To the extent the case for the unitary Executive depends heavily, even critically, on the President's political character, the case cannot be rooted in the original Article II alone.

Some of the most prominent critics of the unitary theory have likewise assumed that the presidency is and was meant to be a representative institution, or a political office of some type.<sup>167</sup> Cass Sunstein and Larry Lessig began with that assumption in their seminal article, *The President and the Administration*, and proceeded to explain both the lack of a textual removal power and Congress's rather active involvement in administration during the 1790s on the basis of a distinction between "political" and

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162. JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 71, 96 (2005).

163. U.S. CONST. art. II, § 1, cl.1.

164. See YOO, *supra* note 162, at 18-19.

165. Calabresi, *supra* note 1, at 479; see also CALABRESI & YOO, *supra* note 62, at 34-38.

166. See CALABRESI & YOO, *supra* note 62, at 4-9; see also Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1388 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 570-81 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1178-79, 1182 n.145 (1992).

167. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 39-41 (1994).

“administrative” authority.<sup>168</sup> But as they ultimately acknowledge, this division is more nineteenth-century gloss than original understanding<sup>169</sup> and, in any event, misleading.<sup>170</sup>

Akhil Amar has recently argued that the Framers deliberately left Article II’s terms opaque and its arrangement untidy in the expectation that George Washington would supply the definition of executive power through his practice as the first President.<sup>171</sup> Indeed, Amar goes so far as to claim that the Convention intended to delegate to Washington the authority to do so.<sup>172</sup> But this hypothesis is premised almost exclusively on a single comment in a private letter from Pierce Butler to a relative,<sup>173</sup> and as historians have long pointed out, it “hardly squares with the tangled record of proposals, tentative decisions, reconsiderations, and reversals from which the presidency finally, and belatedly, emerged.”<sup>174</sup>

The ambiguity that attended the original Executive and early administrative practice owes less to some implicit delegation of interpretive authority to George Washington, or to a division between “political” and “administrative” power, than to the President’s uncertain political status. The Framers could neglect to give the President full control over the executive branch, fail to define “executive power,” and remain comfortable with significant congressional involvement in administration precisely because they did not anticipate the President acting as a political leader, and certainly not as *the* political leader.<sup>175</sup> Politics was something for Congress to make and do. When the President began to engage in politics, the Founders’ assignment of powers became far more contentious and their rationale for crafting Article II as they did increasingly hard to fathom. But then that is the story of the 1790s and the watershed election of 1800.

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168. *Id.*

169. *See id.* at 42.

170. *See* Calabresi & Rhodes, *supra* note 166, at 1173.

171. AMAR, *supra* note 2, at 313-14.

172. *Id.*

173. *See* Letter from Pierce Butler to Weedon Butler (May 5, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 302.

174. RAKOVE, *supra* note 38, at 244.

175. *See supra* notes 65-79 and accompanying text.

## II. THE ROAD TO THE POLITICAL PRESIDENCY

In forging a new model of government, the Framers had hoped to settle certain political questions once and for all. Madison opined in Federalist No. 49 that after ratification, frequent appeals to the people would no longer be necessary—in fact they would be malign, insofar as they kept in dispute fundamental questions of political principle.<sup>176</sup> The 1790s revealed that a great many political principles were not settled after all.<sup>177</sup> Sparked by Alexander Hamilton's ambitious banking and manufacturing plans, and fanned by the revolution in France, political controversy blazed in the 1790s.<sup>178</sup> That such deep and principled political disagreement would persist after the Constitution's adoption came as a shock to the decade's political actors.<sup>179</sup> But perhaps more surprising still was the role the presidency played in the decade's political conflagrations. The controversies of the 1790s revealed that in designing the presidency as they did, the Framers inadvertently vested the office with sizable political potential.<sup>180</sup> The structure of the branch permitted it to formulate policy and influence the legislature.<sup>181</sup> Indeed, the structure of the office uniquely suited it to exercise power. These facts—unintended, unlooked for, and largely unwanted—made the presidency an engine of political strife and an object of political competition. By decade's end, contending factions schemed to gain control of the government by gaining control of the Executive.

The discovery of the Executive's political potential plunged the republic into crisis. Neither the Framers nor any other political actor had developed an account of the presidency as a political office.<sup>182</sup> This proved to be a dangerous intellectual deficit. Political leaders' inability to agree on how the presidency should operate and to whom it should be accountable nearly provoked armed conflict.<sup>183</sup>

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176. See THE FEDERALIST NO. 49, *supra* note 7, at 349 (James Madison).

177. See *infra* Part II.A.1.

178. See *infra* Part II.A.1.

179. See *infra* Part II.A.1.

180. See *infra* Part II.A.1.

181. See *infra* Part II.A.1.

182. See *supra* notes 65-79 and accompanying text.

183. See *infra* Part II.A.2.

In the end, the crisis gave way to a new conception of the presidency that would require a new constitutional amendment for its realization.<sup>184</sup> This Part takes up each installment of this story in turn. I begin with the discovery of the Executive's political potential and its destabilizing consequences and then turn to the new constitutional synthesis that provided the apology for the Twelfth Amendment.

### A. *Political Potentials*

#### 1. *Politics and Structure*

The opening years of the 1790s destroyed any expectation that constitutional disputes were a thing of the past. There was Alexander Hamilton to thank for that. Hamilton's ambition as Secretary of the Treasury to transform America's agrarian economy into a commercialized and manufacturing powerhouse provoked fierce dissent.<sup>185</sup> In a series of three reports to Congress, Hamilton proposed to charter a national bank, levy new internal taxes, and increase foreign impost revenues.<sup>186</sup> His broader aims were to create a stable national currency and provide the nation's merchants access to large pools of capital.<sup>187</sup> James Madison and Thomas Jefferson read in Hamilton's proposals a covert bid to convert the republic into a capitalist aristocracy.<sup>188</sup> They were especially alarmed by Hamilton's enthusiasm for federal power.<sup>189</sup> By the early 1790s they had assembled a robust (if minority) opposition in Congress.<sup>190</sup>

The train of revolution in France only heightened America's burgeoning political tension. Jefferson, in particular, sympathized with the revolutionaries and linked their struggle against monarchy to his and Madison's opposition to the Hamilton economic

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184. See *infra* Part II.A.2.

185. See SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 43-44 (2005).

186. See *id.* at 44.

187. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 92-194 (1993); WILENTZ, *supra* note 185, at 44.

188. See WILENTZ, *supra* note 185, at 45.

189. See *id.*

190. See *id.* at 48.

program.<sup>191</sup> The fight against Hamilton was a fight, Jefferson came to say, against “monocracy.”<sup>192</sup> The Jefferson-Madison alliance took to calling itself “Democratic-Republican[s],” after the name of the private societies formed in Philadelphia and elsewhere to support the French Revolution.<sup>193</sup> Hamilton and his supporters, meanwhile, viewed the Republicans’ sympathy for the French cause with alarm and read in their opposition to economic development a Jacobin agenda for radical social leveling.<sup>194</sup> Politics was back with a vengeance.

And the second great surprise of the decade was the degree to which the executive branch was at the center of it. Though the Framers had built Congress to function as the locus of positive government,<sup>195</sup> already by the early 1790s the executive branch was exerting appreciable influence on congressional deliberation and policy-making. No doubt this development owed something to the personal skill of Hamilton, who creatively leveraged the resources of his Treasury post to shape Congress’s work.<sup>196</sup> But above all, it was due to structure.

By design, the Framers gave the presidency very little authority that would stand on its own. The President shares his most weighty executive powers with Congress, at least in some manner. The President’s treaty and appointments powers are divided with the Senate;<sup>197</sup> the veto power is subject to congressional override;<sup>198</sup> and even the commander-in-chief power, the most potent of the authorities spelled out in Article II, is qualified by Congress’s rights to declare war,<sup>199</sup> to appropriate funds for the military,<sup>200</sup> to make rules governing the armed forces,<sup>201</sup> to call forth the militia,<sup>202</sup> and to

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191. *See id.* at 47.

192. *Id.*

193. *See id.* at 53.

194. *Cf. id.* at 47.

195. *See supra* Part I.A.

196. *See* RALPH VOLNEY HARLOW, THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825, at 141-43 (1917); WHITE, *supra* note 57, at 56.

197. U.S. CONST. art. II, § 2, cl. 2.

198. U.S. CONST. art. I, § 7, cl. 2.

199. U.S. CONST. art. I, § 8, cl. 11.

200. U.S. CONST. art. I, § 8, cl. 12.

201. U.S. CONST. art. I, § 8, cl. 14.

202. U.S. CONST. art. I, § 8, cl. 15.

organize, arm, and discipline the militia as Congress sees fit.<sup>203</sup> As for the President's remaining Article II powers—like the authority to require opinions from department heads<sup>204</sup> or adjourn Congress when the houses could not agree<sup>205</sup>—they are more nearly ministerial in character. The upshot is that the President has relatively few powers not shared with Congress, and thus relatively little room to maneuver apart from congressional cooperation.<sup>206</sup>

And yet, as Charles Black noticed nearly four decades ago, the Article II presidency was exceptionally well structured for the receipt and exercise of power.<sup>207</sup> In placing the branch under the direction of a single officer rather than several, the Constitution permitted the Executive to act with unity of purpose.<sup>208</sup> In freeing the President of the need to explain his decisions to a council of state,<sup>209</sup> or otherwise seek cabinet officers' input before acting, the Constitution allowed him to act with "dispatch."<sup>210</sup> By investing him with some sort of authority over cabinet ministers,<sup>211</sup> the document made it possible for him to develop, review, and implement policy.

Congress, by contrast, was handicapped in the exercise of power by just those mechanisms needed to avoid majoritarianism.<sup>212</sup> The division into two houses, each chosen by a different electorate, meant congressional leaders could not use a single majority to enact legislation; they would have to build a different coalition in each body.<sup>213</sup> That same division made devising a coherent policy agenda

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203. U.S. CONST. art. I, § 8, cl. 16.

204. U.S. CONST. art. II, § 2, cl. 1.

205. U.S. CONST. art. II, § 3.

206. Justice Jackson made this point in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

207. See Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 17 (1974).

208. See generally THE FEDERALIST NO. 70, *supra* note 7, (Alexander Hamilton).

209. Executive councils were a familiar feature in the states, see RAKOVE, *supra* note 38, at 269, and the working draft of what became Article II contained one until early September, when it was eliminated in committee, see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 541-42.

210. See 2 1787: DRAFTING THE U.S. CONSTITUTION, *supra* note 58, at 1226 (quoting James Wilson); see also *id.* at 1099 (quoting Edmund Randolph); THE FEDERALIST NO. 70 (Alexander Hamilton).

211. U.S. CONST. art. II, § 2, cl. 1.

212. See Black, *supra* note 207, at 16-17.

213. See *id.*

quite difficult because the two houses were elected to staggered terms, by different sets of voters, and thus populated with members who came to Congress with differing policy priorities.<sup>214</sup> And then there was the congressional leadership: the Constitution provided for none, certainly for none that straddled the two houses, making the inter-house coordination problem acute.<sup>215</sup>

In the 1790s, these structural features began to play themselves out. Lacking the institutional means to develop policy, Congress turned to the Executive for help, and did so quite early on. It was Congress that initiated Hamilton's famous troika of reports to help it craft an economic program.<sup>216</sup> Indeed, the First and Second Congresses made a practice of referring fiscal questions to the Treasury for counsel.<sup>217</sup> Hamilton skillfully drafted his replies, crafting his answers in the form of policy recommendations so as to exert maximum influence on the legislative agenda.<sup>218</sup> Soon Hamilton and his staff were drafting legislation and forwarding it to friendly congressmen.<sup>219</sup> Secretary of State Jefferson did the same (though less frequently) on matters related to his department.<sup>220</sup> By the time of his resignation in 1795, Hamilton was known to visit Congress in person to lobby individual members, to attend committee hearings, to speak at legislative caucuses, and even to designate the membership of the committees to which his measures would be referred.<sup>221</sup> "Nothing," Senator William Maclay of Pennsylvania said, "is done without him."<sup>222</sup>

Here again, Hamilton's unique talents and ambition surely accounted for some of these developments, but on the whole, constitutional structure drove the institutional praxis of the 1790s.<sup>223</sup> A constitutionally powerful but structurally disadvantaged

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214. See Kendall, *supra* note 54, at 330-31.

215. These structural features have been thoroughly analyzed in the political science literature. See, e.g., RAYMOND TATALOVICH & THOMAS S. ENGEMAN, *THE PRESIDENCY AND POLITICAL SCIENCE: TWO HUNDRED YEARS OF CONSTITUTIONAL DEBATE 199-201* (2003).

216. See WHITE, *supra* note 57, at 56.

217. See *id.*

218. See *id.*

219. See *id.*

220. See *id.* at 57.

221. *Id.* at 58.

222. HARLOW, *supra* note 196, at 141.

223. See David P. Currie, *The Constitution in Congress: The First Congress and the*



Congress found itself turning again and again to a constitutionally weaker but structurally privileged Executive for aid in the business of governing.<sup>224</sup> This was not because Washington himself was committed to a political use of the presidency. On the contrary, Washington saw himself as a non-partisan figure and his office as an apolitical one.<sup>225</sup> He scrupulously avoided political statements, declined to lobby members of Congress, and generally refused to exercise his veto power for policy reasons.<sup>226</sup> He considered but removed policy language in his first inaugural address.<sup>227</sup> And tellingly, his annual reports to Congress were almost entirely devoid of policy recommendations, providing no direct guidance for legislative programs.<sup>228</sup> When he permitted his deputies, principally Hamilton, to develop policy and recommend it to Congress, he arguably did not regard those policies as properly his own.<sup>229</sup> Instead, Washington, as President, pursued an essentially collaborative politics, not so different, as one political scientist has remarked, from the British king-in-council model.<sup>230</sup> This collaborative institutional behavior revealed Washington's conception of the President as a professional executor, above party and above politics, with no distinct political or programmatic agenda of his own to press.<sup>231</sup>

Still, the office was undeniably exerting political influence.<sup>232</sup> And that was unquestionably controversial. As early as Washington's first term, Madison and Jefferson grew uneasy with the influence they were surprised to find the Executive exerting on Congress.<sup>233</sup> In the House, Madison objected to Congress's emerging practice of

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*Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 190 & n.196 (1995).

224. See, e.g., WHITE, *supra* note 57, at 58 (describing Hamilton's role as an executive representative in Congress).

225. See KETCHAM, *supra* note 66, at 72.

226. WHITE, *supra* note 57, at 54-55, 65. There are a few exceptions to Washington's apolitical stance, but their rarity proves the rule. See *id.* at 57.

227. BAILEY, *supra* note 2, at 136 (citing *Fragments of a Draft of the First Inaugural Address*, in GEORGE WASHINGTON WRITINGS 702-16 (John Rhodehannel ed., 1997)).

228. Currie, *supra* note 223, at 188.

229. See WHITE, *supra* note 57, at 54-58.

230. GEORGE C. EDWARDS III, ON DEAF EARS: THE LIMITS OF THE BULLY PULPIT 115 (2003); see also KETCHAM, *supra* note 66, at 89-93.

231. See EDWARDS, *supra* note 230, at 115; WHITE, *supra* note 57, at 54-58.

232. See, e.g., KETCHAM, *supra* note 66, at 91-92.

233. See WHITE, *supra* note 57, at 69-70.

referring policy questions to the executive branch for advice.<sup>234</sup> He repeatedly pressed to stop those referrals and finally succeeded in 1795.<sup>235</sup> Madison was even less sanguine about executive lobbying, bill drafting, and influence on the legislative calendar. Partly at Madison's behest, the Third Congress amended the House's rules to require every proposed revenue law to be debated in the Committee of the Whole; the new rules similarly forbade the House from approving any tax increase until debated on the floor.<sup>236</sup> The intent of both changes was to frustrate outside executive influence on the House's procedures.<sup>237</sup> Madison also spearheaded the creation of two standing committees to assist the House in policy development, again with the aim of countering executive pressure.<sup>238</sup>

In sum, although the structure of the two branches may have been familiar to political actors,<sup>239</sup> the practical consequences of that structure were not. On the contrary, Madison, Jefferson, and their allies blamed Hamilton for what they perceived to be a fundamental misuse of executive authority.<sup>240</sup>

But the effects of structure could not be denied. By the end of Washington's tenure, both Madison and Jefferson recognized the political potential Article II created in the presidency.<sup>241</sup> They concluded that controlling the legislature was not enough to control the government because the presidency had proved too consequential. If they wanted to direct the state, they needed to capture the Executive.<sup>242</sup> This was the fact of constitutional structure. It was a fact not lost on Hamilton and his Federalist cohort either. Before Washington left office, both Federalists and Republicans began assembling party organizations for the purpose of amassing enough electoral votes in the states to elevate their favored candidate.<sup>243</sup> Yet

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234. *See id.* at 69-72.

235. *Id.* at 73-74.

236. LEONARD D. WHITE, *THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1801-1829*, at 46 (1959).

237. *Id.*

238. *Id.* at 46-47.

239. After all, Madison was more responsible than anyone for the final shape of the Constitution. *See RAKOVE, supra* note 38, at 35-56.

240. *See WILENTZ, supra* note 185, at 48.

241. *See Rakove, supra* note 129, at 45.

242. *See id.*

243. *See id.* at 50-53.

this dawning realization of the presidency's political potential and the race to capture it posed two profound problems for the constitutional order—one conceptual and one structural.

The conceptual problem was that no set of political actors had yet developed an account of the Executive and its place within the constitutional system that could explain the political potential the 1790s had made apparent, or justify using the presidency for political ends.<sup>244</sup> The structural problem was that Article II was not designed to permit electoral competition for the executive office.<sup>245</sup> If both Republicans and Federalists understood by the mid-1790s that they needed to win control of the Executive to control the government, the Constitution gave them no clear, or clearly legitimate, method for doing so.<sup>246</sup> These problems merged to produce the wrenching constitutional crisis of 1800.

## 2. *The Crisis of 1800*

Precisely as Article II contemplated with its provisions leaving the time and manner of selecting electors to the states, the presidential election in 1800 was more exactly a series of discrete state elections than a national one.<sup>247</sup> Five states that year chose their college members by popular election—Virginia, Maryland, Rhode Island, North Carolina, and Kentucky.<sup>248</sup> Virginia and Kentucky elected by general ticket, while the other three conducted elections in congressional districts.<sup>249</sup> Ten of the remaining eleven states chose electors in the state legislature;<sup>250</sup> Vermont, meanwhile, delegated the choice to a “grand committee” consisting of the governor, an executive council, and the state house of representatives.<sup>251</sup> The elections occurred at various points through the summer and fall.<sup>252</sup> In the run-up, both Republicans and Federalists

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244. See BAILEY, *supra* note 2, at 132-33.

245. CEASER, *supra* note 89, at 51.

246. *Id.*

247. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII; see KURODA, *supra* note 2, at 83-98.

248. KURODA, *supra* note 2, at 94-95.

249. *Id.*

250. See *id.* at 83.

251. *Id.* at 93-94.

252. *Id.* at 88.

organized feverishly to persuade the relevant voters to choose electors pledged to their particular candidates.<sup>253</sup> In hopes of making at least some sort of coordinated voting possible in the electoral college, Republican congressmen caucused in May 1800 to designate their preferred candidates for President and Vice-President.<sup>254</sup> They settled on Thomas Jefferson and Aaron Burr.<sup>255</sup> Federalist congressmen, guided by Alexander Hamilton, used the same mechanism to choose incumbent John Adams as their presidential candidate and Charles Pinckney for Vice-President.<sup>256</sup>

But thanks to Article II's electoral college, all the planning and maneuvering and attempted coordination yielded an unexpected result. The Republicans outpolled Adams and Pinckney, who received sixty-five and sixty-four votes, respectively.<sup>257</sup> But, unable to know how other Republican electors had voted in other states, or indeed whether Federalist electors had (as Hamilton advised) concentrated their second votes behind Pinckney in an effort to elevate him over the Republican choice, the Republican electors failed to divert at least one of their second votes to a candidate other than Burr.<sup>258</sup> In so doing, they denied Jefferson an outright majority.<sup>259</sup> When all the ballots were counted, Jefferson and Burr had sixty-nine votes apiece.<sup>260</sup> According to the rules of Article II, the election moved immediately to the House of Representatives, which would decide between the top five candidates.<sup>261</sup> As only five candidates had received votes from the electors, all options were, so to speak, on the table. Due to a quirk of tradition, however, the new Congress with its healthy Republican majority, would not convene until after the new President was sworn in, on March 4, 1801.<sup>262</sup> So

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253. See, e.g., Rakove, *supra* note 129, at 50-52.

254. KURODA, *supra* note 2, at 87; WHITE, *supra* note 236, at 53.

255. See, e.g., KURODA, *supra* note 2, at 87; WHITE, *supra* note 236, at 53.

256. KURODA, *supra* note 2, at 87.

257. *Id.* at 102.

258. *Id.* at 99.

259. ACKERMAN, *supra* note 1, at 55.

260. *Id.* The official counting of those electoral votes in the U.S. Senate was controversial in and of itself—Georgia's four electoral votes were not originally included due to irregularities. See *id.* at 55-74.

261. See *id.* at 55.

262. KURODA, *supra* note 2, at 100; see also ACKERMAN, *supra* note 1, at 59.

it was the expiring, Federalist-controlled Sixth Congress that held the fate of the presidency.

For thirty-five ballots cast over six days, Federalist congressmen persisted in refusing to vote for Thomas Jefferson, whom they regarded as a threat to the very existence of the republic.<sup>263</sup> Meanwhile, rumors raced about the capital. Members of the Pennsylvania congressional delegation each received a letter from Philadelphia Republicans, warning them that the day Congress denied Jefferson or Burr the presidency would be “the first day of revolution and Civil War.”<sup>264</sup> Pennsylvania’s Republican governor, Thomas McKean, went so far as to make preliminary preparations to mobilize his state’s militia in the event the congressional Federalists prevented the ascension of one of the Republican candidates.<sup>265</sup> Virginia’s James Monroe did the same.<sup>266</sup>

The deep problems of the presidency’s unanticipated political potential—mechanical and conceptual—were taking their toll. The mechanical design of the electoral college, which forbade discrimination between presidential and vice-presidential votes,<sup>267</sup> prevented electors from communicating, and referred the top five vote-getters to the House, kept Jefferson from winning the election even though he was clearly the first choice of a majority of electors.<sup>268</sup> Once the election devolved on the (lame-duck) House of Representatives, the conceptual problem proved just as intractable. Lacking a shared idea as to whom the President was politically accountable and why, Republicans and Federalists could not agree on which candidate the House should elect. Republicans argued that the people’s choice, as reflected in the electoral college, should control.<sup>269</sup> Federalists

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263. James E. Lewis, Jr., “What Is to Become of Our Government?": *The Revolutionary Potential of the Election of 1800*, in *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC*, *supra* note 129, at 3, 9-10.

264. JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* 268 (1993).

265. *Id.* at 268-69.

266. *Id.*; see also Michael A. Bellesiles, “*The Soil Will Be Soaked with Blood*”: *Taking the Revolution of 1800 Seriously*, in *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC*, *supra* note 129, at 59, 72.

267. U.S. CONST. art. II, § 1, cl.3, *amended by* U.S. CONST. amend. XII.

268. See Rakove, *supra* note 129, at 30.

269. See Joanne B. Freeman, *Corruption and Compromise in the Election of 1800*, in *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC*, *supra* note 129, at 87, 105.

rejected this populist theory of presidential election and seemed initially determined to choose the candidate they thought best for the Union, regardless of how the electors voted.<sup>270</sup>

Shaken by threats of armed conflict and the specter of disunion, and following a decisive intervention by Alexander Hamilton, who urged compromise,<sup>271</sup> Federalist congressmen finally relented. On February 17, 1801, the House of Representatives elected Thomas Jefferson on the thirty-sixth ballot, ten states to four, with two abstaining.<sup>272</sup> The Federalists' stand-down resolved the electoral crisis, but provided no answers to the emergent problem of the politicized presidency.

In the immediately following years, those answers would come from the supposed skeptics of executive power, the Jefferson-led Republicans. Over the course of the election of 1800 and the years shortly following, the Republicans developed a new account of the President's connection to the people—one that would justify fresh uses of presidential power and lead ultimately to a revised conception of the presidency as a political office.<sup>273</sup> But the structure of the Constitution had to be changed to make this reimagined presidency a reality. In 1803, Republicans amended Article II to more directly link the President and the people and to permit political partisans to more effectively contest presidential elections.<sup>274</sup>

In this way, the Twelfth Amendment reset the separation of powers and changed American government. Before we can appreciate fully the transformation it wrought, however, we must take account of the idea that supplied its logic: the Republican case for the political presidency.

### *B. Reimagining the Executive*

The Republicans developed their notion of a political Executive over time and in various forums as they struggled to capture the presidency, but it was their leader, Thomas Jefferson, who gave the

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270. See, e.g., ACKERMAN, *supra* note 1, at 88; see generally Lewis, *supra* note 263, at 13-21.

271. See WILENTZ, *supra* note 185, at 93-94.

272. KURODA, *supra* note 2, at 105.

273. See Bailey, *supra* note 153, at 464.

274. KURODA, *supra* note 2, at 149 (describing the Republican party's motivation for creating the Twelfth Amendment).

idea mature theoretical expression in his 1801 inaugural address.<sup>275</sup> In those remarks, Jefferson outlined an office more populist, more politically active, and more constitutionally central than the one made in Philadelphia.<sup>276</sup> As of 1801, however, the presidency Jefferson described was an office founded only in speech. It would require constitutional change to become a reality.

Jefferson delivered his inaugural address on March 4, 1801 to a Senate chamber so crowded that one observer, Margaret Bayard Smith, declared she believed “not another creature could enter.”<sup>277</sup> Jefferson’s new ideas about his office were evident almost immediately. Whereas Washington and Adams had both addressed their inaugural remarks to Congress, Jefferson directed his speech to “[f]riends [and] [f]ellow [c]itizens.”<sup>278</sup> That was no coincidence. Jefferson cast the President as an exponent and advocate of political principle. That is, Jefferson reimagined the Executive as a political actor.<sup>279</sup>

According to Jefferson, it was not merely the President’s prerogative, but his *duty* to found his administration on political principles and to offer those principles to the people for their endorsement.<sup>280</sup> Midway through his brief address, Jefferson announced he found it only “proper” that his electorate “should understand what I deem the essential principles of our government”—and proceeded to list fourteen of them.<sup>281</sup> Astute listeners quickly recognized “the manifesto of the party and a declaration ... of [Jefferson’s] political creed.”<sup>282</sup> This was quite deliberate. Jefferson believed that the President should act not as a king above party, but as a delegate of the people, chosen by them to prosecute a political agenda they approved. In his view, the presidency should be an instrument of

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275. See 33 THE PAPERS OF THOMAS JEFFERSON 148-52 (Barbara B. Oberg et al. eds., 2006).

276. *Id.* at 150-51.

277. *Id.* at 134 (quoting Margaret Bayard Smith in a newspaper report).

278. *Id.* at 148.

279. BAILEY, *supra* note 2, at 140-45.

280. See 33 THE PAPERS OF THOMAS JEFFERSON, *supra* note 275, at 150.

281. *Id.* at 150-51. Jefferson’s points effectively repudiated the Alien and Sedition Acts and Hamilton’s pro-debt and pro-manufacturing agenda, even as he praised state governments and called for a return to an agricultural economy. See BAILEY, *supra* note 2, at 144-45.

282. BAILEY, *supra* note 2, at 149 (quoting Alexander Baring); see also *id.* at 144-45; 33 THE PAPERS OF THOMAS JEFFERSON, *supra* note 275, at 151 (referring to points ten, thirteen, and fourteen).

popular, majoritarian self-rule.<sup>283</sup> A politically responsive, politically accountable Executive was the principal means by which the people exercised control over their government.<sup>284</sup> In keeping with this philosophy, Jefferson cast himself as the people's representative. He referred to "the post *you* [the people] have assigned me."<sup>285</sup> He asked for the public's "confidence" and for popular support against those who opposed him.<sup>286</sup> He concluded the address by promising to rely "on the patronage of [the people's] good will" to perform "with obedience" the task they had assigned him, and "to retire from it whenever you become sensible how much better choices it is in your power to make."<sup>287</sup> This was the President as popular delegate.

For that model to work, however, presidential election had to become something it had not been for the Framers in 1787: a type of national plebiscite. The original Article II had taken care to insulate the choice of the President from the "tumult and disorder" of popular majorities.<sup>288</sup> Jefferson now claimed that the great purpose of presidential election was to give voice to majority opinion. Republicans in Congress had made the same argument in the throes of the 1800 election dispute, arguing as the Federalists forced ballot after ballot that a vote to deny Jefferson the presidency was a vote to usurp the rule of the people.<sup>289</sup> At the hands of Jefferson and the Republicans, the electoral college morphed from an independent body of leading men with the authority to select the President to a merely formal mechanism for expressing the majority's preference.

And precisely because presidential elections should be, according to Jefferson, a national plebiscite organized around the political principles the candidates espoused, public endorsement of a given candidate conferred public *authority* on the victor to enact his principles.<sup>290</sup> Thus Jefferson told his listeners that the political points he deemed "essential" and which he understood the people to

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283. Bailey, *supra* note 153, at 464.

284. *Id.* at 143-45.

285. See 33 THE PAPERS OF THOMAS JEFFERSON, *supra* note 275, at 151 (emphasis added).

286. *Id.* at 151-52.

287. *Id.* at 152.

288. THE FEDERALIST NO. 68, *supra* note 7, at 441 (Alexander Hamilton).

289. See KURODA, *supra* note 2, at 100; Lewis, *supra* note 263, at 15-16.

290. ACKERMAN, *supra* note 1, at 245.



have endorsed were principles he now intended to use “to shape [the government’s] administration.”<sup>291</sup> Put another way, the people’s approval authorized the President to administer his office in a *political* manner, according to a particular *political* agenda.

With this logic, Jefferson decisively abandoned the apolitical Executive the framers crafted in Philadelphia.<sup>292</sup> The Jeffersonian President was no patriot king; rather, an instrument of majority rule. Indeed, for Jefferson, the election of the President, *not* Congress, became the primary means by which the people expressed their will in the constitutional system.<sup>293</sup>

Yet however compelling this vision, it found no home in the Constitution. The electoral college as Jefferson described it simply did not exist, not in 1801. He might call his own election a national plebiscite, but in fact the rules of Article II prevented the public, when they were permitted to vote for electors at all, from designating which candidate they wanted for President and which for Vice-President.<sup>294</sup> The electoral college thus provided no mechanism for the people to confer political approval on any specific candidate. Article II also prevented coordination between electors, which in the absence of ballot designation made organized party competition for executive offices difficult at best.<sup>295</sup> In frustrating both public participation and organized electioneering, Article II forestalled just the sort of national choice between competing political principles Jefferson thought presidential election should become. If the political presidency Jefferson described was to be fact, not just rhetoric, Article II would have to change. And that is what the Twelfth Amendment did.

### III. A REVOLUTION IN FORM

Most observers have missed the significance of the Twelfth Amendment because of what it did *not* do. It did not abolish the electoral college; it did not institute a direct national plebiscite; it

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291. See 33 THE PAPERS OF THOMAS JEFFERSON, *supra* note 275, at 150.

292. See ACKERMAN, *supra* note 1, at 256.

293. See Bailey, *supra* note 153, at 464.

294. U.S. CONST. art. II, § 1, cl. 3, *amended* by U.S. CONST. amend. XII.

295. See Rakove, *supra* note 129, at 31.

did not direct the states to choose their electors by popular vote.<sup>296</sup> At first glance, the Amendment seems to have done relatively little, even to be, as Bruce Ackerman has recently said, “the very opposite of a serious attempt to think the problem [of presidential selection] through.”<sup>297</sup>

First glances can be deceiving. The Amendment in fact fundamentally altered the operation of the electoral college, and with it, the relationship between the executive and legislative branches. The Amendment accomplished this by directing electors to designate their ballots for President and Vice-President and by reducing Congress’s role in presidential elections in favor of greater and more direct control by the people. The effect was to facilitate political competition for the Executive, further unify the branch under the political control of the President, and make the President the choice of popular majorities. These innovations converted the Philadelphia presidency into a political one for good, shifting the structure of the constitutional order along the way. In the end, the Republicans’ Twelfth Amendment gave the President’s executive powers new scope and potentially new meaning, even as it produced a different sort of politics from the one the Framers had anticipated—one no longer congressional, but centered on the President.

#### *A. Enter the Twelfth Amendment*

The Amendment began life on October 17, 1803, when Representative John Dawson, Republican from Virginia, introduced the following resolution on the floor of the House:

That, in all future elections of President and Vice President, the persons shall be particularly designated, by declaring which is voted for as President, and which as Vice President.<sup>298</sup>

De Witt Clinton, Republican from New York, introduced substantially similar language in the Senate four days later.<sup>299</sup> Debate

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296. See U.S. CONST. amend. XII.

297. ACKERMAN, *supra* note 1, at 247.

298. 13 ANNALS OF CONG. 372 (1803).

299. *Id.* at 16-17.

began first in the House, on October 19,<sup>300</sup> and lasted for nine days, with the House voting to approve an amendment proposal on October 28.<sup>301</sup> Meanwhile, Senators began debate on October 24, but kept at it only briefly before various exigencies, including the need to debate the Treaty of Paris with which President Jefferson proposed to purchase the Louisiana territory,<sup>302</sup> forced delay. The Senate eventually returned to the Amendment on November 23.<sup>303</sup> After a week of robust and sometimes heated debate, the Senate approved on December 2, 1803 a version different from the House's text in a modest yet, as we shall see, critical way regarding the number of candidates referred to the House in the case of a disputed election.<sup>304</sup> The House ultimately accepted the Senate's version on December 8.<sup>305</sup>

As the Amendment cycled through Congress, debate narrowed to three major issues. First was the Amendment's leading feature, the designation of ballots for President and Vice-President.<sup>306</sup> Amendment supporters in fact called the text the "designating" Amendment.<sup>307</sup> Designation was not a new idea; it had previously enjoyed bipartisan support.<sup>308</sup> But in the Eighth Congress, the designating principle proved controversial. Once raised, it invited two additional and difficult questions—the proper number of candidates to be referred to the House in the event of a disputed election<sup>309</sup> and the status of the vice-presidency.<sup>310</sup> These three issues together formed

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300. *Id.* at 374.

301. *Id.* at 515-44.

302. *Id.* at 21-31.

303. *Id.* at 80-81.

304. KURODA, *supra* note 2, at 140-42.

305. 13 ANNALS OF CONG. 699-776 (1803); KURODA, *supra* note 2, at 147-48.

306. *See* KURODA, *supra* note 2, at 131.

307. 13 ANNALS OF CONG. 16 (1803) (statement of Rep. Clinton); *see also* KURODA, *supra* note 2, at 127-31.

308. Federalist congressmen proposed a designating amendment in 1798. Alexander Hamilton had been a supporter and remained one after the 1800 election. In 1802, he helped convince the New York legislature to adopt a resolution endorsing designation, along with selection of electors by popular voting in congressional districts, which was the method he had favored at the Philadelphia Convention. *See* Alexander Hamilton, *Draft of a Resolution for the Legislature of New York for the Amendment of the Constitution of the United States, January 29, 1802*, in 25 THE PAPERS OF ALEXANDER HAMILTON 512-13 (Harold C. Syrett ed., 1977); *see also* KURODA, *supra* note 2, at 119.

309. *See* KURODA, *supra* note 2, at 136.

310. *See id.* at 131.

the core of congressional debate. Raised in sequence, each was logically, even inseparably, connected to the other, and by the conclusion of debate in early December, Republicans offered essentially one argument on all three subjects: it was the right of popular majorities to choose the President.<sup>311</sup> Listening to their case, the Federalist John Quincy Adams realized that Amendment sponsors wanted to “reform [the Constitution’s] federative institutions upon popular principles.”<sup>312</sup> He was exactly correct.

### *1. Debate in the House*

The debate began in the House with designation.<sup>313</sup> Dawson’s terse initial draft called for ballot designation and nothing more,<sup>314</sup> and Republicans made their case for it first on rather technical grounds.<sup>315</sup> Representative John Clopton, a Republican from Virginia and one of the Amendment’s primary supporters, reminded his listeners just how easy it was, in the absence of separate ballots for President and Vice-President, for the electoral college to wind up selecting as President a candidate who was the first choice of practically no one.<sup>316</sup> Clopton posed the hypothetical of an election between four presidential candidates in which the electors split their “first choice” votes between two candidates, while more or less uniformly giving their “second choice” votes to a third and scattering only a handful of votes to the fourth.<sup>317</sup> The result was that the third candidate, whom no elector wanted to be President, became President, and one of the first two candidates became Vice-President instead.<sup>318</sup> A mechanism so liable to malfunction, where malfunction meant failure to reflect voters’ specific preferences for President and Vice-President, “cannot be expected,” Clopton concluded, to “receive the public confidence.”<sup>319</sup>

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311. *See id.* at 142.

312. 13 ANNALS OF CONG. 119 (1803).

313. *See id.* at 490.

314. *See id.* at 372.

315. *See id.* at 490-95.

316. *See id.* at 490-92.

317. *Id.*

318. *Id.* at 491.

319. *Id.* at 492.

The scenarios only became more complex and troubling when one factored in organized partisan competition for the presidency. The election of 1796 demonstrated that because the second-highest vote recipient automatically became Vice-President, the President and Vice-President might often be aligned with different parties.<sup>320</sup> A hostile and scheming Vice-President, however, might use his constitutional presence in the Senate to build an independent power base, allying with opposition Senators to thwart the President's agenda and create a sort of shadow government.<sup>321</sup> Any attempt to prevent this outcome posed additional problems. Electors who wanted to ensure that *both* of their party's candidates came to office, and to the specific offices for which the party had chosen them, had limited options. They could give exactly the same number of votes to their presidential and vice-presidential candidates, but that would produce the very deadlock between the top two candidates that sent the election of 1800 to the House of Representatives.<sup>322</sup> Alternatively, electors might toss away a handful of their second-choice votes on a candidate not from their party who had no chance of attaining any office. But this route would only be safe if electors were sure their majority was sufficiently large to prevent the other party from placing their top-finishing candidate into the vice-presidency.<sup>323</sup> For that matter, the majority party had to be careful who they nominated for Vice-President on their own ticket because the minority might cast a number of their second-choice votes for the majority's vice-presidential candidate and thereby make that candidate the President.<sup>324</sup> This last scenario is just what Republicans feared Federalists intended to do in 1804, elevating Aaron Burr over Jefferson.<sup>325</sup>

John Quincy Adams inadvertently summarized the mechanical case for designation when he concluded that "the present mode is too much like choice by lot."<sup>326</sup> One small mistake by one anonymous elector could prevent the public's clear preference for President from

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320. See BAILEY, *supra* note 2, at 197-98.

321. See *id.* at 199.

322. See *id.* at 198.

323. See *id.* at 199.

324. See *id.*

325. See *id.* at 199-200; KURODA, *supra* note 2, at 163.

326. 13 ANNALS OF CONG. 131 (1803).

claiming victory.<sup>327</sup> The only way to make the college accommodate specific voter preferences was to designate the ballots.<sup>328</sup>

Republicans were not content to rest on this argument, however. They pressed forward to link ballot designation with election by popular majority. “For, sir,” John Clopton claimed, “in a Government constituted as our Government is ... *all* the constituted authorities are the agents of the people”—or should be—and that emphatically included the President.<sup>329</sup> It was inexcusable in a government founded on popular rule that the electoral college could not accurately register the people’s preferences for President and Vice-President. “[T]he suffrages given for the election of those agents ought ever to be a complete expression of the public will,” Clopton said, “and should ... be directed immediately to those persons in whom the Electors intend to place confidence, as their agents, in the particular offices for which the elections are made.”<sup>330</sup>

This logic led naturally to the second major issue in debate—the number of candidates to be referred to the House in the event of a disputed election. On October 19, just two days after Dawson introduced his minimalist text, Republicans proposed to reduce the number of candidates referred from five to some smaller contingent.<sup>331</sup> Representative Clay proposed two;<sup>332</sup> the House committee appointed to consider Dawson’s resolution suggested three.<sup>333</sup> Here too, the case could be made on mechanical grounds. The original Article II provided for five candidates to be referred, but those five were candidates for *both* President and Vice-President; the original text did not recognize any distinction.<sup>334</sup> If the ballots were to be separated, the logic of Article II suggested only approximately half that number—two or three—should be referred to the House for election specifically as President, and similarly with the candidates for Vice-President.<sup>335</sup>

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327. *See id.*

328. *See id.* at 131-32.

329. *Id.* at 490 (emphasis added).

330. *Id.*

331. *See* BAILEY, *supra* note 2, at 203.

332. 13 ANNALS OF CONG. 420-21 (1803).

333. *See id.* at 422; KURODA, *supra* note 2, at 128-30.

334. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

335. *See* 13 ANNALS OF CONG. 421-22; KURODA, *supra* note 2, at 130-31.

But once again the Republicans quickly carried the argument onto populist terrain. They contended that reducing the number of candidates referred to the House was the only way to keep faith with the great original purpose of the Constitution, popular sovereignty.<sup>336</sup> “[T]he object of the proposed amendment” was the vindication of “a fundamental principle,” John Clopton argued.<sup>337</sup> “It is the primary, essential, and distinguishing attribute of the Government, that the will of the people should be done; and that elections should be according to the will of the people.”<sup>338</sup> This was historical revisionism, but of a revealing kind. In the Republicans’ retelling, the electoral college was never meant to insulate presidential election from popular choice, but rather to effectuate the public will.<sup>339</sup> That meant election by the House, or any entity other than the people, ought to be an anomaly. Republican G.W. Campbell drew the threads of the argument together.<sup>340</sup> It was “the duty of this House ... to secure *to the people* the benefits of choosing the President,” he said,<sup>341</sup> which implied “resorting to Legislative interposition only in extraordinary cases.”<sup>342</sup> Furthermore, when legislative intervention was absolutely unavoidable, as in the case of an electoral deadlock, it was essential to constrain the House’s discretion as much as possible to the popular will. That is why reducing the number referred to the House was so critical. “[T]hose only should be capable of Legislative election who possessed a strong evidence of enjoying the confidence of the people,” Campbell explained.<sup>343</sup>

The import of these linked arguments for designation and referral was not lost on Federalists, who quickly understood that Republicans were arguing for a form of majoritarian election. In what was to become a recurrent theme, Federalists accused the Republicans of seeking to denigrate the role of small states in presidential election and promote capture of the Executive by political factions.<sup>344</sup>

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336. See 13 ANNALS OF CONG. 423 (1805).

337. *Id.*

338. *Id.*

339. *See id.*

340. *See id.* at 421.

341. *Id.* (emphasis added).

342. *Id.*

343. *Id.*

344. *See id.* at 517.

Both were arguments against majoritarian election. Federalist Gaylord Griswold of New York put the small-state argument succinctly to the House on October 28.<sup>345</sup> “In no other place than on this floor are the smaller States on an equal footing with the larger States in the choice of the President of the United States,” he said.<sup>346</sup> Separating the presidential and vice-presidential ballots would make referral to the House less common and thus diminish the small states’ chances to influence the voting.<sup>347</sup> Federalists deployed the same logic against reducing the number of referred candidates.<sup>348</sup>

The Federalists’ protests on behalf of the small states were perhaps a bit disingenuous, considering so few Federalists hailed from small states themselves.<sup>349</sup> But Federalists also objected to majoritarian election on a more principled ground that demonstrated they understood the systemic change Republicans hoped to achieve. Federalists argued the Republicans’ amendment would politicize presidential election and foster political faction.<sup>350</sup> “The present mode of bringing forward candidates” for election, Gaylord Griswold told the House, “is the least liable to call forth art, intrigue, and corruption,” precisely because the electoral college made political coordination severely difficult.<sup>351</sup> The Amendment, however, would facilitate organized political competition with all its pathologies.<sup>352</sup> “[T]he moment the mode pointed out by this resolution is adopted,” Griswold warned, “the door for intrigue and corruption is open.”<sup>353</sup> “[T]he power of party, influence of office, art, cunning, intrigue, and corruption” would all be deployed to win the presidency.<sup>354</sup>

This point brought House Federalists to the heart of their case against the Amendment. The majoritarian fevers it would unleash and the political competition it would engender would work together

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345. *See id.* at 516-17.

346. *Id.*

347. *See id.*

348. *See, e.g., id.* at 520-27.

349. *See* KURODA, *supra* note 2, at 110, 130-31.

350. *See* 13 ANNALS OF CONG. 518 (1803).

351. *Id.* at 516, 518.

352. *See id.* at 518.

353. *Id.* at 516, 518.

354. *Id.* (statement of Rep. Griswold).



to bind the President to the public in a way the original Constitution did not provide, and which it was not built to accommodate.<sup>355</sup> The effect would be to elevate the presidency above all other offices in the government. “But, sir, I could not then suppose, nor do I yet think,” Benjamin Huger summed up for the Federalists, “that the salvation and political happiness of the Republic depends so entirely on the election of any one man as President.”<sup>356</sup> Republicans wanted a representative, political presidency. Federalists were not willing to go along.

With the major purposes of the Amendment now in the open, the House voted on October 28 to adopt the draft by a margin of eighty-eight to thirty-one, but not before Federalists scored a partial victory.<sup>357</sup> Whether because they found the small-state argument troubling or out of concern for the House’s institutional prerogatives, a key group of Republicans voted to leave the number of candidates referred to the House in the case of an electoral deadlock at five rather than three.<sup>358</sup>

## 2. *Debate in the Senate*

It fell to Republicans in the Senate to reforge the majoritarian link between ballot designation and change in the referral number. Their effort to do so, however, brought the structural implications of the Amendment into sharper focus and prompted perhaps the most insightful argument against the proposed Amendment, one focused on its implications for the vice-presidency.

Debate re-opened in the upper chamber on November 23, 1803, and returned immediately to the referral question.<sup>359</sup> The Republicans were ready. When John Quincy Adams suggested that referring only three candidates to the House would diminish the small states’ role,<sup>360</sup> Republican Samuel Smith of Maryland promptly dismissed the argument as a distraction.<sup>361</sup> He contended

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355. *See id.* at 533.

356. *Id.* at 518, 533.

357. *See* KURODA, *supra* note 2, at 131.

358. *See* BAILEY, *supra* note 2, at 205; KURODA, *supra* note 2, at 129-31.

359. *See* KURODA, *supra* note 2, at 136.

360. 13 ANNALS OF CONG. 87 (1803).

361. *See id.* at 87-88.

that differences between small and large states had not been a point of contention in Congress in the last ten years.<sup>362</sup> Moreover, there was no principled ground on which to support ballot designation but not a reduction in the House's electoral role—at least, not if one accepted that the purpose of ballot designation was to render presidential selection more public and popular. “[T]he principles correspond so exactly as to support and enforce each other,” Smith insisted.<sup>363</sup> “It is to place the election in the hands of the people we wish to designate; it is for the same purpose we wish to keep the election out of the House of Representatives.”<sup>364</sup> Senate Republicans explicitly and repeatedly drew the connection between reducing the House's role and majoritarian election. “[T]he number three in the amendment ... brought the election two degrees nearer the people,” James Jackson asserted.<sup>365</sup> Senator John Taylor claimed that anything more than this number would annihilate “the elective power of the people.”<sup>366</sup> But it was William Coker, Republican of Tennessee, who put the finest point on the argument: the President, he said, should be a “man of the people,” and that meant he ought to be chosen by the people and not the legislature.<sup>367</sup>

Having closed ranks on the referral question, Senate Republicans amended the draft on November 29 to refer three candidates to the House rather than five.<sup>368</sup> But their populist-sounding arguments prompted a fresh Federalist rejoinder. In the House, Federalists had pointed out that a more truly majoritarian form of presidential election would entrench political competition for the office, making the presidency political as a result.<sup>369</sup> Senate Federalists now argued that this same majoritarianism would alter the internal structure of the executive branch. Stephen Bradley of Vermont expressed the point most colorfully. Enact this Amendment, he argued, and the “Vice President would be hawked about at market, and given as change for votes for the Presidency.”<sup>370</sup> Separating the

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362. *See id.*

363. *Id.* at 122.

364. *Id.*

365. *Id.* at 112, 114.

366. *Id.* at 114-15.

367. *Id.* at 112.

368. *See id.* at 124. Debate on this point was quite thorough. *See id.* at 108-24.

369. *See id.* at 531-33.

370. *Id.* at 91; *see also id.* at 94.

ballots for President and Vice-President meant that in the future no Vice-President could again claim what Thomas Jefferson did in 1796—that he had been the choice *for President* of a very substantial portion of the electorate. Yet without the political cachet that votes for President lent, and with precious few constitutional responsibilities to fall back on, the Vice-President would become a resolutely secondary political figure.<sup>371</sup>

Federalists predicted this would render the executive branch more internally unified even as it fostered the presidency's political character. James Hillhouse of Connecticut developed the argument for the Federalists by way of an alternative history of the vice-presidency's original purpose. In his story, the recent factional competition for the presidency was the same political temptation the Framers constructed their system to guard against.<sup>372</sup> "The First Magistracy of this nation is an object capable of exciting ambition; and no doubt it would one day or other be sought after by dangerous and enterprising men," Hillhouse said.<sup>373</sup> That is where the vice-presidency came in. "It was to place a check upon this ambition that the Constitution provided for a competitor for the Chief Magistrate."<sup>374</sup> According to Hillhouse, "once or twice there may be such an organization of party as will secure for a conspicuous character the majority of votes."<sup>375</sup> But that contemptible party spirit would not endure. So long as it did, the original electoral college made it likely that "men of each of the parties may hold the two principal offices of the Government" and in this way "be checks upon each other."<sup>376</sup>

Hillhouse's history was fictive. In fact, the Framers never contemplated the political competition for the presidency that erupted in the late 1790s.<sup>377</sup> But this imagined counter-narrative did draw out two important truths. The first was that the original electoral college made the executive branch something less than politically hierarchical because the Vice-President did not necessar-

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371. *See id.* at 89-90.

372. *See id.*

373. *Id.* at 89.

374. *Id.*

375. *Id.* at 90.

376. *Id.*

377. *See CEASER, supra* note 89, at 88; Rakove, *supra* note 129, at 39-40.

ily owe his station to the President's good will or to the President's party.<sup>378</sup> The second was that separating the ballots would destroy whatever institutional independence the vice-presidency might claim. Designation would make it very unlikely that the President and Vice-President would ever be of different parties going forward and made it certain that the Vice-President would never have been anyone's first choice for President. And all this meant the Vice-President would become clearly the chief executive's political subordinate. In the age of parties and political competition, the executive branch would become unified under the control of a single party and directed entirely by a single executive officer.

Federalists forecast profound consequences. The corollary effect of demoting the Vice-President was to fix the public's eyes, as well as political competition, on the presidency. Do this, Federalists warned, and the presidency would become a populist office. "[B]y the new amendment, it would be every man to his own book," Hillhouse warned, "and every demagogue would be a leader and a champion."<sup>379</sup> The Republicans, he contended, had been blinded by "idol worship" of the presidency and now would have the citizens believe "there is only one man of correct politics in the United States."<sup>380</sup> He feared a popularly backed President would come to dominate the entire federal system.<sup>381</sup> Samuel White, Federalist of Delaware, similarly predicted that the Republican's constitutional renovation would unleash "the licentiousness of democracy" and lead ultimately to a quasi-dictatorship.<sup>382</sup> "[U]pon this designating plan the public attention will be entirely engrossed in the election of the President, in making one great man," he said.<sup>383</sup> Uriah Tracy wondered "If the gentlemen wish to shake the Constitution to pieces, if majorities must decide everything, why not go at once to a simple democracy?"<sup>384</sup>

Tellingly, the Republicans made no effort to deny the popularizing tendency of their Amendment. Nor did they deny that the

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378. See Fontana, *supra* note 2, at 1422-23.

379. 13 ANNALS OF CONG. 129 (1803).

380. *Id.* at 190.

381. *See id.*

382. *Id.* at 139, 151.

383. *Id.* at 144.

384. *Id.* at 206.

Amendment would demote the vice-presidency or make the President a political actor.<sup>385</sup> Instead, they defended the right of the people to control the Executive by public election. The Federalists, Republicans said, were defending rule by the minority. This was the Republicans' closing argument, and with it they indicted not just their party opponents but the original electoral college too. "Is it better that the people—a fair majority of the popular principle—should elect Executive power; or, that a minor faction should be enabled to embarrass and defeat the judgment and will of this majority?" John Taylor asked on the final day of Senate debate.<sup>386</sup> William Coker sharpened the refrain: "I say, I do not understand the principle of minorities governing majorities. The law of the minority is not the law of the Constitution, and it is not the law for me."<sup>387</sup> To Federalist charges that the Amendment would destroy institutional checks within the executive branch or make the President too great a figure, the Republicans responded with more populism. "The great check imposed upon Executive power," John Taylor said, "was a popular mode of election."<sup>388</sup>

This was a different sort of political science than the one the Framers wrote at Philadelphia. The Republicans' President was the choice of the people, the people's representative, and the means by which the people controlled the administration of the laws. He was the creature of political competition and perhaps even the leader of a political faction. In all events, he was a political actor, empowered by the people to act on the political principles he announced to them. For all the Republicans' protests that the designating Amendment worked no great alteration in the Constitution's frame,<sup>389</sup> constitutional renovation was in fact the point and the result.

The Senate voted to approve the final text of the Amendment on December 2, 1803, by a margin of twenty-two to ten.<sup>390</sup> It commanded electors to "name in their ballots the person voted for as

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385. Though they did resist a Federalist proposal, made for strategic effect, to eliminate the vice-presidency altogether. See KURODA, *supra* note 2, at 134.

386. 13 ANNALS OF CONG. 180, 183 (1803).

387. *Id.* at 151-52.

388. *Id.* at 180, 183.

389. See, e.g., *id.* at 422-23 (statement of Rep. John Clopton).

390. KURODA, *supra* note 2, at 142-43.

President, and in distinct ballots the person voted for as Vice-President”<sup>391</sup> and further provided that in the event no candidate received a majority of the votes for President, the House would choose from among the “persons having the highest numbers not exceeding three.”<sup>392</sup> After brief debate, the House followed suit six days later on December 8, 1803, adopting the Senate’s version.<sup>393</sup> Kentucky, Virginia, North Carolina, and Ohio ratified before January.<sup>394</sup> Maryland followed on January 7 and Pennsylvania on January 9.<sup>395</sup> After brief but heated debate, Vermont—a small state—ratified on January 30.<sup>396</sup> New York joined the affirmative tally in February, while New Jersey, Rhode Island, South Carolina, and Georgia approved the Amendment shortly thereafter.<sup>397</sup> By the time every state legislature had cast its votes, the Amendment received the approval of all but four states—Delaware and three states from Federalist New England: Massachusetts, Connecticut, and New Hampshire.<sup>398</sup> Secretary of State James Madison proclaimed the text adopted as the Twelfth Amendment to the United States Constitution on September 25, 1804, just in time for the presidential election.<sup>399</sup>

### *B. Changing Structure: What the Twelfth Amendment Did*

Constitutional text creates constitutional structure—or changes it, and that is what the Twelfth Amendment did. By changing the mode of executive election, the Amendment facilitated and indeed entrenched organized political competition for the presidency. This constitutional alteration in turn worked at least two additional structural changes: It conferred new warrants for political action on

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391. U.S. CONST. amend. XII.

392. *Id.*

393. See KURODA, *supra* note 2, at 148, 151. In this final version, vice-presidential election shifted to the Senate. See *id.* at 146, 148-49.

394. *Id.* at 156.

395. *Id.* at 156-57.

396. *Id.* at 158-59.

397. *Id.* at 159-60.

398. See House, *supra* note 2, at 58, 60-61. In New Hampshire, the legislature actually supported the Amendment. But the New Hampshire governor claimed to have a say in the state’s decision and vetoed the Amendment. The legislature protested, but lacked the votes to overturn a veto. New Hampshire was thus considered not to have ratified. See *id.* at 60-61.

399. *Id.* at 61.

the President. And it unified the executive branch internally by removing the Vice-President as a possible political rival. To describe these alterations is to describe the rise of the political presidency. Together, the changes, and the presidency they created, amounted to a structural realignment of the federal system.

### *1. Entrenching Political Competition*

Before the late 1790s, centrally coordinated, national competition for the executive office was unheard of and largely unimagined. After the Twelfth Amendment, it became commonplace. Directing electors to designate their ballots for President and Vice-President solved the problem of elector coordination posed by the original Article II. With electors casting one vote specifically for a presidential candidate and one for a vice-presidential aspirant, there would be no more guessing as to how many electoral votes a given candidate had at any one time, the question that had so confounded partisans in 1800.<sup>400</sup> Eliminating this information deficit meant parties would now be able to run presidential and vice-presidential candidates effectively on a single ticket.<sup>401</sup> State electors only needed to pledge their support to a given ticket before being selected. Provided they did, the electoral vote could be contested and won with no need for electors to meet in person or confer.<sup>402</sup>

The Amendment did not require pledged electors nor party tickets, but it made these practices effective mechanisms for capturing the presidency and powerfully encouraged parties to organize competition in this way. If the original Article II had made it difficult to win an electoral majority by coordinated campaigning, the Twelfth Amendment made it all but impossible to win without it.<sup>403</sup> Parties began nominating candidate tickets in 1796, when the parties' respective congressional caucuses chose the candidates. That means of selection would last until 1824, to be replaced by nominating conventions, but the institution of the party ticket endured.<sup>404</sup> Meanwhile, the practice of pledged partisan electors

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400. *See supra* Part III.A.

401. *See supra* Part III.

402. *See* BAILEY, *supra* note 2, at 221.

403. CEASER, *supra* note 89, at 105.

404. *Id.* at 121-27.

became similarly entrenched. “[T]he people do not elect a person for an elector who, they know, does not intend to vote for a particular person as President,” Congressman Samuel Mitchell remarked in 1802.<sup>405</sup> In time, multiple states would require their electors to pledge support to a particular candidate.<sup>406</sup>

The Amendment worked to entrench organized competition in another way. The new text reduced the number of electoral-college ballots cast for President by half and actually made it more likely that the top-finishing candidate would not gain an outright electoral majority unless political parties actively concentrated national support behind two or three leading contenders.<sup>407</sup> The Amendment thus made political parties central to achieving one of its primary objectives, keeping election out of the House of Representatives.<sup>408</sup> As political scientist James Ceaser has observed, “[I]f parties began to disintegrate, the Twelfth Amendment ... provided a powerful new justification for recreating them.”<sup>409</sup> This was perhaps an ironic result given that Republicans, for all their enthusiasm regarding political competition, remained ambivalent on the question of political parties as permanent institutions. A good many Republicans hoped the parties would in due course pass away.<sup>410</sup> But the Twelfth Amendment made this most unlikely. Instead, it provided powerful incentives for party organization and made the presidency both the subject and beneficiary of ongoing, organized political competition.

## 2. *Warranting Political Action*

That competition conferred on the Executive something the office had not enjoyed before: democratic warrants for political action, along with democratic incentives to act. Political competition had a democratizing effect. Whereas only five states chose their electors by popular vote in 1800, over half did by 1816, and all but one by

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405. 11 ANNALS OF CONG. 1289-90 (1802).

406. Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 925 n.47 (1992).

407. CEASER, *supra* note 89, at 105.

408. *Id.*

409. *Id.* at 106.

410. *Id.* at 105-06, 124-27; WILENTZ, *supra* note 185, at 50.



1828.<sup>411</sup> Still, even in 1804, the Twelfth Amendment fostered public-oriented political electioneering that linked the presidency to the populace in a way it had not been previously. The shift in presidential behavior that this newfound representative status authorized was observable almost immediately in Jefferson's presidency. To be sure, some of Jefferson's political practices as President predated the adoption of the Twelfth Amendment. Still, it was Jefferson's view of the Executive as a representative office that informed his new praxis, and he and the Republicans would point to the Twelfth Amendment as making their vision constitutional.<sup>412</sup>

Whereas Washington and Adams had studiously avoided overly political statements, especially in their inaugural addresses,<sup>413</sup> Jefferson made them forthrightly, even boldly.<sup>414</sup> He claimed to speak as a political leader.<sup>415</sup> He also claimed to speak as a policy leader. Neither Washington nor Adams used their annual messages to Congress to argue the merits of specific pieces of legislation, and neither attempted to influence directly the deliberations in Congress.<sup>416</sup> Jefferson did both.<sup>417</sup> In fact, Jefferson embraced political leadership of Congress of a kind that only Hamilton had ventured to try; Jefferson, however, did so as President, not as a cabinet secretary.<sup>418</sup> Jefferson began by deputizing a member of the Republican House caucus to act as his spokesman in that body.<sup>419</sup> This floor leader was a "presidential agent[], appointed by the executive, and dismissed at his pleasure."<sup>420</sup> Jefferson routinely communicated his wishes to the caucus, articulated legislative priorities, and suggested draft legislation.<sup>421</sup> His influence was so great that Federalist Timothy Pickering could remark, with only modest overstatement, that Jefferson "secretly dictates every measure which is seriously proposed and supported."<sup>422</sup> His practice

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411. CEASER, *supra* note 89, at 20, 103 n.22.

412. BAILEY, *supra* note 2, at 201-11.

413. See FIRST PRESIDENTIAL MESSAGES 19-29 (George N. Otey ed., 2009).

414. BAILEY, *supra* note 2, at 213-15.

415. *Id.*

416. WHITE, *supra* note 57, at 59.

417. WHITE, *supra* note 236, at 32.

418. *Id.* at 551.

419. *Id.* at 48-51.

420. HARLOW, *supra* note 196, at 177.

421. WHITE, *supra* note 236, at 49-53.

422. *Id.* at 35. Buttressing Pickering's view, historian Sean Wilentz has concluded that

would set the pattern for Presidents to come.<sup>423</sup> Future Executives would be more or less aggressive than Jefferson in establishing a policy agenda and advocating its passage,<sup>424</sup> but all would enjoy the democratic authority to do so.<sup>425</sup>

Jefferson also exerted greater control than his predecessors over the executive branch.<sup>426</sup> Washington had filled cabinet seats and other official posts on the basis of competence, character and reputation,<sup>427</sup> but Jefferson expressly included political allegiance as a criterion for appointment and dismissal.<sup>428</sup> Upon assuming office, he set about determinedly changing the complexion of the executive branch from a Federalist to a Republican hue by filling the 316 offices subject to his appointment power with Republican loyalists.<sup>429</sup> When asked to justify his departure from the earlier, non-partisan norm of appointment, Jefferson offered an essentially populist rejoinder. The “public sentiment [had] at length declared itself” in favor of the Republican political program through the medium of presidential election, he said.<sup>430</sup> “Is it political intolerance” for Republicans thus “to claim a proportionate share in the direction of public affairs?”<sup>431</sup> Jefferson portrayed political control of the executive branch as the means by which the people, acting through a political President, implemented the principles they preferred.<sup>432</sup> And once again, the democratic warrant of public approval would make the same arguments available to all future Presidents. Not surprisingly, the vast majority has followed Jefferson’s practice.<sup>433</sup>

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“until the abandonment of the embargo in 1809, not a single important piece of Jeffersonian legislation failed to pass Congress.” WILENTZ, *supra* note 185, at 137.

423. See, e.g., WHITE, *supra* note 236, at 51-52.

424. *Id.* at 39.

425. STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE 17-32 (1993).

426. WHITE, *supra* note 236, at 551.

427. WHITE, *supra* note 57, at 257-59. This was a prescription Adams followed in principle, if not always in practice. *Id.* at 267-68, 277-80.

428. BAILEY, *supra* note 2, at 155, 158.

429. SKOWRONEK, *supra* note 425, at 72.

430. Letter from Thomas Jefferson to Elias Shipman and Others (July 12, 1801), in 9 THE WORKS OF THOMAS JEFFERSON 272 (Paul Leicester Ford ed., 1905).

431. *Id.* (emphasis omitted).

432. BAILEY, *supra* note 2, at 158-60.

433. SKOWRONEK, *supra* note 425, at 17-32.

If public approval communicated political authority to act, it also imposed political consequences for the actions Presidents took, and this made presidential election a catalytic event. A more public form of election meant that any and all presidential action would now be subject to popular judgment, just as Congress's actions were. But the President's institutional prominence and head of state status made him specially accountable for his performance and for the performance of the federal government as a whole. In the words of political scientist Stephen Skowronek, the presidential office "focuses the eyes and draws out the attachments of the people."<sup>434</sup> The President could be blamed for the operation of the government in a way no individual congressman could, precisely because he appeared responsible in a way no individual congressman did. As the ever-perceptive Alexis de Tocqueville observed, the Executive's "honor, property, liberty, and life stand as constant guarantees to the people that he will make good use of his power."<sup>435</sup> Presidential elections became a referendum on the state of the union.

Jefferson anticipated that the election of the Executive would come to work in just this manner. Presidential terms, he told a correspondent in 1805, were effectively eight years in length, "with a power to remove at the end of the first four" should the people decide, after assessing the President's performance, that he was "doing wrong."<sup>436</sup> Presidential election, in other words, was a form of performance review. In this way, public-style election spurred the President not just to good conduct, but to affirmative action, and not just to execute the policies Congress adopted, but to pursue his own agenda.<sup>437</sup>

### 3. *Unifying the Executive*

In addition to conveying new warrants for political leadership, the Amendment granted the President a freer hand in exercising political power by reducing the Vice-President to a decidedly

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434. *Id.* at 20.

435. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 136 (Arthur Goldhammer trans., Penguin 2004) (1835).

436. Letter from Thomas Jefferson to John Taylor (Jan. 6, 1805), in 10 *THE WORKS OF THOMAS JEFFERSON* 125, *supra* note 430.

437. See SKOWRONEK, *supra* note 425, at 26, 37, 41, 49.

subordinate status.<sup>438</sup> The institutional consequences were significant. The Executive might well have become politicized, after all, without becoming politically homogeneous. Congress was a political institution, and it was anything but homogeneous: different members elected by different constituencies at different times guaranteed robust political diversity.<sup>439</sup> And although the Constitution vested the executive power in a single President, the document created two elective executive offices.<sup>440</sup> This structure made it entirely possible, as Federalist congressmen in 1803 hoped, that the Vice-President would emerge as a political rival to the chief executive.<sup>441</sup> There is in fact ample precedent for such a development. Nearly every state in the American union operates with a politically heterogeneous executive,<sup>442</sup> as indeed do most other nations that employ a presidentialist system.<sup>443</sup> A politically independent Vice-President was a very real possibility, and might have significantly altered the practice of executive administration.<sup>444</sup>

But even as it politicized the executive branch, the Twelfth Amendment ruled political heterogeneity out. Separating the ballots for President and Vice-President meant that no future Vice-President would ever be able to claim that he was the choice for President of a significant segment of the public.<sup>445</sup> Nor would he ever likely again be the leader of a major political faction outside the President's party.<sup>446</sup> Although in theory electors might vote for a presidential candidate from one party and a vice-presidential candidate from another, the new political realities the Twelfth Amendment helped create made such ticket splitting improbable.<sup>447</sup> Parties placed their candidates before the public (or the state legislature) as pairs. Some states in the early 1800s listed the

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438. See *supra* notes 370-85 and accompanying text.

439. U.S. CONST. art. I, §§ 2, 3.

440. U.S. CONST. art. II, §§ 1, 3.

441. 13 ANNALS OF CONG. 89-90 (1803) (statement of Sen. James Hillhouse).

442. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1399-1401 (2008); Fontana, *supra* note 2, at 1417-18.

443. See Fontana, *supra* note 2, at 1417-19.

444. *Id.* at 1423-25.

445. See AMAR, *supra* note 1, at 168.

446. See Amar & Amar, *supra* note 406, at 923-24 (describing the development of the single party ticket for President and Vice-President).

447. Though a few electors ticket split through the early 1800s. See *id.* at 922-23.

candidates as a pair on the ballot, as all do today,<sup>448</sup> and electors typically pledged themselves to party tickets. In addition, a party had every incentive to nominate its most attractive and well-known candidate for President rather than for Vice-President.<sup>449</sup> This practice made it unlikely that vice-presidential candidates would be sufficiently popular to win election on their own, without party backing. In turn, it was difficult for vice-presidential candidates to establish a compelling identity apart from the party apparatus.<sup>450</sup>

Louis Clinton Hatch once famously remarked that John Calhoun was “the only American statesman of the first or second rank who held the Vice-Presidency in the century between its occupancy by Jefferson and Roosevelt.”<sup>451</sup> That was because the Twelfth Amendment made the vice-presidency a tertiary office, and the President the unrivaled political leader of the executive branch.

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One might legitimately wonder about the counterfactual question:<sup>452</sup> Was the Twelfth Amendment truly necessary to the emergence of the political presidency? Or would this change in the Executive have happened anyway? Well before the adoption of the Twelfth Amendment the presidency was having political effect. Hamilton demonstrated that executive officers could influence the legislature and craft policy,<sup>453</sup> and Washington showed that the President could manage foreign affairs largely on his own.<sup>454</sup> The structure of Article II made these things possible insofar as it uniquely fitted the Executive to receive and exercise power.<sup>455</sup> But these early practices revealed only the political potential of the presidency; they showed that the Executive’s actions carried

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448. *Id.* at 942-43 & n.85.

449. Fontana, *supra* note 2, at 1428-29.

450. *Id.* at 1428.

451. LOUIS CLINTON HATCH, A HISTORY OF THE VICE-PRESIDENCY OF THE UNITED STATES 71 (Earl L. Shoup ed., 1934).

452. See generally Niall Ferguson, *Virtual History: Towards a “Chaotic” Theory of the Past*, in VIRTUAL HISTORY: ALTERNATIVES AND COUNTERFACTUALS 1, 1-90 (Niall Ferguson ed., 1997) (describing “counterfactual” history).

453. See *supra* Part III.A.

454. See *supra* notes 171-75 and accompanying text.

455. See Black, *supra* note 207, at 17; see also discussion *supra* Part III.A.

political implications. They did not make the presidency a political office. For that, the Executive required some sort of democratic sanction. And this is what the Twelfth Amendment conferred.

It is entirely possible, of course, that political actors might have found some other way to confer democratic warrant on the presidency apart from the particular changes to presidential election the Twelfth Amendment made. But in any scenario, *some* reform of the electoral college was essential. If the President was to be connected to the people, and acquire democratic warrants for political action, the non-public election specified by the 1787 Constitution had to change. This is what the Twelfth Amendment did.

None of this is to argue that Twelfth Amendment led ineluctably to what we now call the “modern presidency.” The hyperkinetic chief executive familiar to Americans of the twenty-first century is the product of multiple complex and interlocking historical events, of which the Twelfth Amendment is only one. But if the Twelfth Amendment’s direct consequences were more limited, they were transformative nonetheless. The Amendment made the President a political actor. It is time to consider what that portends for constitutional law.

#### IV. STRUCTURAL REASONING ABOUT THE EXECUTIVE

Structural changes have interpretive consequences. The Twelfth Amendment changed the available uses of the President’s executive power by conferring on the office political authority and altering its relationship to Congress. And this in turn may affect our understanding of executive power. The Twelfth Amendment’s renovations carry potential import for a number of separation of powers controversies. Here I focus principally on a paradigmatic one: the President’s authority to remove executive branch officers. By constitutionalizing the political presidency, the Twelfth Amendment implies that the President may rightfully claim political control over the executive branch. To exercise political control, he must be able to remove subordinate policy-making officers. This is the argument that can break the removal-debate logjam, and this Part explains it in some detail.

Structural arguments of the kind I make here have recently become controversial. And so I begin with a brief word about what

sort of structural reasoning I have in mind, and then offer a brief explanation as to why this type of structural reasoning does not run afoul of John Manning's recent and well-taken critique of purposivist structural interpretation. These necessary clarifications made, I turn to apply structural reasoning to the removal debate.

### *A. Brief Defense of Structural Reasoning*

Interpretation by structural inference is one of the most venerable methods of constitutional reasoning in American law.<sup>456</sup> Chief Justice John Marshall was its earliest practitioner and perhaps its most skillful.<sup>457</sup> But it was Charles Black who gave the method its modern canonical expression.<sup>458</sup> In distinction from precedent-based reasoning and textual analysis, Black defined structural interpretation as a “method of inference from the structures and relationships created by the constitution in all its parts or in some principal part.”<sup>459</sup> The idea was to ask not only what a specific text meant in itself but also what relationship that text bore to other texts, and what relationships those texts together created among the various branches and entities of government.<sup>460</sup>

That last part is central because while it is surely possible to use structural reasoning to analyze the relationship between various clauses in the Constitution in order to fix the meaning of an ambiguous passage,<sup>461</sup> the method's core application involves more. Structural reasoning can and should encompass the relationships between the *branches* and *offices* of government that the Constitution creates, as well as those branches' and offices' internal compositions.<sup>462</sup> Put another way, the structure we care about should

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456. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 440-43 (2010).

457. *Id.* at 441 n.206.

458. John Harrison, *Review of Structure and Relationship in Constitutional Law*, 89 VA. L. REV. 1779, 1779-80 (2003) (reviewing CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969)).

459. BLACK, *supra* note 458, at 7.

460. Black, *supra* note 207, at 16-17.

461. Manning, *supra* note 456, at 439-40; *see also* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 791-95 (1999).

462. *See* Amar, *supra* note 461, at 790 (“[T]he most typical forms of structural argument focus not on the words of the Constitution, but rather on the institutional arrangements implied or summoned into existence by the document—the relationship between the

include not just grammatical structure but political structure too. Charles Black said as much when he famously argued that the Supreme Court ought to have premised its judgment in *Carrington v. Rash*<sup>463</sup> on a political structure argument that emphasized political supremacy of the federal government over the state governments.<sup>464</sup> Chief Justice Marshall relied on the same logic of political structure to decide *McCulloch v. Maryland*.<sup>465</sup> And the modern Supreme Court reasoned from political structure to reach the anti-commandeering principle announced in *Printz v. United States*.<sup>466</sup>

Thus it is quite relevant for the interpretation of the executive Vesting Clause in Article II, Section 1, that the Twelfth Amendment confers on the President a democratic warrant to act politically. This tells us that whatever else it is, the President's "executive power" after 1804 includes a political dimension. That is, the business of administering the laws includes *political* administration. That fact should weigh heavily when we consider, for example, what the President must be able to do and what sort of control over the executive branch he must be able to exercise in order to "take Care that the Laws be faithfully executed."<sup>467</sup> It is similarly relevant that the Twelfth Amendment empowered the President to act as a policymaker vis-à-vis Congress, and that as it did so, it removed the Vice-President as an internal political rival, making the Executive as a whole politically homogeneous.<sup>468</sup> These facts too tell us something about what "executive power" means. I will have more to say on all of this momentarily, but the point now is that political structure matters. That is my first claim.

My second claim is that reasoning from the political structure created by the Constitution's text does not constitute an objectionable form of generality shifting. John Manning has recently pointed out that some of the Supreme Court's structural reasoning in its

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Presidency and the Congress, or the balance between the House and the Senate.").

463. The main issue of the case was whether Texas could forbid active-duty members of the U.S. military from establishing residency to vote in the state. 380 U.S. 89, 89-90 (1965).

464. See BLACK, *supra* note 458, at 8, 11-12.

465. 17 U.S. (4 Wheaton) 316, 428 (1819); see BLACK, *supra* note 458, at 13-15; see also AMAR, *supra* note 2, at 22-23.

466. 521 U.S. 898, 918-20 (1997). I am indebted to Justice Scalia for this point.

467. U.S. CONST. art. II, § 3.

468. See *supra* Part III.



federalism and separation of powers jurisprudence looks suspiciously like the sort of purposivism the Court has rejected as a method of statutory interpretation.<sup>469</sup> In the statutory context, the Court has been keen to emphasize in recent years that no law pursues its ends at all costs, and that the specific means of implementation a statute's drafters select must therefore not be gainsaid by reference to broader statutory purpose.<sup>470</sup> Statutory directives represent bargained-for legislative compromises; to trump them by reference to purpose is to shift statutory meaning to a level of generality higher than and different from what the drafters agreed upon. Manning argues persuasively that the Court's process-based critique of generality shifting for statutory interpretation should apply to constitutional interpretation also.<sup>471</sup>

Interpretive inferences based on political structure, however, need not constitute generality shifting of this sort. Indeed, Manning contends that the "most promising [ ] way to lend determinacy to the Vesting Clauses is to read them in the light of surrounding constitutional terms."<sup>472</sup> I would add that the Article II Vesting Clause should be read in light of not only surrounding *terms* but also the political *structures* that those terms, and the Constitution as a whole, create. To make this move from semantic structure to political structure is not to fall back into purposivism. Put another way, to interpret "executive power" by reference to the structural changes the Twelfth Amendment made to the executive branch internally and the new structural relationship it created between that branch and Congress is not to announce an abstract value, like federalism or separation of powers, that stands free of any particular constitutional provision.<sup>473</sup> Rather, it is to allow the political and

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469. See Manning, *supra* note 456, at 440-43; John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2004-08 (2009) [hereinafter Manning, *Federalism and the Generality Problem*]; John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942-46 (2011) [hereinafter Manning, *Separation of Powers as Ordinary Interpretation*].

470. See, e.g., *MCI Telecomms. Corp. v. AT&T Corp.*, 512 U.S. 218, 231 n.4 (1994) ("[The Court is] bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes"); *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) (same).

471. See, e.g., Manning, *Federalism and the Generality Problem*, *supra* note 469, at 2004-06; Manning, *Separation of Powers as Ordinary Interpretation*, *supra* note 469, at 1946-49.

472. Manning, *Separation of Powers as Ordinary Interpretation*, *supra* note 469, at 2034.

473. Manning, *supra* note 456, at 440.

institutional implications of one very specific constitutional provision, the text of the Twelfth Amendment, to inform the meaning of other specific provisions: the Article II, Section 1 Vesting Clause and the presidential powers enumerated in Sections 2 and 3.<sup>474</sup> To that task of structural reasoning, I now turn.

*B. Application: The Removal Power*

The removal debate is one badly in need of structural argument. After nearly three decades of renewed and impassioned scholarly attention, the debate is deadlocked along now familiar lines. On the one side are advocates of what has been styled the “unitary Executive,” who contend that as a matter of original meaning, the Constitution gives “all of the executive power to one, and only one, person: the president of the United States.”<sup>475</sup> These “unitarians,” as they are sometimes called, believe the executive power emphatically includes the authority to remove subordinate executive officers, a contention they support by reference to the Constitution’s Article II Vesting Clause,<sup>476</sup> as well as to the historical meaning of executive power and early federal practice.<sup>477</sup> On the other side stand the skeptics, who argue variously that the Constitution’s textual silence as to presidential removal is authoritative;<sup>478</sup> that the Article II Vesting Clause conveys no substantive authority on the President apart from those powers listed in Sections 2 and 3 (which do not include removal),<sup>479</sup> that the historical meaning of executive power is indeterminate or contrary to the unitarian position;<sup>480</sup> that the

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474. See *Printz v. United States*, 521 U.S. 898, 918-22 (1997) (stating that the Commerce Clause cannot be interpreted to permit the federal government to commandeer state officials to implement its directives because to do so would upset the structural division between federal and state sovereigns).

475. See CALABRESI & YOO, *supra* note 62, at 3.

476. U.S. CONST. art. II § 1.

477. See, e.g., CALABRESI & YOO, *supra* note 62, at 4-9; see also CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION*, 154-160 (1991); Calabresi & Prakash, *supra* note 166, at 599; Calabresi & Rhodes, *supra* note 166, at 1161; Currie, *supra* note 223, at 195-202.

478. A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1373 (1994).

479. Flaherty, *supra* note 137, at 1789; Froomkin, *supra* note 478, at 1365.

480. Flaherty, *supra* note 137, at 1790; Lessig & Sunstein, *supra* note 167, at 12; Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2078 (2009).

First Congress actually separated substantial portions of the administration from presidential control,<sup>481</sup> never endorsing presidential removal as a constitutional matter;<sup>482</sup> and that a bevy of normative considerations counsel against vesting a power to remove in the President.<sup>483</sup>

The stalemate is entrenched, due largely to the profound ambiguity of Article II's text and history. Advocates of presidential removal typically rest their claims on the Vesting Clause,<sup>484</sup> and they have made a strong case that it does more than merely designate the identity of the actor who will exercise the powers enumerated in Sections 2 and 3, but rather conveys some independent substantive authority to administer the laws.<sup>485</sup> But "the executive power" mentioned in the Clause is undefined. As a consequence, insisting that the President alone has authority to remove any officer performing executive responsibilities because the Constitution gives all of the executive power to the President does not get one very far.<sup>486</sup> It only begs the question: what does

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481. Lessig & Sunstein, *supra* note 167, at 30-33.

482. Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 360-63 (1927).

483. See Flaherty, *supra* note 137, at 1740; Froomkin, *supra* note 478, at 1374.

484. See, e.g., Calabresi & Prakash, *supra* note 166, at 570-81. The Supreme Court and various scholars have named other textual candidates. In the seminal *Myers v. United States*, Chief Justice William Howard Taft suggested the President's authority to remove executive subordinates was founded on his obligation to "take Care the Laws be faithfully executed." 272 U.S. 52, 122 (1926). In 1789, James Madison argued that the power to remove was concomitant with the power to appoint, which Article II conferred on the President. See 11 DEBATES IN THE HOUSE OF REPRESENTATIVES 868 (Charlene Bangs Bickford et al. eds., 1992). But neither of these is particularly plausible as a source of removal authority. The Faithful Execution Clause imposes a duty, rather than conferring power. See Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1836-37 (2006). And our Constitution clearly does not make the power to remove incident to the power to appoint. *Id.* at 1834. As Prakash points out, "numerous entities select various federal officials, with apparently few supposing that the selectors may remove the selected." *Id.* For instance, the Electoral College voters may not remove a President; "the people of a congressional district may not recall their representative"; and governors who can "appoint" replacement Senators under Article I, Section 3 have no power to remove them. *Id.* Prakash also persuasively shows that the appointment-based removal argument relies on assumptions about agency relationships between the President and other officials not warranted in the federal system. *Id.* at 1834-37.

485. See Calabresi, *supra* note 166, at 1388; Calabresi & Prakash, *supra* note 166, at 570-81 (1994); Calabresi & Rhodes, *supra* note 166, at 1178. For the contrary view, see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551 (2004); Froomkin, *supra* note 478, at 1363.

486. Calabresi & Prakash, *supra* note 166, at 595-96. Calabresi and Prakash do not rest

“executive power” include? Some unitarians look to the historical practice of the British Crown for the answer and argue that because the Crown held the authority to remove executive officers at will or, perhaps more precisely, to designate the length and type of tenure during which these officers would hold their posts,<sup>487</sup> the Article II “executive power” can be assumed to include the same.<sup>488</sup> Yet as with every argument that looks to English practice as a source of background meaning, this claim presumes that revolutionary-era Americans regarded the English experience as normative. They likely did not—at least, not uniformly.<sup>489</sup>

Alternatively, some advocates of removal have pointed to the decision of the First Congress to include in the bill establishing the Department of Foreign Affairs language acknowledging the right of the President to remove the department’s secretary.<sup>490</sup> This is the so-called Decision of 1789.<sup>491</sup> But fixing the Decision’s meaning is a notoriously complicated endeavor, not least because what is called “the Decision” spans multiple cycles of voting and debate across both Houses.<sup>492</sup> Even the most spirited proponents of this approach must

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on this assertion, but go on to develop an account of executive power and presidential responsibility based on text and history. *Id.* at 596-97.

487. See Prakash, *supra* note 484, at 1820.

488. See YOO, *supra* note 162, at 45, 65.

489. See Bailey, *supra* note 153, at 455; Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 U. SAN DIEGO L. REV. 575, 592-93 (2011). The history of the framing period casts considerable doubt on the idea that the American constitution makers looked to the British experience as a ready model. *Id.* at 592-93. Historians emphasize that the political and military revolution that began in the mid-1770s was accompanied by an intellectual cataclysm, one that swept away political concepts inherited from the common law in favor of newly forged American variants. *Id.* at 589. Evidence for how the framers did or did not borrow from the British tradition of royal removal is thin. The Philadelphia debates are silent on this question, as on the content of executive power more generally. *Id.* at 591-92. The practices of the revolutionary era states are similarly ambiguous: four state constitutions in the revolutionary period referenced some sort of removal power, but three of the four entrusted it to the state executive acting with a council. Prakash, *supra* note 484, at 1822. Only in Maryland could the governor alone suspend or remove civil officers. *Id.* Other state constitutions did not address the subject. *Id.* at 1822-23.

490. CALABRESI & YOO, *supra* note 62, at 35.

491. See *id.* at 10-36; Prakash, *supra* note 484, at 1827-30. See generally Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006) (providing a general discussion of the Decision of 1789). Chief Justice William Howard Taft made the same argument in *Myers v. United States*, 272 U.S. 52, 174-75 (1926).

492. To simplify, the key question is what motivated a group of fifteen Representatives who voted *against* removing language from one version of the bill that explicitly grounded the President’s removal authority in a delegation from Congress, only to vote *in favor* of the final

rely on inferences from scattered statements by the key voters and speculation as to those voters' true motives.<sup>493</sup> In the end, it appears impossible to say with any certainty whether the determinative House members believed the Constitution vested the power of removal in the President.<sup>494</sup>

The removal debate is due for a structural turn. Tellingly, unitarian scholars' most powerful point is less an argument from Article II's text and history than an intuition. The intuition is that if the President is in charge of the executive branch, "[i]t would make little sense to force the President to deal with officers who fundamentally disagree with his administrative or political philosophy."<sup>495</sup> That idea turns on a certain unacknowledged conception of what presidential administration is about. To be specific: The unitarian position assumes presidential administration would be impossible, or nearly so, if the President were not able to maintain *political* control over the executive branch. Beneath that assumption rests a further one: that what the President does is political, that he is in fact a political actor. As it turns out, the best case for a presidential power of removal comes from the political character the Twelfth Amendment conferred on the presidency.

### 1. *The Core Argument*

The critical question for determining whether the President has constitutional power to remove executive officials is: What does it mean to administer the laws? This is where the Twelfth Amendment proves enlightening. The structural changes Amendment

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version that acknowledged the President's right to remove the Foreign Affairs Secretary but without specifying the source of that authority. The consensus view is that this faction of fifteen believed the Constitution did not unambiguously confer removal authority on the President, but thought the authority could be delegated by act of Congress under the Necessary and Proper Clause. This view was first articulated by Justice Louis Brandeis in dissent in *Myers*, 272 U.S. at 285 & n.74 (Brandeis, J., dissenting), and since reiterated by Edward Corwin, see Corwin, *supra* note 482, at 361-62; 1 CORWIN ON THE CONSTITUTION 332 (Richard Loss ed., 1981), and David Currie, Currie, *supra* note 1, at 41 & n.240, among others, see Bradley & Flaherty, *supra* note 485, at 662. For a detailed discussion of this voting sequence, see Prakash, *supra* note 491, at 1028-33; see also Corwin, *supra* note 482, at 360-70.

493. Prakash, *supra* note 491, at 1052-53, 1060.

494. *Id.* at 1060-61, 1072-73. For a similar conclusion, see Manning, *Separation of Powers as Ordinary Interpretation*, *supra* note 469, at 2030-32 & nn. 452-53.

495. Calabresi & Prakash, *supra* note 166, at 598.

made supply definition to the task of law administration and by extension, definition to the content of executive power.<sup>496</sup> Specifically, the Twelfth Amendment tells us that law administration now has political implications, that it is in fact a political task because the presidency is now a political office.<sup>497</sup> By subjecting the Executive to organized political competition, and by connecting it to popular majorities,<sup>498</sup> the Twelfth Amendment authorizes presidential administration according to political principles and for the purpose of advancing a political agenda.<sup>499</sup>

The President's post-Twelfth Amendment political role has significant institutional implications. Simply put, in order to impose his political principles on the administration of the laws, the President must be able to control those executive branch subordinates who occupy policy-making positions. Political control is necessary to political administration. If policy-making officials in the executive branch were insulated from the direct management of the President in the vein Alexander Hamilton imagined, for instance with a more or less permanent civil service devising policy and administering the government as figurehead chief executives came and went,<sup>500</sup> the President would be institutionally unable to conform the enforcement of the law to his political priorities. The President as political administrator thus implies a reasonably close integration of the Executive and the administration.

This integration would be defeated should the President be unable to remove policy-making subordinates who refuse to comply with his wishes. This point is the true, if unacknowledged, heart of Chief Justice Taft's famous defense of presidential removal power in *Myers v. United States*.<sup>501</sup> After holding that "[t]he vesting of the executive power in the President was essentially a grant of the power to execute the laws,"<sup>502</sup> Taft went on to note that the President exercises the enforcement authority with the help of numerous subordinates.<sup>503</sup> The President must be able to control

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496. See *supra* Part III.

497. See *id.*

498. U.S. CONST. amend. XII.

499. See *supra* Part III.

500. See BAILEY, *supra* note 2, at 170; see also *supra* notes 118-20 and accompanying text.

501. 272 U.S. 52, 53 (1926).

502. *Id.* at 117.

503. *Id.* ("[T]he President alone and unaided could not execute the laws. He must execute

those subordinates in order to control the administration. “[T]o hold otherwise [and permit the Senate a negative on removals] would make it impossible for the President, *in case of political or other difference with the Senate or Congress*, to take care that the laws be faithfully executed.”<sup>504</sup>

Though he barely acknowledged it, Taft’s logic turned on the political dimensions of presidential law enforcement. If the President’s responsibility were merely to administer laws Congress wrote without regard to political considerations or policy, then there would be nothing untoward in Congress insulating executive officials, including those with appreciable authority like cabinet secretaries, from direct presidential control.<sup>505</sup> The President’s job, after all, would be to administer the policy Congress devised. But Taft’s reasoning hinged on the claim that Congress is not the only policymaker in the federal government. “The extent of the political responsibility thrust upon the President” is vast, Taft contended.<sup>506</sup> And it was the President’s right to “determin[e] the national public interest and [to] direct[] the action to be taken by his executive subordinates to protect it.”<sup>507</sup> The President was entitled to make policy judgments of his own, which meant that in cases of political disagreement with the Senate, or Congress more generally, he must be able to pursue his own political principles and not have Congress’s forced upon him.<sup>508</sup> James Madison invoked exactly this logic in 1834 when he defended Andrew Jackson’s exercise of the removal power. If the Senate had a share in the power to remove, Madison reasoned, it could “force on the Executive Department a continuance in office, even of Cabinet officers, notwithstanding a change from a personal [and] political harmony with the President, to a state of open hostility towards him.”<sup>509</sup> Taft and Madison’s argument

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them by the assistance of subordinates.”).

504. *Id.* at 164 (emphasis added).

505. Bradley & Flaherty, *supra* note 485, at 546; Froomkin, *supra* note 478, at 1348-49; see also Lessig & Sunstein, *supra* note 167, at 5-11.

506. *Myers*, 272 U.S. at 133.

507. *Id.* at 134.

508. *Id.* at 164.

509. Letter from James Madison to John Patton (Mar. 24, 1834), in 9 THE WRITINGS OF JAMES MADISON, 1819-1836, at 534-36 (Gaillard Hunt ed., 1910).

assumed the President's political authority without inquiring as to its source. The Twelfth Amendment is that source.<sup>510</sup>

The argument can be extended by reference to changes the Amendment made to the internal composition of the Executive Branch. The text eliminated the Vice-President as an independent political authority and unified the executive department under the political direction of the President.<sup>511</sup> Permitting Congress to place executive officers outside presidential control would reverse this structural change and reintroduce political heterogeneity to the Executive. This political diversification is likely what unitarians have in mind when they argue that denying the President the power to remove would render the Executive less unitary, even though it would still leave the President as the single head of the executive branch.<sup>512</sup> Again, the argument is a structural one about political control and is best made from the Twelfth Amendment.

The Amendment provides at least one other reason to conclude that the President has the constitutional authority to remove policy-making executive officials. By virtue of the changes to presidential election, the presidency is now a representative office, and the President's control over the administration is one powerful means by which the people exert control over their government.<sup>513</sup> This reason is all the more compelling in an age when administration accounts for the vast majority of day-to-day governance. Perhaps not surprisingly, it was the populist Jefferson's central justification for presidential control of subordinate officers.<sup>514</sup> The "will of the nation," he contended, "calls for an administration of government according with the opinions of those elected," and that meant the President needed authority to remove those persons from whom he "could scarcely expect ... a cordial co-operation [sic]."<sup>515</sup>

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510. Lessig and Sunstein reach a similar conclusion on atextual grounds. The reasoning given here supplies firmer ground than their merely functional and consequentialist logic. See Lessig & Sunstein, *supra* note 167, at 97-98.

511. See *supra* notes 370-85 and accompanying text.

512. See CALABRESI & YOO, *supra* note 62, at 4; Calabresi & Prakash, *supra* note 166, at 661-65; Calabresi & Rhodes, *supra* note 166, at 1165-66.

513. BAILEY, *supra* note 2, at 152.

514. *Id.* at 152-55.

515. Letter from Thomas Jefferson to Elias Shipman, in 9 THE WORKS OF THOMAS JEFFERSON, *supra* note 430, at 270; see also BAILEY, *supra* note 2, at 163-64.



The same point also appeared in *Myers*, though its true significance was obscured. “The President is a representative of the people,” Taft wrote, “just as the members of the Senate and of the House are, and it may be at some times, on some subjects ... [that he] is rather more representative of them all than are the members of either body of the Legislature, whose constituencies are local and not countrywide.”<sup>516</sup> Because the President was elected “with the mandate of the people,”<sup>517</sup> the power of the President to remove was essential to “the plan of government devised by the framers of the Constitution.”<sup>518</sup> Taft was wrong about the Framers—their plan of government did not include a political presidency—but right that presidential removal is, after the Twelfth Amendment, one important way of implementing the people’s authority over their government.

The argument I have advanced here is structural: in sum, the political character of the presidency and its policy-making authority in relation to Congress make presidential administration a political undertaking, and the President requires the power of removal to vindicate this structurally conferred political role.<sup>519</sup> Moreover, removal power in the hands of a democratic and representative President is an important means by which “We the People” exercise control over the government.<sup>520</sup> There remains the question of precisely which executive officials the President needs to have power to remove. The argument from political structure suggests the class extends to those officials with significant policy-making authority—cabinet heads, principal deputies, and heads of agencies, at least. I turn now to briefly trace how this model might work in practice.

## 2. *Cases and Controversies*

My intention in this Section is to offer a brief overview of how the political structure argument might play out in four of the Supreme Court’s seminal removal cases: *Myers v. United States*, *Humphrey’s*

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516. *Myers v. United States*, 272 U.S. 52, 123 (1926).

517. *Id.* at 123.

518. *Id.* at 127.

519. See *supra* notes 495-506 and accompanying text.

520. See *supra* notes 506-10, 513-19 and accompanying text.

*Executor v. United States*, *Bowsher v. Synar*, and *Morrison v. Olson*. In at least one case it suggests a different result; in others it would work a change in the reasoning. I will not attempt to analyze the cases in detail, but only to suggest how the structural argument might affect their resolution.

*a. Myers v. United States*

Chief Justice Taft, writing for the Court, concluded that the President enjoyed exclusive constitutional authority to remove executive officers of the United States, and that an 1876 act of Congress requiring Senate approval for removal of postmasters was unconstitutional.<sup>521</sup> Taft's voluminous opinion relied heavily on the constitutional judgment he believed the First Congress had reached in the Decision of 1789.<sup>522</sup> *Myers* also credited Congress's acquiescence to presidential removal for three-quarters of a century (until the Tenure of Office Act of 1867), and the executive branch's consistent claims that the President possessed removal authority.<sup>523</sup> In addition, *Myers* held, if somewhat obliquely,<sup>524</sup> that "executive power" inherently included the removal power, both by virtue of historical practice—"[i]n the British system, the Crown, which was the executive, had the power of appointment and removal"<sup>525</sup>—and because without the power to remove, the President could not take care that the laws be faithfully executed.<sup>526</sup>

The argument from political structure suggests the *Myers* conclusion is right, but the reasoning is in need of revision. To the extent Taft's opinion held that the Decision of 1789 represented an authoritative judgment by the First Congress on the removal question, it was likely mistaken.<sup>527</sup> And even if the claim were

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521. *Myers*, 272 U.S. at 163-64, 176-77.

522. *Id.* at 136.

523. *See id.* at 136, 174-75.

524. *See id.* at 136 ("We have devoted much space to this discussion and decision of the question of the Presidential power of removal in the First Congress ... because of our agreement with the reasons upon which it was avowedly based.").

525. *Id.* at 118.

526. *Id.* at 122 ("[W]hen the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.").

527. *See supra* notes 491-94 and accompanying text.

historically accurate, it is not clear from an originalist perspective why the views of a body of individuals other than the drafters and ratifiers should count as constitutionally authoritative, nor why the acquiescence of subsequent Presidents and Congresses should settle the question—unless of course these actors' views actually comported with the original meaning.<sup>528</sup> If they did not comport with the original meaning, they would be irrelevant. Alternatively, if they were only one plausible interpretation of a fundamentally ambiguous meaning, they would be not legal interpretations but political constructions, which the judiciary should neither invalidate nor endorse.<sup>529</sup> *Myers's* reference to English Crown practice was similarly flawed: it is far from clear that the Constitution takes the monarch's prerogatives as a baseline.<sup>530</sup>

When the opinion turns to the President's need to control the administration, *Myers* moves to firmer ground.<sup>531</sup> The structural argument would set this point in its proper context. Because the Constitution's structure makes the President a political actor, *Myers* should have held that his administration of the laws is a political undertaking in the broadest sense. As the people's representative, the President has the right to exercise independent policy judgment in his execution of the law and to administer the government according to his political principles. He cannot realize these rights without exercising control over policy-making subordinates. As to whether the Portland postmaster at issue in *Myers* counts as a policy-making official, it is sufficient to note that in 1926, the time the case was decided, regional postmasters were important political appointees with significant administrative responsibilities.<sup>532</sup>

This revised reasoning captures *Myers's* most promising insights about the President's need for political control of his administration and the office's representative character, while grounding those insights firmly in constitutional structure.

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528. See Manning, *Separation of Powers as Ordinary Interpretation*, *supra* note 469, at 2029.

529. See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 154-55 (1999).

530. See *supra* notes 487-89 and accompanying text.

531. See *Myers*, 272 U.S. at 122.

532. See C. Herman Pritchett, *The Postmaster General and Departmental Management*, 6 PUB. ADMIN. REV. 130, 133-35 (1946) (describing the responsibilities of the Postmaster General around the time of the *Myers* decision).

*b. Humphrey's Executor*

In *Humphrey's Executor v. United States*, decided just nine years after *Myers*, the Supreme Court reversed course and held that Congress may limit the President's removal authority over members of independent agencies and other government officials who are not "purely executive."<sup>533</sup> The question in the case was whether the Federal Trade Commission's ("FTC") founding statute, the Federal Trade Commission Act, prevented the President from removing FTC commissioners for any reason other than "inefficiency, neglect of duty, or malfeasance."<sup>534</sup> The Court famously reasoned that the Commission was "a body of experts"<sup>535</sup> created by Congress to "carry into effect legislative policies embodied in the statute,"<sup>536</sup> that it was "to be non-partisan"<sup>537</sup> and was obliged to "act with entire impartiality,"<sup>538</sup> and therefore could not be an executive agency.<sup>539</sup> Instead, the Court declared the Commission to be "quasi-judicial and quasi-legislative."<sup>540</sup>

The Court's refusal to locate the Commission squarely in any one branch of government has been justly criticized.<sup>541</sup> The Court's claim that the Commission's expert and nonpartisan character entitled it to insulation from executive control is equally problematic. The structural argument would produce a different outcome. The Commission, as the Court admitted, administered "legislative policies",<sup>542</sup> more precisely, it conducted investigations, made reports, and generally enforced the government's antitrust law.<sup>543</sup> These duties made the Commission a policy-making agency, and constitutional structure therefore instructs that its members must

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533. 295 U.S. 602, 627-28, 631-32 (1935).

534. *Id.* at 619.

535. *Id.* at 625.

536. *Id.* at 628.

537. *Id.* at 624.

538. *Id.*

539. *Id.*

540. *Id.*

541. See generally Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 234 (analyzing the doctrinal approaches to separation of powers and critiquing the Supreme Court's recent decisions in that area).

542. *Humphrey's Ex'r*, 295 U.S. at 628.

543. *Id.*

be subject to presidential control.<sup>544</sup> This same logic applies to all executive branch agencies, whether designated “independent” or not: If the agency implements policy, the President is entitled to control it through the removal power.<sup>545</sup> The only executive agencies to which this conclusion would not apply are those that conduct largely judicial functions and are therefore not, strictly speaking, policy-making entities.<sup>546</sup>

*c. Bowsher v. Synar*

*Bowsher v. Synar* raised the question of whether Congress could invest the Comptroller General with final authority over the federal budget and simultaneously reserve for itself the power to remove the office’s occupant.<sup>547</sup> The Court answered in the negative based on the constitutional separation of powers doctrine, which it said prevented Congress from seizing the task of law administration.<sup>548</sup> Stated in this form and at this level of abstraction, the *Bowsher* judgment comes dangerously close to relying on a separation of powers meta-norm not anchored to any particular text.<sup>549</sup> Justice White dissented based in part on this ground.<sup>550</sup>

The structural argument developed here supplies an alternative ground for the decision—namely, that the Gramm-Rudman-Hollings Act attempted to prevent *presidential* removal of the Comptroller.<sup>551</sup> The Court’s findings as to the executive, policy-making nature of the Comptroller’s authority were more than enough to sustain the conclusion that the President must be able to direct the Comptroller in order to maintain control of the executive branch.<sup>552</sup> The Court found that the Comptroller General wielded “the ultimate authority

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544. *See supra* Part IV.B.1.

545. *See supra* Part IV.B.1.

546. The Court reached the same conclusion in *Myers*. *See Myers v. United States*, 272 U.S. 52, 135 (1926). Lessig and Sunstein also reach a similar conclusion, although on different grounds. *See Lessig & Sunstein, supra* note 167, at 22-32.

547. 478 U.S. 714, 717 (1986).

548. *Id.* at 726.

549. *See Manning, Separation of Powers as Ordinary Interpretation, supra* note 469, at 1961.

550. *Bowsher*, 478 U.S. at 760 (White, J., dissenting).

551. The statute permitted removal only by congressional resolution, and only for cause. *See id.* at 717, 728.

552. *Id.* at 733.

to determine the budget cuts to be made. Indeed, the Comptroller General commands the President himself to carry out, without the slightest variation ... the directive of the Comptroller General as to the budget reductions.”<sup>553</sup> Structure tells us that an officer with this authority must come under the direction of the President. On this reasoning, Congress may well have been entitled to retain power to remove the Comptroller for cause—the office was arguably an agent of Congress housed in the legislative branch<sup>554</sup>—so long as it did not deny the President’s power to remove the Comptroller at will.

*d. Morrison v. Olson*

Finally we come to *Morrison v. Olson*, the Court’s most recent removal case and one of its most controversial.<sup>555</sup> *Morrison* concerned the Watergate-era Ethics in Government Act, which permitted the Attorney General to seek the appointment of an independent counsel to investigate alleged misfeasance by high executive branch officials, including the President.<sup>556</sup> Appointment of the independent counsel was vested in a special three-judge subpanel of the U.S. Court of Appeals for the D.C. Circuit.<sup>557</sup> Removal was entrusted to the Attorney General alone and only for cause.<sup>558</sup> A seven-member majority of the Court concluded, over the lone dissent of Justice Scalia,<sup>559</sup> that the Act was constitutional in these particulars because the independent counsel did not interfere with “the functioning of the Executive Branch.”<sup>560</sup> For his part, Justice Scalia contended that prosecution of crimes was the quintessential executive power and was uniformly regarded as such at the time of the founding.<sup>561</sup> Scalia also argued that any derogation of the President’s power to remove executive branch officials would

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553. *Id.*

554. *Id.* at 737 (Stevens, J., concurring).

555. 487 U.S. 654, 685 (1988).

556. *Id.* at 660-61.

557. *Id.* at 661 n.3.

558. *Id.* at 686.

559. Justice Kennedy did not participate.

560. 487 U.S. at 658, 691-93.

561. *Id.* at 697, 733-34 (Scalia, J., dissenting).

undermine the principle of separated powers, because “*all of the executive power*” belongs to the President.<sup>562</sup>

Structural reasoning based on the Twelfth Amendment suggests the Court’s conclusion was likely correct, though not for the reasons it offered. Consider the Court’s logic. The majority rightly acknowledged that “the functions performed by the independent counsel are ‘executive’ in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.”<sup>563</sup> The Court concluded that this fact did not settle the matter, however. The majority was right about this because, contrary to the claims of Justice Scalia,<sup>564</sup> it does not appear that criminal prosecution has always been regarded as part and parcel of the executive power. Recent scholarship has cast doubt on Scalia’s assertion that the Framers never separated prosecution from presidential control—the earliest U.S. attorneys, for instance, were not under the direct control of the President.<sup>565</sup> This being the case, Scalia’s argument that to deny the President removal authority over a federal prosecutor is to divide the executive power<sup>566</sup> only begs the question.

According to the majority, the pertinent query was whether the President’s lack of removal control “unduly interfere[d] with the role of the Executive Branch.”<sup>567</sup> The Court apparently derived this test from *Nixon v. Administrator of General Services*, which held that a statute violates the Vesting Clause if it “disrupts the proper *balance* between the coordinate branches ... [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.”<sup>568</sup>

The Court was half right. To the extent the *Morrison* test valorizes interbranch balance as the sum and substance of the

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562. *Id.* at 705 (Scalia, J., dissenting).

563. *Id.* at 691.

564. *Id.* at 732-33 (Scalia, J., dissenting).

565. See, e.g., Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 290-303 (1989); Lessig & Sunstein, *supra* note 167, at 15-16. But see Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 563 (2005).

566. *Morrison*, 487 U.S. at 732-33 (Scalia, J., dissenting).

567. *Id.* at 693.

568. 433 U.S. 425, 443 (1977) (emphasis added). For a perceptive analysis of the *Morrison* decision, see Lee S. Liberman, *Morrison v. Olson: A Formalist Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 327-28 (1989).

Constitution's separated powers,<sup>569</sup> it turns down a blind alley. This sort of functionalism pays far too little attention to the divisions between the branches explicitly written in the Constitution and gives far too little credence to the Constitution's command that these divisions remain permanent.<sup>570</sup> Nevertheless, the Court was onto something when it looked to the *effect* that the removal-insulated independent counsel might have on the President's capacity to execute his assigned constitutional role. As we have seen, structural reasoning tells us that the President's constitutional role is political in the broadest sense and that the President thus requires political control of the executive branch.<sup>571</sup> The question the Court should have asked, therefore, is whether preventing presidential removal of the independent counsel interfered with the President's ability to control his branch politically—that is, his ability to direct policy and conform law administration to his political principles. The Court should have asked this question not because the Constitution commands merely functional balance between the branches, but because the Vesting Clause, interpreted in light of constitutional structure, gives the President political control of the administration.<sup>572</sup>

An effects test is necessary in *Morrison* to vindicate the President's political control of the executive branch, because it is not immediately apparent whether the independent counsel counts as policymaker in the relevant sense. If the independent counsel could be easily classed as a policy-making authority, like the Comptroller General in *Bowsher*, no inquiry as to effects would be necessary. And of course were Justice Scalia correct that criminal prosecution

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569. This is the approach, more or less, famously advocated by Peter Strauss. See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 493-94 (1987); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 575-77 (1984). This functionalist approach was long advocated on the Supreme Court by Justice White, among others. See *Bowsher v. Synar*, 478 U.S. 714, 759-60 (1986) (White, J., dissenting); *INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting).

570. See, e.g., Manning, *Separation of Powers as Ordinary Interpretation*, *supra* note 469, at 1979-80; see also Merrill, *supra* note 541, at 251. See generally M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604-05 (2001) (critiquing contemporary conceptualizations of separation of powers law and advocating a new interpretation).

571. See *supra* Part IV.B.1.

572. See *supra* Part IV.B.1.



had always been regarded as an inherent aspect of the executive power,<sup>573</sup> an effects test would be similarly beside the point: the meaning of executive power would not be ambiguous, at least to this case.<sup>574</sup> But in the end, neither the policy-making status of the independent counsel nor the connection between executive power and prosecutorial control is clear. Consequently, the *effect* of the independent counsel on the President's capacity to exert political control of the executive branch should decide the case.

### C. Other Applications

#### 1. The Treaty Power

The Twelfth Amendment bears on other questions of executive power. For example, it helps explain the Supreme Court's frequently repeated but never adequately justified holding that the President has sole authority to conduct treaty negotiations apart from Senate oversight and its related holding that the President may enter into treaty-like executive agreements with no Senate approval at all.<sup>575</sup>

The touchstone for this line of cases is the Court's famous, and famously confused, Depression-era decision, *United States v. Curtiss-Wright*. In 1934, Congress delegated to President Franklin Roosevelt the authority to prohibit the sale of arms to certain nations in South America.<sup>576</sup> The Court held that this authorization did not constitute an illegal delegation of law-making power because the delegation merely vindicated, rather than augmented, the President's independent power over foreign affairs.<sup>577</sup> "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power," the Court wrote in what is perhaps the decision's key

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573. *Morrison v. Olson*, 487 U.S. 654, 732-33 (1988) (Scalia, J., dissenting).

574. John Manning disputes even this point. Manning, *Separation of Powers as Ordinary Interpretation*, *supra* note 469, at 1966 n.147 ("Even if prosecution is a quintessentially executive function, that conclusion does not preclude all congressional regulation of the way that function is implemented.").

575. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981); *United States v. Pink*, 315 U.S. 203, 229-30 (1942); *United States v. Belmont*, 301 U.S. 324, 330-31 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-29 (1936).

576. *Curtiss-Wright*, 299 U.S. at 311-12.

577. *Id.* at 321-22.

passage, “but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”<sup>578</sup> Elaborating on the point, the Court explained that in the “vast external realm” of foreign affairs, “with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”<sup>579</sup>

From this premise the Court inferred that the President must have the power to negotiate treaties on his own initiative, without senatorial oversight.<sup>580</sup> For one thing, the President, “not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries,” because he enjoyed access to “confidential sources of information” simply not available to the Senate.<sup>581</sup> But the critical point was the President’s status as “the sole organ of the nation in its external relations.”<sup>582</sup> Given that station, the power to negotiate with foreign powers was the President’s *by right*.<sup>583</sup> Thus, the Court concluded, “[i]nto the field of negotiation the Senate cannot intrude.”<sup>584</sup>

The Court used the same logic to infer presidential authority to negotiate binding executive agreements without Senate approval. In *United States v. Belmont*, the Court ruled that agreements reached between the Roosevelt Administration and the Soviet Union in 1933 as part of the Administration’s diplomatic recognition of the Soviet government empowered federal authorities to recover assets from American companies on the Soviet Union’s behalf, even though the agreements had never been ratified by, or even submitted to, the Senate.<sup>585</sup> The Court characterized these executive agreements as incidental to the power of diplomatic recognition.<sup>586</sup> And in the move that decided the case, the Court cast the authority to recognize

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578. *Id.* at 319-20.

579. *Id.* at 319.

580. *Id.* at 319-21.

581. *Id.* at 320.

582. *Id.* at 319 (internal quotations omitted).

583. *Id.*

584. *Id.* (emphasis added).

585. 301 U.S. 324, 330-31 (1937).

586. *Id.* at 330 (“The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments.”).

foreign nations as an exclusively presidential prerogative.<sup>587</sup> Recapitulating the reasoning of *Curtiss-Wright*, the Court in *Belmont* held that “[g]overnmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government.”<sup>588</sup> The Court broadened this logic five years later in *United States v. Pink*, holding that the President’s power to negotiate executive agreements stemmed not only from his right to confer diplomatic recognition but also from his authority “to determine the public policy of the United States with respect to” foreign nations, a right that was his to exercise “without consent of the Senate.”<sup>589</sup>

As a sheer matter of Article II text and history, these conclusions are hardly obvious. Article II, Section 2 grants the President the power, “by and with the Advice and Consent of the Senate, to make Treaties,”<sup>590</sup> but says nothing to suggest that the Senate’s participation should be confined to a ratifying vote taken only after the substantive work of treaty making has finished. And Article II does not so much as contemplate executive agreements.<sup>591</sup> Tellingly, at the Constitutional Convention it was the Senate, not the President, that held the treaty power until the Committee of Detail proposed to divide the treaty authority between the two branches in the Convention’s closing month.<sup>592</sup> Even then, many, and perhaps most, delegates anticipated that the Senate would remain the more important and active partner in treaty negotiations.<sup>593</sup>

How, then, to make sense of the Court’s conclusions? One might look to early executive practice, as courts have often done and as Akhil Amar has recently advocated.<sup>594</sup> But that interpretive strategy, if it can truly be called interpretive, is no more persuasive

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587. *Id.*

588. *Id.*

589. 315 U.S. 203, 229 (1942); *see also* *Dames & Moore v. Regan*, 453 U.S. 654, 682-83 (1981).

590. U.S. CONST. art. II, § 2, cl. 2.

591. U.S. CONST. art. II.

592. RAKOVE, *supra* note 38, at 264-65; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 493-95.

593. RAKOVE, *supra* note 38, at 266; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 5, at 540-41, 547-50.

594. AMAR, *supra* note 2, at 309-19.

in this context than on the removal question. And the Court's own attempted explanation in *Curtiss-Wright* is infamously convoluted.<sup>595</sup> That opinion claimed that the foreign affairs power belonged indivisibly to the President because the power originated not with the States, but rather was an incident of sovereignty, passing "from the Crown ... to the colonies in their collective and corporate capacity" as a result "of the separation from Great Britain."<sup>596</sup> This view of sovereignty has been roundly criticized, but in any event it only begs the question; even if the foreign affairs power was one that by its nature inhered only and ever in the national government, why should the Executive be the sole branch and the President the sole officer capable of its exercise? The Court's better answer has nothing to do with sovereignty, and everything to do with the political representation that follows from the Twelfth Amendment.

At one point in its opinion, the Court in *Curtiss-Wright* comments that the President is "a representative of the nation."<sup>597</sup> It is a tantalizing reference. In context, the language is largely rhetorical flourish, offered to embellish the Court's repeatedly stated and thoroughly conclusory point that the President is the nation's "sole organ" in foreign affairs.<sup>598</sup> But the Twelfth Amendment suggests that this reference to representation may supply a deeper logic for the Court's conclusions. The President is indeed, after the Twelfth Amendment, the nation's representative. He is connected to popular majorities, and thanks to that connection, authorized to act on behalf of the people. Ultimately, the post-Twelfth Amendment President possesses political authority, which is what the Court was gesturing toward, without ever quite grasping, in *Curtiss-Wright*.

The Constitution makes the President the head of state, as well as "Commander in Chief."<sup>599</sup> Join those constitutional designations with political authority, and the President acquires a strong claim to act as a policymaker in the realm of foreign affairs. That the President is the one and only head of state strongly suggests that a politically empowered Executive should be the *principal*

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595. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-20 (1936).

596. *Id.* at 316.

597. *Id.* at 319.

598. *Id.* at 319-20.

599. U.S. CONST. art. II, § 2.

policymaker in foreign matters and that he is uniquely empowered to, in the words of *United States v. Pink*, “determine the public policy of the United States” concerning foreign nations.<sup>600</sup> Once the President is understood in this light—as the nation’s political representative—the rest of the Court’s inferences seem far more plausible. If head of state status joined to political authority conveys the power to set the nation’s foreign policy, then the authority to make treaties is surely an important implement for carrying that foreign policy-making power into effect. To force the President to submit to Senate oversight of treaty-making, to deny him initiative and discretion, would severely hamper his ability to “determine the public policy of the United States”<sup>601</sup> concerning foreign nations in a way that submitting a finalized treaty for ratification would not. Similarly, if the President is, by virtue of being *the people’s* democratically chosen head of state, the sole representative of the nation to the outside world, then the power to recognize foreign governments would seem to be a uniquely presidential power. The ability to conclude bilateral agreements with other governments or to reach agreements that further America’s international public policy follows naturally enough. The President’s political status supplies the missing link in the Court’s treaty-making cases. And that status is a product of the Twelfth Amendment.

## 2. Directive Authority over Administrative Agencies

To take a brief, final example, structural reasoning based on the Twelfth Amendment might also have something to say about the President’s directive authority over administrative agencies. The Supreme Court’s decisions in *A.L.A. Schechter Poultry Corp. v. United States* and *Panama Refining Co. v. Ryan* suggested that delegation of rule-making authority directly to the President violates the Constitution’s separated powers,<sup>602</sup> while the Court’s subsequent decisions indicate that such delegations to administrative agencies, however broad, do not.<sup>603</sup> From these decisions, many scholars have concluded that presidential direction of

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600. 315 U.S. 203, 229 (1942).

601. *Id.*

602. 295 U.S. 495 (1935); 293 U.S. 388, 431-33 (1935).

603. *See, e.g.,* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 486 (2001).

administrative rule-making is unconstitutional, or at least, highly problematic.<sup>604</sup> The structural argument developed here suggests otherwise. If those agencies are within the executive branch<sup>605</sup> and engaged in policy making, presidential direction of their activity violates no constitutional norm because the President is constitutionally entitled to control the political, policy-making activity of the Executive. Or so one might argue. Whether Congress may delegate administrative authority to particular executive branch officers and prevent the President from controlling their decisions, except by removal, is a separate question, though the structural argument may well have something to say on that point also.<sup>606</sup>

#### CONCLUSION

The American presidency was perhaps the Philadelphia Framers' most original composition. My argument here has been that the Twelfth Amendment fundamentally transformed that office and restructured the constitutional order in the process. I have argued that these structural changes have interpretive consequences. By altering the character of the presidency and its relationship to Congress, the Twelfth Amendment changed the meaning of executive power. After the Amendment, administration of the laws became a political task and the President a political actor. This shift, at once constitutional and political, casts new light on the removal debate, on the treaty-making power, and potentially on a series of other executive power questions. Ultimately, my argument is just this: one cannot understand the constitutional presidency and its powers without reckoning with the Twelfth Amendment.

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604. For a discussion, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319-31 (2001).

605. And every entity or agency in the government must reside within one branch. See Merrill, *supra* note 541, at 231.

606. Chief Justice Taft acknowledged this possibility in *Myers* and deemed it constitutionally permissible. See *Myers v. United States*, 272 U.S. 52, 161 (1926).