

## CONSTITUTIONAL CHANGE, ORIGINALISM, AND THE VICE PRESIDENCY

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*Constitutional formalists posit that the Article V amendment process represents the only legitimate method of achieving constitutional change. This view is challenged by numerous widely-accepted judicial decisions that have introduced new meaning into constitutional language by departing from original intentions, expectations, or meaning. A similar, though less discussed, process occurs as, independent of judicial work, constitutional institutions evolve to take forms inconsistent with what the Founders imagined or the language they wrote suggested.*

*The history of the Vice Presidency offers an important example of how constitutional institutions do and should change, sometimes in ways quite different from what various theories of originalism would suggest. Although the Founders placed the Vice President primarily in the legislative branch and provided that he/she would be "President of the Senate," the office has evolved to become a central part of the executive branch whose occupant almost never discharges the formal legislative role the Constitution assigns. Nor does the Vice President's successor role account for his/her activities. Instead, the office has been transformed to function as an active part of the executive branch essentially through a common-law-like process. To the extent that Article V is associated with constitutional change regarding the vice-presidential duties, it has largely confirmed, rather than prescribed, the changes that had otherwise occurred. The reimagining of the Vice Presidency has occurred with broad support.*

*The experience of the Vice Presidency provides a counterexample to constitutional formalism generally and to originalism more specifically. Constitutional change through institutional evolution should become more relevant in thinking about constitutional amendment and originalism, especially as the proponents of originalism justify it increasingly not as a means of promoting judicial restraint, but rather as the appropriate way to interpret the Constitution. This change lends greater importance to studying examples of institutional behavior in considering the merits of originalism as a guiding theory of constitutional interpretation.*

Constitutional formalism holds, among its central principles, that constitutional change can only occur through the amendment process of Article V of the Constitution. Those who regard the Constitu-

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tion as a dynamic document reject this premise.<sup>1</sup> They believe that, independent of Article V, at least some constitutional provisions can take on new meaning and support behavior different from that originally intended, understood, or meant. And they think that this adaptability is a desirable, even a necessary, characteristic of our Constitution.

Most such discussions focus on the Supreme Court as an agent of constitutional change and either celebrate or criticize its role in revising constitutional meaning through judicial reinterpretation. Proponents argue that the Supreme Court does and should interpret the Constitution's concepts to accommodate changing times and that many widely accepted interpretive results are inconsistent with originalist methodologies. Opponents view such activity as illegitimate and inconsistent with constitutionalism and limited government.

But much behavior of constitutional institutions occurs through the actions of political figures and independent of judicial interpretation. And these institutions sometimes conduct themselves in a manner quite different from what the Framers intended or expected, or from the meaning that that generation's public would reasonably have attached to constitutional language. If constitutional institutions must comport with original meaning when it exists, then those who deviate from it act unconstitutionally, violate their oaths, and are properly subject to criticism, even sanction. Yet sometimes, that divergent behavior is met with widespread acceptance, rather than reprimand, not only by those who advocate for a "living Constitution," but also by those who, in other contexts, celebrate originalism. And sometimes, that repeated practice produces enduring change in the way in which our government's constitutional institutions operate.

That has certainly been true of the American Vice Presidency. Its constitutional character has been transformed from what the Founders intended or expected, and its modern operation certainly does

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<sup>1</sup> See, e.g., HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION: A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW* 11 (1927) ("And wholly apart from amendments by which the actual words of the constitution have been altered or added to, a living constitution cannot remain static. Our constitution has, as we shall see, developed by the growth of custom, by the practices of political parties, by the action or inaction of Congress or the President, and especially by judicial interpretation."); Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 21–23 (1934) (discussing constitutional amendment by governmental practice); David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 975 (2011) ("What is clear is that even when the text does not change, answers to the question 'what does the Constitution require' do change.").

not conform to original design or meaning. A dramatic, and ever increasing, discrepancy separates the institution's present reality from the Constitution's original prescription. Whereas our first Vice President, John Adams, lamented that his office was "the most insignificant office that ever the invention of man contrived or his imagination conceived,"<sup>2</sup> all now recognize that Joe Biden holds a very consequential position. So did Biden's predecessor, Dick Cheney, and several who preceded him. The transformation from the insignificance of Adams's office to the clear significance of Biden's came, in large part, from the Vice Presidency's migration from the legislative to the executive branch, and more specifically, from the Senate to the White House. The change in the Vice Presidency is substantial, fundamental, and enduring, yet it occurred independent of Article V's amendment process. And that change happened because Vice Presidents, and everyone else, have ignored originalist guidance and largely abandoned the one ongoing duty the Constitution's original meaning assigned—presiding over the Senate—to enable the office to evolve into a significant contributing part of the executive branch.

These claims about the Vice Presidency belong to a discussion of constitutional change, even though they describe the experience of a single political institution, one essentially remote from the judiciary's constitutional work. The Vice Presidency is, after all, the nation's second office. Whether its behavior squares with constitutional design or with a particular theory should matter, at least in assessing the descriptive power of that design or theory. Although other national institutions have also gained power during the last sixty or seventy years, the Vice Presidency is unique since it has not only experienced a substantially enhanced role, but also seems now to be widely perceived in a much more positive manner than was true for most of American history. Its stature makes its story important, and its success suggests that its path may be instructive regarding constitutional change. Finally, the experience of the Vice Presidency provides a case study of a wider phenomenon of constitutional change outside of Article V.

The recent evolution of originalism also draws the story of the Vice Presidency into this discussion. Until recently, originalism was primarily a strategy to restrain judicial discretion, a rationale entirely

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<sup>2</sup> Letter from John Adams to Abigail Adams (Dec. 19, 1793), *in* 1 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS* 459, 460 (Charles Francis Adams ed., 1856).

irrelevant to an essentially nonjusticiable office like the Vice Presidency.<sup>3</sup> Now, originalism's advocates increasingly justify it as the key to legitimate constitutional interpretation, not primarily as a means to restrain judges. This new rationale has implications for assessing originalism. If originalism is justified because it is synonymous with constitutional meaning, not simply as a strategy to control judicial behavior, then its use and value can and should be examined across much of the Constitution, not simply with respect to those portions in which the courts frequently engage. The new rationale invites inquiry into whether a range of constitutional institutions, including those like the Vice Presidency that function largely outside the reach of judicial review, operate in accordance with the Constitution's original meaning. And, if a gap separates the office's performance from its constitutional design, does the discrepancy suggest that the office needs a course correction, or does it impeach some claims of originalism, formalism, and Article V exclusivity?

The Vice Presidency offers a case study which discredits the claims of constitutional formalists regarding constitutional change. It suggests that repeated and accepted behavior works enduring constitutional change; that sometimes, such change causes constitutional institutions to perform functions quite different from, and even inconsistent with, what their creators intended, imagined, or prescribed; that such change occurs independent of Article V's formal amendment procedures; that this species of constitutional change may command widespread support notwithstanding its departure from originalism; and that it provides a necessary mechanism to allow American political institutions to adapt to provide workable government.

This Article will use the recent history of the Vice Presidency to demonstrate this phenomenon. Part I sketches the standard formal account of constitutional change, its link to originalism,<sup>4</sup> and some objections to that account. This Part further suggests that the recent

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<sup>3</sup> *But see* *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367 (2004) (deciding whether an executive branch commission chaired by the Vice President was required to disclose certain records).

<sup>4</sup> I am using "originalism" to refer to theories that assign priority to original intent, original understanding, original expected application, or original public meaning in constitutional interpretation such that they, or one of them, can and should override other modes of constitutional argument. I do not mean to challenge the use of these interpretive devices as part of a pluralistic approach to constitutional interpretation. *See, e.g.*, PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991); CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 14–28 (1969); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

evolution of originalist thinking increases the relevance of institutional behavior in evaluating these matters. Part II describes the Vice Presidency as originally conceived and constitutional changes which have transformed the office in a way which deviates from originalism. Part III draws some general lessons regarding constitutional change and originalism from the experience of the Vice Presidency.

## I. THE CONVENTIONAL VIEW OF CONSTITUTIONAL CHANGE AND IMPLICATIONS OF NEW ORIGINALISM

Originalism rests largely on four basic and interconnected ideas. First, originalists believe that the Constitution, properly interpreted, is binding law.<sup>5</sup> Second, originalists believe that a constitutional text should be interpreted to give its words their original meaning,<sup>6</sup> either based on the intent or expectations of the Framers or, increasingly at least in academic circles,<sup>7</sup> based on the original public meaning that a reasonable person would have attributed to its language when produced.<sup>8</sup> Third, originalists believe that the meaning of constitutional language is static and does not change over time.<sup>9</sup> Finally, many

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<sup>5</sup> Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 3 (Robert W. Bennett & Lawrence B. Solum eds., 2011) (stating that originalists believe that “courts and officials are bound” by the Constitution’s text and original meaning); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378 (2013).

<sup>6</sup> See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 2 (2004) (criticizing the departure from the “original Constitution”).

<sup>7</sup> See, e.g., BARNETT, *supra* note 6, at 92–93; Solum, *supra* note 5, at 1, 2–3.

<sup>8</sup> Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011).

<sup>9</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part) (“[T]he Constitution means the same thing today as it will in 300 months.”); *Home Bldg. & Loan Ass’n. v. Blaisdell*, 290 U.S. 398, 448–49 (1934) (Sutherland, J., dissenting) (“A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time.”); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1856) (“No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States.”); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 7 (1996) (“[T]he Constitution

originalists identify the procedures of Article V of the Constitution as the exclusive method of changing constitutional meaning.<sup>10</sup> As Justice Hugo Black wrote in his dissent in *Griswold v. Connecticut*,

The Constitution makers knew the need for change, and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and, being somewhat old-fashioned I must add it is good enough for me.<sup>11</sup>

These premises and that method have not, however, always been good enough for the Supreme Court. In *M'Culloch v. Maryland*, Chief Justice John Marshall asserted that under certain circumstances, constitutional meaning could be shaped by the repeated practice of non-judicial public officials, especially if those acts engendered reliance.<sup>12</sup>

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means . . . what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean . . . . [The] Constitution . . . has a fixed meaning that does not change.”).

10 See, e.g., *Ullmann v. United States*, 350 U.S. 422, 428 (1956) (“Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.”); JACK M. BALKIN, *LIVING ORIGINALISM* 10 (2011) (arguing that Article V presents the only means of constitutional amendment for original-expectations originalists); BARNETT, *supra* note 6, at 108–09, 126 (insisting on a formal amendment process as an exclusive means to changing the Constitution); Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 418 (2013) (“[T]he proper way to change ‘this Constitution’ is provided in Article V. Judges are not allowed to update the text of the Constitution by changing the meaning it had at the time of enactment.”); Thomas, *Judging*, *supra* note 9, at 7 (arguing that the Constitution’s meaning can only be changed via Article V procedure). But see KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 218 (1999) (“Constitutional constructions allow change in the effective meaning of the constitutional text, but they are not analogous to textual amendments. . . . Although the amendment model may explain some forms of constitutional change, it must at least be supplemented with a more politically oriented model that is less reliant on a notion of an autonomous fundamental law and of judicial enforcement.”).

11 *Griswold v. Connecticut*, 381 U.S. 479, 507, 522 (1965) (Black, J., dissenting); see also *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 676–79 (1966) (Black, J., dissenting) (rejecting judicial amendment of the Constitution in lieu of Article V process); *Scott*, 60 U.S. at 426 (“If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.”).

12 *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (“It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.”); see also ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 78 (1955) (“[W]e must remember that the Supreme Court is not the only

Later in *M'Culloch*, he spoke of “a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs,”<sup>13</sup> to some extent echoing Justice Joseph Story’s insights offered three years earlier in *Martin v. Hunter’s Lessee*.<sup>14</sup> Justice Oliver Wendell Holmes, Jr., too, thought that our nation’s experience, not simply constitutional text or original expectations, was relevant in discerning constitutional meaning.<sup>15</sup> In his majority opinion in *Home Building & Loan Association v. Blaisdell*, Chief Justice Charles Evans Hughes rejected the idea that “the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them.”<sup>16</sup> And, in *Brown v. Board of Education*, the Court unanimously declared that in addressing the constitutionality of racially segregated public schools, “we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.”<sup>17</sup>

This disposition, as reflected in these canonical pronouncements, though inconsistent with literal adherence to constitutional form, finds support from sources that inform much constitutional thinking. The Framers ignored the Articles of Confederation, which condi-

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force that is operating upon the Constitution. Custom, even in most vital matters, may serve to alter it.”); WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 135 (1916) (“Executive power is sometimes created by custom, and so strong is the influence of custom that it seems almost to amend the Constitution.”).

13 *M'Culloch*, 17 U.S. at 415.

14 14 U.S. (1 Wheat.) 304, 326–27 (1816) (“It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.”).

15 *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (“[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”).

16 *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442–43 (1934).

17 *Brown v. Bd. of Educ.* 347 U.S. 483, 492–93 (1954).

tioned constitutional change on unanimous consent of all colonies<sup>18</sup> in order to produce a more perfect union under a more enduring Constitution with more relaxed (though still pretty rigid) amendment provisions.<sup>19</sup> In his formulation that “we must never forget that it is *a constitution* we are expounding,”<sup>20</sup> Chief Justice John Marshall recognized that a constitution, by nature, must be sufficiently elastic to allow change without recourse to the amendment process.<sup>21</sup> Many widely accepted decisions are difficult to reconcile with some or all forms of originalism.<sup>22</sup> Accordingly, some argue that a living or

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18 ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 1 (“Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.”); see AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 285–86 (2005).

19 U.S. CONST. art. V (outlining the procedures for amending the United States Constitution); see AMAR, *supra* note 18, at 286.

20 *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

21 See, e.g., *id.* at 415 (“This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.”); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 326–27 (1816) (“The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.”); see also Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 38 (1932) (“[T]he Constitution had ample resources within itself to meet the changing needs of successive generations. The Constitution provided for the future partly by not forecasting it and partly by the generality of its language. The ambiguities and lacunae of the document left ample scope for the unfolding of life. If only the Court, aided by the bar, has access to the facts and heeds them, the Constitution, as he had shown, is flexible enough to respond to the demands of modern society. . . . In essence, the Constitution is not a literary composition but a way of ordering society, adequate for imaginative statesmanship, if judges have imagination for statesmanship.”).

22 See generally RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW* (2004); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 8–13 (2010) (discussing the various tenets of originalism and the difficulties of reconciling it with modern society); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 774–76 (2011) (criticizing new originalists’ efforts to reconcile originalism with some iconic decisions); William P. Marshall, *Progressive Constitutionalism, Originalism, and the Sig-*

common law constitution descriptively<sup>23</sup> and/or normatively<sup>24</sup> better captures and guides constitutional practice than does originalism.<sup>25</sup>

Originalism is, of course, something of a “moving target” since it has assumed different forms in recent decades.<sup>26</sup> As most prominently articulated by Robert H. Bork<sup>27</sup> in the 1970s and Attorney General Edwin Meese<sup>28</sup> in the 1980s, the theory focused on discerning the original intent of the drafters.<sup>29</sup> The myriad problems with that approach<sup>30</sup> soon manifested themselves and provided incentive to

*nificance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1270–76 (2011) (arguing that originalism could not produce various iconic decisions). Some originalists have argued that originalism could produce some of these results. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1132 (1995) (arguing that *Brown* was consistent with originalism); *see also* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257, 260 (2005) (agreeing with McConnell’s conclusions that *Brown* was consistent with originalism); Solum, *supra* note 5, at 1, 46 (expressing agreement with McConnell’s conclusions that *Brown* was consistent with originalism).

23 FALLON, *supra* note 22, at 270 (“For better or for worse, American constitutional practice thus relies more on flexible, pragmatic practices of constitutional interpretation than on frequent formal amendment.”); *see also* Robert W. Bennett, *Originalism and the Living American Constitution*, in CONSTITUTIONAL ORIGINALISM *supra* note 5, at 78, 84 (arguing for the inevitability of living constitutionalism in a system with “far-ranging judicial review”).

24 STRAUSS, *supra* note 22, at 1–2 (“[T]he world has changed in incalculable ways. . . . So it seems inevitable that the Constitution will change, too. This is a good thing, because an unchanging constitution would fit out society very badly.”).

25 STRAUSS, *supra* note 1, at 974–76; *see also* H. Jefferson Powell, *On Not Being “Not An Originalist,”* 7 U. ST. THOMAS L.J. 259, 276–78 (2010) (likening constitutional interpretation to common law adjudication).

26 Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 246 (2009); *see, e.g.*, James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 670–71 (tracing the development and abandonment of various theories of originalism); Solum, *supra* note 5, at 1, 7–12 (sketching the evolution of originalism from original intent to original understanding to original public meaning). *But see* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459–62 (2013) (arguing that most originalists agree on certain principles).

27 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13 (1971).

28 Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986) (calling for “jurisprudence of original intention” (emphasis omitted)).

29 *Id.* at 466 n.60 (describing original intent as an effort “to discern the meaning of the text of the Constitution by understanding the intentions of those who framed, proposed, and ratified it”).

30 *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 212–13 (1980) (explaining that members of groups may have differing intentions); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 476 (1981) (explaining the difficulty in determining a collective intent, particularly when many delegates might not have ascertained their own intentions); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1087–89 (1989) (pointing out the difficulty of ascertaining the intent of the collective body of Framers, especially given incomplete records and the fact that they did not discuss many contemporary issues); James E. Fleming,

search for a more convincing theory. Some originalists replaced the original intent of the drafters with the original understanding of the ratifiers as the new suggested source of constitutional meaning. This new prescription at least focused on the Constitution-making act of the ratifiers, rather than the often secret work of the Philadelphia proposers, but it inherited most of the problems of its ancestor.<sup>31</sup> Ultimately, “new originalism” emerged. Although various theories take different shapes,<sup>32</sup> new originalism has generally focused on discovering and applying the original public meaning of constitutional language by focusing on what it would have meant to a hypothetical reasonable person at the time,<sup>33</sup> not on discerning the intent of the Framers or ratifiers or their expectations regarding how language would be interpreted.<sup>34</sup>

A change in originalism’s stated rationale accompanied the new methodology. Although proponents of originalism had advanced multiple arguments in its support, original intent and understanding had been justified primarily for their claimed ability to restrain unelected judges from exercising discretion more appropriately lodged in elected officials.<sup>35</sup> New originalists abandoned that instrumental

*Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U. L. REV. 1171, 1177–78 (2012) (criticizing originalism for misunderstanding the Constitution as a “code of detailed historical rules,” rather than as a “framework or scheme of abstract aspirational principles and ends”); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 895–96 (1985) (pointing out that the Framers’ generation looked to documents, not the subjective intent of the Framers, to determine meaning); David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL’Y 137, 138–41 (2011) (describing how ascertaining meaning and translating it into remote times are problems for originalism); Mark Tushnet, *The U.S. Constitution and the Intent of the Framers*, 36 BUFF. L. REV. 217, 218–19 (1987) (attacking original intent).

<sup>31</sup> Bennett, *supra* note 23, at 78, 95–96 (examining the common problems of original intentions and original understandings); Solum, *supra* note 5, at 1, 9 (“[T]he move from intentions of the framers to understandings of the ratifiers was not successful. Much depends on what is meant by the ambiguous phrase *understandings of the ratifiers*.”).

<sup>32</sup> See Colby & Smith, *supra* note 26, at 244 (describing a “profound internal disagreement” among originalists); Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL’Y 5, 7 (2011) (“There are multiple strands of originalism, with additional versions proliferating as rapidly as law reviews can publish them.”); Fleming, *supra* note 26, at 670–71 (tracing the development and abandonment of various theories of originalism).

<sup>33</sup> Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 609 (2004) (“[N]ew originalism is focused less on the concrete intentions of individual drafters . . . than on the public meaning of the text that was adopted.”).

<sup>34</sup> Solum, *supra* note 5, at 1, 9–10.

<sup>35</sup> See, e.g., Meese, *supra* note 28, at 464 (arguing that original intent would “produce defensible principles of government that would not be tainted by ideological predilection”); *id.* at 465 (arguing for originalism as means to restrain judicial power); see also Colby, *supra*

rationale targeted at judges<sup>36</sup> and replaced it with claims regarding originalism's superior legitimacy as a method of interpretation. Originalists contend that constitutional interpretation, by definition, involves a search for the original meaning of the document.<sup>37</sup> Some associated that methodology with a written constitution.<sup>38</sup> Randy Barnett, for instance, argued that the primary purpose behind writing a Constitution is to "restrict the lawmakers," a goal which would be impeded by adopting interpretive methodologies "whose purpose is to improve upon the content of a written constitution."<sup>39</sup> Others, like Keith Whittington, connected originalism to popular sovereignty, since those who ratified the Constitution were democratically elected.<sup>40</sup> Lawrence Solum argued that original public meaning promotes the rule of law by giving the Constitution a fixed meaning "thereby insulated from ideological and political struggle" and that it reflects popular sovereignty since the Constitution was created through a process which, with all its imperfections, "must count as one of the most profoundly democratic moments in human history," and the original public meaning was what that process produced.<sup>41</sup> In any event, new originalists justify their methodology as reflecting the authentic and morally justifiable constitutional meaning, not primarily as a strategy to limit judicial discretion. It is more concerned with

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note 22, at 714 ("Originalism was born of a desire to constrain judges." (footnote omitted)); Whittington, *supra* note 33, at 601–02 (describing this brand of originalism as "reactive theory" focused on responding to perceived judicial activism with "primary commitment" to judicial restraint).

36 See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 4 (1999) (disclaiming reliance "on traditional originalist arguments in favor of judicial restraint"); Whittington, *supra* note 33, at 608–09 (noting the new originalists' move away from a focus on restraining judges). Some thoughtful critics doubted the ability of originalism to serve as a vehicle for judicial restraint. See, e.g., Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 277–82 (2005) (arguing that precedent does a better job of restraining judges than originalism); Strauss, *supra* note 30, at 137 (pointing out problems with originalism as a means of judicial restraint).

37 Whittington, *supra* note 33, at 610.

38 See BARNETT, *supra* note 6, at 88, 103–07 (arguing that originalism provides the appropriate method of deciphering the meaning and maintaining the integrity of a written constitution).

39 *Id.* at 103–04; see also Barnett, *supra* note 10, at 417 ("[T]he Constitution was put in writing so it could provide *the law that governs those who govern us*. . . . [T]he Constitution that is the supreme law of the land is *this one*, the written one, not a constitution provided by the Supreme Court of the United States.").

40 See WHITTINGTON, *supra* note 36, at 111–12, 152–59 (discussing originalism as advancing and preserving "democratic values" of the popular sovereign); Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 39 (2011) (espousing that originalism promotes the preservation of democratic values and popular sovereignty).

41 Solum, *supra* note 5, at 1, 38, 43.

generating “positive constitutional doctrine”<sup>42</sup> than in constraining judges.<sup>43</sup> These changes, in originalist methodology and justification, have implications for the operation of originalism. Prominent originalist theorists have conceded that some constitutional language does not lend itself to the discovery of one original meaning.<sup>44</sup> Whereas earlier forms of originalism had allowed theorists to interpret vague constitutional language based on the Framers’ purported intent or the ratifiers’ expectations, the defects in those methodologies led to their abandonment. Yet, that move deprived originalism of the claimed ability to resolve many constitutional questions. As Lawrence Solum nicely put it, new originalists abandoned the old originalists’ premise that the Framers’ intent “provided a sort of universal solvent that dissolved every problem of constitutional interpretation.”<sup>45</sup> They rejected as implausible the old originalists’ belief that constitutional meaning was determinate and instead came to see much of the constitutional text as underdeterminate, i.e., capable of resolving some questions at the core of the text but not others at its periphery.<sup>46</sup>

The change in methodology necessitated a distinction between constitutional interpretation and constitutional construction, a distinction which some, but not all,<sup>47</sup> originalists adopt. Although originalists have not embraced a uniform delineation between these two activities,<sup>48</sup> in essence, constitutional interpretation searches for the Constitution’s meaning, whereas constitutional construction is a

<sup>42</sup> Whittington, *supra* note 33, at 608.

<sup>43</sup> *Id.* at 608–09; BALKIN, *supra* note 10, at 16–19 (arguing for original meaning as the appropriate method of constitutional interpretation rather than as a method for restricting judges).

<sup>44</sup> BARNETT, *supra* note 6, at 118–21; KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 8 (1999); Solum, *supra* note 5, at 20–22; Whittington, *supra* note 40, at 37–38.

<sup>45</sup> Solum, *supra* note 5, at 1, 20.

<sup>46</sup> *See id.* at 1, 21–22 (arguing that the Constitution’s linguistic meaning does not resolve many important constitutional questions).

<sup>47</sup> *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752 (2009) (criticizing constitutional construction); Solum, *supra* note 5, at 1, 3 (describing the interpretation-construction divide as “more controversial” than other tenets of originalism).

<sup>48</sup> *See, e.g.*, BARNETT, *supra* note 6, at 118–22 (viewing interpretation as less appropriate and ultimately insufficient when constitutional language is vague rather than ambiguous, but criticizing Whittington’s legal versus political distinction); WHITTINGTON, *supra* note 44, at 7–8 (describing constitutional interpretation as legal and constitutional construction as political); Solum, *supra* note 5, at 1, 3, 22–26 (distinguishing between interpretation that identifies meaning and construction that gives legal effect to constitutional terms); *id.* at 1, 69–71 (describing various approaches to constitutional construction, namely construction as politics, construction as principle, and construction by original methods).

creative enterprise in which governmental actors implement constitutional provisions which are too vague to hold one specific meaning or where constitutional gaps or contradictions exist.<sup>49</sup> Originalists view interpretation as originalism's domain but concede that it does not always dictate results.<sup>50</sup> Some matters are necessarily left to constitutional construction. Even when original public meaning does not yield answers, it still may define the options in which construction may occur. "Originalism insists that constitutional construction should be constrained by the original meaning of the Constitution,"<sup>51</sup> Solum explains. Nonetheless, diverse modes of constitutional argument are accepted as part of construction,<sup>52</sup> although originalists disagree among themselves regarding exactly how constitutional construction should occur.<sup>53</sup>

In any event, the move to original meaning forced originalists to narrow significantly that part of the Constitution for which they claimed their theories provided answers. The recognition that original intent or understanding could not give meaning to vague constitutional language necessarily left many constitutional questions for resolution by recourse to other modes of constitutional argument, including some which originalists had previously discounted. This retreat has the virtue of candor, but it implicitly acknowledges signifi-

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49 See Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 645–46 (2013) (calling for interpretation through constitutional construction when the Constitution is silent or uses vague language, principles, or standards); Solum, *supra* note 26, at 469–72; Keith E. Whittington, *Constructing a New American Constitution*, 27 *CONST. COMMENT.* 119, 122–25 (2010) (describing various uses of constitutional construction).

50 See Colby, *supra* note 22 at 731–34 (explaining that originalists believe that originalism can dictate results when constitutional language is rule-like and clear, but construction is needed when it is "more abstract and standard-like"); Solum, *supra* note 5, at 1, 20–26, 69 (associating interpretation with originalism but recognizing areas of constitutional underdeterminacy where construction is needed); Whittington, *supra* note 33, at 611–12 (explaining the need for construction).

51 Solum, *supra* note 5, at 1, 26. Solum also claims that most originalists "agree that the practice of constitutional construction should be constrained by the results of constitutional interpretation." *Id.*; see, e.g., Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 645–47 (1999) (arguing that constitutional construction must occur "within the bounds established by original meaning"); Whittington, *supra* note 49, at 121 (describing constitutional construction as "built within the boundaries . . . of the interpreted Constitution"); *id.* at 130–31 (stating that interpretation constrains construction).

52 See Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J.L. & PUB. POL'Y* 65, 68–70 (2011) (describing the role of competing normative commitments in constitutional construction).

53 See Solum, *supra* note 5, at 1, 26. (describing how originalists disagree regarding the proper approach to constitutional construction).

cant limits of originalism and that other modes of constitutional analysis are essential in order to implement the Constitution.<sup>54</sup>

Although the new methodology narrowed originalism's scope, the new justification of originalism made it potentially applicable to additional parts of the Constitution. As new originalism presented itself primarily as the legitimate method to ascertain constitutional meaning, not principally as a restraint on judicial discretion, originalism became relevant to interpreting parts of the Constitution that do not regularly figure in litigation, in addition to those portions which judges routinely encounter. The new justification of originalism as the key to interpreting constitutional language logically applies when constitutional text is considered in the political arena, just as when judges address it. That potentially broader assignment makes originalism accountable over a wider terrain. As such, originalism must be evaluated not only by whether it can generate judicial decisions which most are not prepared to abandon, but also by whether it can account for widely accepted institutional practices of our governmental system. Constitutional theorists now must consider the behavior of non-judicial actors in considering the merits of competing interpretative methodologies, a ramification some new originalists have implicitly recognized,<sup>55</sup> even though much of the literature of new originalism still focuses on judicial decision-making.

## II. THE CONSTITUTIONAL CHANGE OF THE VICE PRESIDENCY

The story of the Vice Presidency presents problems for originalism as a descriptive and normative theory. That history shows an institution, without any formal change in its constitutionally prescribed ongoing duties,<sup>56</sup> evolving to perform roles quite different from, and even inconsistent with, original intent, expectations, and meaning.

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<sup>54</sup> See Fallon, *supra* note 32, at 13–14 (discussing circumstances where originalists allow other modes of constitutional argument); Strauss, *supra* note 30, at 142 (describing the concession of interpretation versus construction divide as “something . . . like conceding defeat”); cf. Whittington, *supra* note 5, at 388–91 (recognizing the utility of other modalities to discover original meaning or as shortcuts).

<sup>55</sup> See, e.g., BARNETT, *supra* note 6, at 105 (referring to original meaning as restraint on judges and legislators); *id.* at 110–11 (“Some may argue that the original scheme as formally ratified was not ‘good enough’ to create laws that bind in conscience or, even if it once was, it would be no longer in today’s world.”); Whittington, *supra* note 40, at 31 (stating that originalism provides a “framework of principles to guide judges and other constitutional interpreters in interpreting the constitutional text”).

<sup>56</sup> Section 4 of the Twenty-Fifth Amendment arguably added some duties regarding determining and acting upon presidential inability, but any such duties were not ongoing, and they may have been implicit in the original constitutional scheme.

In short, the original constitutional Vice Presidency was an insignificant institution, primarily associated with the legislative branch, the main, ongoing constitutional responsibility of which was to preside over the Senate. By contrast, the modern Vice Presidency is a very consequential office, almost exclusively associated with the executive branch, where it now has ongoing, not merely contingent, significance, and its occupant almost never presides over the Senate. The disparity between the original constitutional design of the Vice Presidency and its present reality could hardly be greater. Nonetheless, few criticize the Vice Presidency for now performing so differently from the course originalism dictates. On the contrary, its evolution represents one of the great recent successes of American constitutional institutions, one which has received bipartisan support over a long period of time. As such, the story of the Vice Presidency furnishes a descriptive account of constitutional change independent of Article V, one which has won normative acceptance.

*A. The Original Constitutional Vice Presidency*

The Constitution, as originally ratified, gave the Vice President two functions. His ongoing role was to be President of the Senate.<sup>57</sup> His contingent assignment was to be first successor, should the President of the United States die, resign, be removed, or be unable to discharge the powers and duties of his office.<sup>58</sup> Although it is often impossible to confidently fathom the intent of collective bodies, a task made even more intractable when they acted 225 years ago and left incomplete records, it seems likely that neither responsibility explained the creation of the institution, a decision most likely made to help the initial presidential election system function. Originally, each elector had two presidential votes, at least one of which had to be cast

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<sup>57</sup> U.S. CONST. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”); 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 51 (1928) (explaining that the Vice President’s “only functions are to preside in the Senate and succeed the President”); *id.* at 300 (the Vice President’s “only ordinary function” is chairing the Senate); RAMSON H. GILLET, *THE FEDERAL GOVERNMENT; ITS OFFICERS AND THEIR DUTIES* 109 (1871) (stating that being President of the Senate is the Vice President’s “only duty, except when there is a vacancy in the office of president, when the duties of that office devolve upon him”).

<sup>58</sup> U.S. CONST. art. II, § 1, cl. 6. (“In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.”).

for someone not from the elector's home state.<sup>59</sup> The system was designed to overcome parochial voting in order to promote election of a national President. The second office was created to encourage electors to cast both votes seriously.<sup>60</sup>

It is not surprising that an office conceived essentially for instrumental purposes related to the presidential election system proved insubstantial once governing began. Indeed, at Philadelphia, Roger Sherman, who had served on the committee which proposed the Vice Presidency, had justified the role as the Senate's presiding officer partly based on the realization that otherwise, the Vice President

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<sup>59</sup> *Id.* at art. II, § 1, cl. 3. ("The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.")

<sup>60</sup> Not coincidentally, the Vice Presidency and the Electoral College made their debut together at the Constitutional Convention, late in its proceedings. The Founders assumed that George Washington would be our first President, but after his service, they feared, parochialism would prevent agreement on a national leader as each state would support its own favorite son. Their solution was to give each elector two votes but to require that one be cast for someone from a different state. The second votes would overcome localism to elect a national President. Creating a second office would promote serious voting. *See, e.g.*, BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 56 (2005); AMAR, *supra* note 18, at 167–68; Richard Albert, *The Evolving Vice Presidency*, 78 *TEMPLE L. REV.* 811, 817–18 (2005) (discussing the role of the Vice President). The person with the most votes, provided a majority, would be president; the runner-up would be the Vice President. Indeed, at the Constitutional Convention, Hugh Williamson explained that the "Vice president was not wanted. He was introduced only for the sake of a valuable mode of election which required two to be chosen at the same time." 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 537 (Max Farrand ed., 1966). *See generally* Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 *WAKE FOREST L. REV.* 505, 510–15 (1995) (discussing the reasons the Vice Presidency was created and associating it with the initial presidential election system).

would be “without employment.”<sup>61</sup> Our first Vice President, John Adams, said that as vice president, “I am nothing,” but “I am President also of the Senate.”<sup>62</sup> Adams later became thoroughly frustrated with his Senate role,<sup>63</sup> but his formulation at least suggested where his professional time was to be spent. Alexander Hamilton supported Adams as vice president in 1788 partly because if Adams did not achieve that position, then “he must be nominated to some important office for which he is less proper.”<sup>64</sup> The office was so insignificant that James Madison worried that his ally, Thomas Jefferson, might decline to accept it if he was the runner-up in 1796.<sup>65</sup> Although Jefferson judged the Vice Presidency as “the only office in the world about which I am unable to decide in my own mind whether I had rather have it or not have it,”<sup>66</sup> he ultimately decided to “have it” when he

61 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, note 60, at 537; *see also* THE ANTI-FEDERALISTS 193 (Cecelia M. Kenyon ed., 1985) (George Mason stating that the Vice President was made President of the Senate “for want of other employment”); *id.* at 305 (George Clinton stating that the Vice President was made President of the Senate “for want of other employment”).

62 9 THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 6 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

63 DAVID MCCULLOCH, JOHN ADAMS 408–12 (2001) (describing Adams’s frustrations as Vice President).

64 Letter from Alexander Hamilton to James Madison (Nov. 23, 1788), *in* 5 THE PAPERS OF ALEXANDER HAMILTON: JUNE 1788–NOVEMBER 1789, at 236 (Harold C. Syrett, ed., 1962); *see also* CHARLES FRANCIS ADAMS, THE LIFE OF JOHN ADAMS (1871) (minimizing the duties of the Vice Presidency and stating that “[n]o high situation in the government of the United States could now be so easily lopped off without missing it, as that of the Vice president”); *id.* at 155 (“Though in some respects irksome, the duties of the second office in the United States are not laborious.”); *id.* at 157 (quoting Adams, minimizing the powers of his office); *id.* at 158 (quoting Adams’s letter of December 19, 1793: “But my country has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived. And as I can do neither good nor evil, I must be borne away by others, and meet the common fate.”); *id.* at 166 (Adams complaining that he was “confined to [his] seat, as in a prison, to see nothing done, hear nothing said, and to say and do nothing.”); Letter from Tench Coxe to James Madison (Jan. 27, 1789), *in* 25 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 478, 480 (Paul H. Smith ed., 1998) (describing Adams as possessing talents “beyond the proper duties of a V.P. which indeed are not very important”); Letter from Thomas Jefferson to Aaron Burr (Dec. 15, 1800), *in* 7 THE WRITINGS OF THOMAS JEFFERSON 468 (Paul Leicester Ford ed., 1896) (expressing regret to Burr that his election as Vice President would deprive Jefferson of his services in his administration).

65 Letter from James Madison to Thomas Jefferson (Dec. 19, 1796) *in* 16 THE PAPERS OF JAMES MADISON 432, 433 (J.C.A. Stagg et al. eds., 1989) (referring to the “inadequateness of the importance of the place to the sacrifices you would be willing to make to a greater prospect of fulfilling the patriotic wishes of your friends; and from the irksomeness of being at the head of a body whose sentiments are at present so little in unison with your own”).

66 Letter from Thomas Jefferson to James Madison (Jan. 1, 1797), *in* 7 JEFFERSON WRITINGS, *supra* note 64, at 98, 98–99.

finished second to Adams, perhaps because he could not imagine “a more tranquil & unoffending station” which would provide “philosophical evenings in the winter & rural days in summer.”<sup>67</sup>

The Constitution’s original meaning conceived of the Vice President, although perhaps not a member of Congress,<sup>68</sup> as occupying essentially a legislative position,<sup>69</sup> since he would serve as President of the Senate,<sup>70</sup> the only ongoing function the Constitution conferred. To assure “a definitive resolution” of the Senate, the Vice President would have “a casting vote.” Absent the Vice President, some state’s Senator would have to preside over the Senate, thereby depriving that state of equal effective representation.<sup>71</sup>

Of course, the original Constitution did not dissociate the Vice Presidency entirely from the executive branch. Article II sets out the Vice President’s term,<sup>72</sup> selection,<sup>73</sup> qualifications (implicitly),<sup>74</sup> presidential succession role,<sup>75</sup> and susceptibility to impeachment and removal,<sup>76</sup> features which connect the Vice President to the executive branch. Some Founders viewed the Vice President as an executive figure,<sup>77</sup> and some scholars have subsequently concluded that the

67 Letter, Thomas Jefferson to Benjamin Rush (Jan. 22, 1797), in 7 JEFFERSON WRITINGS, *supra* note 64, at 113, 114.

68 U.S. CONST. art. I, § 2, cl. 1. (defining “Members” of the House of Representatives); *id.*, art. I, § 3, cl. 1 (defining “Members” of the Senate); *see also* Memorandum from Nicholas deB. Katzenbach, Assistant Attorney Gen., Office of Legal Counsel, to the Vice President, Participation of the Vice President in the Affairs of the Executive Branch 222 (Mar. 9, 1961) (concluding that it is “troublesome conceptually” to categorize the Vice President as a member of Congress, but that the Constitution attaches him to Congress).

69 *But see* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 60, at 536 (noting Elbridge Gerry’s opposition to making the Vice President the President of the Senate as a violation of the separation of powers); Albert, *supra* note 59, at 821 (describing the office of the Vice Presidency as “the executive office”).

70 U.S. CONST. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”); *see also id.* art. I, § 3, cl. 5 (implicitly referring to the Vice President as an “Officer” of the Senate).

71 *See* THE FEDERALIST No. 68, at 461 (Alexander Hamilton) (Jacob Cooke ed., 1961); *cf.* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 736, at 524–25 (1833) (suggesting that if the Vice President did not preside, the state from which the presiding officer came would have too much or too little influence depending on whether he could vote).

72 U.S. CONST. art. II, § 1, cl. 1.

73 *Id.* art. II, § 1, cls. 2–4.

74 *See id.* art. II, § 1, cl. 5 (stating presidential qualifications which implicitly applied to the Vice President as presidential runner-up); *id.* amend. XII (making this point explicit, necessarily so since it created separate elections for the two offices).

75 *Id.* art. II, § 1, cl. 6.

76 *Id.* art. II, § 4.

77 *See, e.g.*, 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 60, at 536 (quoting Elbridge Gerry as complaining that “[w]e might as well put the President himself at the head of the Legislature”); *id.* at 537 (describing George Mason’s view that the Vice President’s

Constitution made the Vice President an executive-legislative hybrid<sup>78</sup> or even an executive officer.<sup>79</sup>

The latter view, in describing the Vice President as an executive officer, seemed to elevate form over substance. Although Article II did confer various vice presidential features, from a functional standpoint, it vested executive powers and duties entirely in the President, and gave the Vice President no executive role whatsoever unless and until the President died, resigned, was removed, or became disabled.<sup>80</sup> The Vice President was “an anomalous officer with an execu-

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presence in the Senate breached the separation of powers); *see also* 2 THE COMPLETE ANTI-FEDERALIST 113 (Herbert J. Storing ed., 1981) (describing the Vice President as part of the “executive power” in criticizing the Constitution). *But see* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 60, at 537 (summarizing comments of Governor Morris implicitly challenging Gerry’s characterization); *id.* at 537 (reporting Sherman’s observation that the Vice President would be “without employment” absent the Senate role).

78 *See, e.g.*, PAUL C. LIGHT, VICE PRESIDENTIAL POWER: ADVICE AND INFLUENCE IN THE WHITE HOUSE 7–8 (1984) (describing the vice president as “the only constitutional officer with both legislative and executive roots,” “a Constitutional hybrid,” and the only federal official “with one foot in the legislative branch and the other in the executive”); MICHAEL NELSON, A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE PRESIDENCY 27 (1988) (referring to the office’s “hybrid status”); CLINTON ROSSITER, THE AMERICAN PRESIDENCY 136 (2d ed. 1960) (describing the Vice Presidency as “[s]uspended in a constitutional limbo between the executive and legislature”); Albert, *supra* note 60, at 820 (describing the Vice President “as an officer whose functions would place her in both the executive and legislative spheres of government”); Goldstein, *supra* note 60, at 515 (describing the Vice President as “something of a constitutional hybrid between the executive and legislative branches” since he was “the constitutional successor in case of presidential vacancy” with “an ongoing duty . . . to preside over the Senate”); Roy E. Brownell, II, Constitutional Chameleon: The Vice President’s Place in Both Political Branches (Part I) 5 (Oct. 2013) (unpublished manuscript) (on file with author) (suggesting that the Vice President is a “constitutional chameleon” whose constitutional identity varies depending on contextual factors and providing extensive documentation); *see also* Memorandum from Nicholas deB. Katzenbach, Assistant Attorney Gen., Office of Legal Counsel, to the Vice President, Constitutionality of the Vice President’s Service as Chairman of the National Aeronautics and Space Council (Apr. 18, 1961) (describing the evolving role of the Vice President over the past century).

79 Albert, *supra* note 60, at 821 (describing the Vice President as a member of the “executive branch”).

80 *See* U.S. CONST. art. II, § 1; *see also id.* (“The executive Power shall be vested in a President of the United States of America.”); 1 ANNALS OF CONG. 673–74 (1789) (Joseph Gales & William Winston Seaton eds., 1834). The Vice President was not expected to perform any executive functions, but his contingent significance did have a consequence. *Id.* The House of Representatives debated whether he should be paid per diem, like senators, or a fixed sum, like the President. *Id.* Different views were expressed. *Id.* Madison successfully argued in the House of Representatives that the Vice President was entitled to a substantial salary, not simply per diem as legislators received. *Id.* Although the Vice President might sometimes be “unemployed,” he needed to be ready in case he was called upon to exercise presidential duties. *Id.* at 685. That required that he be close to the seat of government, withdraw from other vocations, and “direct his attention to obtaining a perfect knowledge of his intended business.” *Id.*

tive title but without executive responsibility under the Constitution,”<sup>81</sup> David Currie wrote. Moreover, from a practical standpoint, the electoral system gave no reason to believe that the President and Vice President, having been contestants against each other, would be politically or personally compatible. Inasmuch as election of the Vice President, unlike that of the President, was not contingent on a majority vote, someone the President’s political enemies supported could conceivably win the second office. Adams captured the nature of his executive role when he said, “I am Vice President, in this I am nothing, but I may be everything.”<sup>82</sup> The vice presidential executive role was entirely contingent, whereas the Senate-presiding function was certain and ongoing.

Elsewhere, the Constitution suggested a conflict between the Vice President’s legislative and executive roles. The Constitution disqualified the Vice President from presiding over the Senate when “he shall exercise the office of President of the United States.”<sup>83</sup> That prohibition reflected the principle that no person could “preside over both the legislative and the executive simultaneously.”<sup>84</sup> And the Incompatibility Clause precluded members of Congress from holding any office under the United States.<sup>85</sup> Even though neither of those two provisions addressed whether the Vice President could handle executive functions while serving as the Senate President, one could infer that the principle animating them counseled that he should not. Alternatively, the Vice President’s connections to the executive branch might suggest that the Constitution did not prohibit him from playing some executive branch role even while Vice President, especially since the Constitution did not expressly proscribe such activity.<sup>86</sup> As is often the case, no constitutional clause, nor recoverable original meaning, makes clear whether the Vice President could take on executive roles (short of exercising the Presidency). Absent a very formalistic view of separation of powers, under the original Constitution,

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81 DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861*, at 181 (2005).

82 9 *DIARY OF WILLIAM MACLAY*, *supra* note 62, at 6.

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

84 AMAR, *supra* note 18, at 171.

85 U.S. CONST. art. I, § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”).

86 Brownell, *supra* note 78, at (Part II) 14–15 (pointing out that the First Congress included the President of the Senate, as well as the Chief Justice, on a board overseeing the federal sinking fund, thereby discharging an executive function).

the Vice President's connections to the executive branch would seem to allow him to undertake some executive branch functions, so long as they did not conflict with his legislative branch role. Yet, the contrast between the actual and ongoing Senate role and the contingent executive assignment surely located the office, as an original matter, *primarily* in the legislative branch,<sup>87</sup> unless and until a presidential vacancy caused him to migrate to Article II.<sup>88</sup>

Early leaders embraced this vision of the Vice President primarily as a legislative figure. George Washington did not include Adams in his Cabinet,<sup>89</sup> and Adams viewed his office as legislative. He wrote, "The Constitution has instituted two great offices . . . and the nation at large has created two officers: one who is the first of the two . . . is placed at the Head of the Executive, the other at the Head of the Legislative."<sup>90</sup> Adams's successor, Jefferson, reached the same conclusion.<sup>91</sup> The second office appealed to Jefferson, since it would allow

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87 Nearly twenty years ago, I wrote that the Founders had fashioned the Vice Presidency as "a constitutional anomaly located somewhere between the legislative and executive branches but not entirely welcome at either address." Goldstein, *supra* note 60, at 508. I continue to regard that description as basically accurate, although I would now place the "somewhere" closer to the legislative branch because of the ongoing nature of the Senate duty. See *id.* at 518 (describing the early Vice President "primarily as a legislative officer").

88 For a discussion of nineteenth-century views of the Vice Presidency, see Brownell, *supra* note 78, at (Part II) 5–27.

89 See M'CULLOCH, *supra* note 63, at 415–16; see also Letter from Thomas Jefferson to Benjamin Rush (Jan. 16, 1811), in 4 MEMOIR, CORRESPONDENCE, AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON 154–55 (Thomas Jefferson Randolph ed., 1829).

90 Letter from John Adams to Benjamin Lincoln (May 26, 1789). On another occasion, Adams wrote that the Vice Presidency "is totally detached from the executive authority and confined to the legislative." MARK O. HATFIELD ET AL., VICE PRESIDENTS OF THE UNITED STATES, 1789–1993, at 7 (1997) (internal quotation marks omitted). As Adams prepared to move from Vice President to President, James Madison referred to "giving a fair start to [Adams's] Executive career." 6 THE WRITINGS OF JAMES MADISON, 1790–1802, at 304 (Gaillard Hunt ed., 1906). Some senators objected early in Adams's term when Adams signed documents as "Vice President" on the grounds that it slighted his Senate role. MACLAY, *supra* note 62, at 43. Adams agreed to sign papers as "Vice President of the United States and president of the Senate." *Id.* at 48. Use of "Vice President" does not suggest a weakening of Adams's recognition of the legislative character of his office. Vice President was, after all, his title, one which placed the pompous Adams right behind Washington—therefore, it is not surprising that he liked to use it. Cf. Brownell, *supra* note 78, at (Part II) 5–27 (collecting evidence of other early associations of the Vice President with the executive branch).

91 See Letter from Thomas Jefferson to Elbridge Gerry (May 13, 1797), in 7 WRITINGS OF THOMAS JEFFERSON, *supra* note 64, at 119–20 (stating that he considered the office "constitutionally confined to legislative functions, and that [he] could not take any part whatever in executive consultations, even were it proposed"); see also DUMAS MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY 300, 319 (1962) (stating that Jefferson did not consider himself part of Adams's administration). Malone reports that when Adams and Jefferson met in early March of 1797 before their inaugurations, Adams said that "the first wish of his heart" was for Jefferson to go to France on a diplomatic mission, but "he sup-

him to remain at Monticello most of the year when the Senate was not in session,<sup>92</sup> a conclusion which rested on the assumption that the Vice President lacked any executive role that would require his presence in the nation's capital once the Senate recessed.

"As to duty, the Constitution will know me only as the member of a legislative body," Jefferson wrote to Madison,

and it's principle is, that of a separation of legislative executive and judiciary functions, except in cases specified. If this principle be not expressed in direct terms, yet it is clearly the spirit of the Constitution, and it ought to be so commented and acted on by every friend to free government.<sup>93</sup>

Regardless of whether the Vice President was associated primarily with the legislature, the executive, or bridged the political branches, the Constitution's original meaning envisioned the Vice President as the Senate's regular presiding officer.<sup>94</sup> "President," according to Samuel Johnson's contemporary dictionary, was "[o]ne placed with authority over others,"—in other words, someone who was "to preside."<sup>95</sup> The Constitution prescribed that the Vice President "shall" be President of the Senate, a formulation understood to impose a mandatory obligation.<sup>96</sup> Senator Oliver Ellsworth, a constitutional author-

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posed that was out of the question." Jefferson "promptly agreed that it was, on grounds both of impropriety and personal disinclination." *Id.* at 296.

92 See Letter from Thomas Jefferson to James Madison (Dec. 17, 1796), in 7 WRITINGS OF THOMAS JEFFERSON, *supra* note 64, at 91 (stating that the Vice Presidency would allow him to remain in Virginia for two-thirds of the year, presumably since the Senate would be out of session). Jefferson thought protocol required that the Senate notify a Vice president-elect of his election, a belief further associating the second office with the upper house. Letter from Thomas Jefferson to Henry Tazewell (Jan. 16, 1797), in 7 WRITINGS OF THOMAS JEFFERSON, *supra* note 64, at 106; see also Letter from Thomas Jefferson to Thomas M'Kean (Mar. 9, 1801), in 8 WRITINGS OF THOMAS JEFFERSON, *supra* note 64, at 12 (stating that as Vice President, he could spend eight months of the year at Monticello).

93 Letter from Thomas Jefferson to James Madison (Jan. 22, 1797), in 29 PAPERS OF THOMAS JEFFERSON 270, 271 (Barbara B. Oberg ed., 2001).

94 See 2 ROBERT C. BYRD, THE SENATE 1789–1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 167 (1991) (noting that as President of the Senate, "the vice president was expected to preside at regular sessions of the Senate"); CURRIE, *supra* note 80, at 181 (stating that the Vice President "is expected to perform the essentially ceremonial task of presiding over the Senate"); Timothy Walch, *Introduction* to AT THE PRESIDENT'S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY 1 (Timothy Walch ed., 1997) (describing presiding over the Senate as the Vice President's sole constitutional duty); Interview by Donald K. Ritchie with Floyd M. Riddick, Senate Parliamentarian, 1964–1974, at 196–97 (Aug. 1, 1978) (on file with U.S. Senate Historical Office) ("[T]he Constitution assigns the Vice President with the responsibility of presiding over the Senate.").

95 1 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (defining "President" as "[o]ne placed with authority over others" and "To Preside" as "to have authority over").

96 See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328 (1816) (stating that "shall" imposes a mandatory obligation); see also BARNETT, *supra* note 6, at 178–79 (arguing that

ity of the Founding generation, confirmed this meaning when he instructed Vice President John Adams: “I find, Sir, it is evident & Clear Sir, that wherever . . . the Senate is to be, then Sir you must be at the head of them.”<sup>97</sup> Adams reached the same conclusion. His wife Abigail complained that he never left the presiding officer’s chair.<sup>98</sup> Jefferson told the Senate during his vice presidential inauguration that he was “entering into an office whose primary business is merely to preside over the forms of this House.”<sup>99</sup> Other than some days at the beginning and end of some sessions,<sup>100</sup> he presided on a daily basis<sup>101</sup> and requested the Senate’s permission before leaving for home.<sup>102</sup> Senator John Quincy Adams observed that “the only duty of a Vice president, under our Constitution, is to preside in Senate”; he thought it anomalous that George Clinton, the fourth Vice President, had been chosen for that position without any regard to his ability to

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“shall” generally had mandatory meaning in legal context in the late eighteenth century); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 231–32 (1985) (arguing that “shall” has mandatory meaning in the Constitution’s vesting clauses); Steven G. Calabresi & Saikrishna Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 571 (1994) (arguing that the Constitution “almost always uses ‘shall’ when it means to impose a mandatory duty”); cf. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 184–85 (2003) (Thomas, J., dissenting) (arguing that in a statutory context, “shall” presumptively has mandatory meaning).

97 MACLAY, *supra* note 62, at 6; *see also* 2 BYRD, *supra* note 94, at 167 (“[As President of the Senate,] the vice president was expected to preside at regular sessions of the Senate . . .”); Interview by Donald K. Ritchie with Floyd M. Riddick, *supra* note 94, at 196–97 (stating that the Constitution assigns the Vice President the “responsibility” to preside over the Senate).

98 Letter from Abigail Adams to Mary Smith Cranch (July 4, 1790), *in* 9 ADAMS FAMILY CORRESPONDENCE, at 73, 74 (Margaret A. Hogan et al, eds., 2009).

99 6 ANNALS OF CONG. 1580–82 (1797); *see also* THOMAS JEFFERSON, *MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES* (Washington City, Davis & Force 1820) 49–60 (enumerating several of the important roles of the President of the Senate); Letter from Thomas Jefferson to George Wythe (Jan. 22, 1797), *in* 7 WRITINGS OF THOMAS JEFFERSON, *supra* note 64, at 110 (writing that he will be called upon “to preside”); Letter from Thomas Jefferson to Elbridge Gerry (May 13, 1797), *in* 7 WRITINGS OF THOMAS JEFFERSON, *supra* note 64, at 120 (calling the Vice Presidency “honorable & easy”).

100 MALONE, *supra* note 91, at 360 (explaining that Jefferson missed the first month of the session beginning November 13, 1797 due to his daughter’s injury, his illness, and his inability to travel due to inclement weather).

101 NOBLE E. CUNNINGHAM, JR., *IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON* 221 (1987).

102 JEFFERSON’S PARLIAMENTARY WRITINGS: “PARLIAMENTARY POCKET-BOOK” AND A MANUAL OF PARLIAMENTARY PRACTICE 16 (Wilbur Samuel Howell ed., 1988) (reporting that Jefferson “took his parliamentary duties with real seriousness”); MALONE, *supra* note 91, at 452 (reporting that Jefferson took his presiding duties “seriously”).

fulfill that function.<sup>103</sup> Elbridge Gerry, Clinton's successor, presided throughout the Senate's session, which began in May 1813.<sup>104</sup>

To be sure, the Constitution empowered the Senate to choose a President pro tempore to preside when the Vice President was absent or acted as President of the United States,<sup>105</sup> but that arrangement certainly was not a license for truancy. Making provision for a substitute does not imply that the principal's attendance is discretionary. Just as the existence of the Vice Presidency does not authorize the President to neglect his duties, the possibility of a Senate-president pro tempore did not free the Vice President to ignore his constitutional responsibility. Indeed, frequent absence would compromise the reasons Hamilton said the Constitution provided for a presiding officer who was not a Senator. Vice presidential absence would leave ties unresolved and require some Senator to preside, thereby denying his state equal representation. The President Pro Tempore Clause was designed to allow the Senate to proceed when the Vice President was away, not to authorize absenteeism. Indeed, that Clause confirms that the duty of the President of the Senate was to preside over the Senate, since otherwise, his absence would not require the selection of a president pro tempore.

The ratification of the Twelfth Amendment in 1804 changed the method of selecting, but not the duties of, the Vice President. The unanticipated development of national political parties had exposed defects in the original presidential-election system,<sup>106</sup> including the opportunity afforded a minority party to barter electoral votes to the rival vice presidential candidate in exchange for concessions.<sup>107</sup> To deprive the Federalists of that leverage, the Jeffersonians pushed through the Twelfth Amendment, which separated electoral voting for President and Vice President. Vice Presidents continued as the first presidential successors but did not consider themselves part of

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<sup>103</sup> 1 MEMOIRS OF JOHN QUINCY ADAMS 385 (Charles Francis Adams ed., 1874).

<sup>104</sup> Henry B. Learned, *Gerry and the Presidential Succession in 1813*, 22 AM. HIST. REV. 94–95 (1916).

<sup>105</sup> U.S. CONST. art. I, § 3, cl. 5 (“The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.”).

<sup>106</sup> The 1796 election installed a President and Vice President from rival parties; the 1800 election revealed the more serious danger that someone who intended to be Vice President, such as Aaron Burr, might inadvertently wind up as President. *See generally* AMAR, *supra* note 18, at 338–41 (discussing problems with the original electoral system).

<sup>107</sup> *See, e.g.*, Letter from Albert Gallatin to Thomas Jefferson (Sept. 14, 1801), in HENRY ADAMS, *THE LIFE OF ALBERT GALLATIN* 286, 287 (1879) (identifying the risk that Federalists might elect Burr as President in 1804).

the presidential administration and sometimes acted adversely to it.<sup>108</sup> Vice Presidents remained the Senate's presidents and, throughout the nineteenth century and well into the twentieth, regularly presided over it unless poor health intervened.<sup>109</sup> That was their job.

Consistent with the expectation that the Vice President would regularly preside, until 1890, the Senate chose a president pro tempore only when the Vice President was absent or acting as President. The appointment terminated when the Vice President appeared,<sup>110</sup> generally within a few days, unless the Vice Presidency was vacant or its occupant was ill.<sup>111</sup> Until 1886, the Senate's president pro tempore followed the Vice President in the line of presidential succession. Vice Presidents generally absented themselves towards the end of the session so that the Senate could elect a president pro tempore to serve as the second successor during the recess, just in case.<sup>112</sup> In 1890, the Senate changed its procedures to elect a president pro tempore to hold office "at the pleasure of the Senate," but to execute

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108 George Clinton opposed some aspects of Thomas Jefferson's foreign policy and cast the deciding vote against rechartering the Bank of the United States, which the Madison Administration favored. See JOHN P. KAMINSKI, *GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC* 279, 289–90 (1993). John C. Calhoun split with President Andrew Jackson over the Nullification Crisis, Jackson's nomination of Martin Van Buren to be Minister to Great Britain, and other matters. See JOHN NIVEN, *JOHN C. CALHOUN AND THE PRICE OF UNION: A BIOGRAPHY* 169–77, 185–86 (1988). Chester A. Arthur acted to oppose some nominations President James A. Garfield submitted to the Senate; Thomas A. Hendricks battled with President Grover Cleveland; and Levi Morton's laissez-faire manner of presiding was thought to have contributed to the defeat of one of President Benjamin Harrison's legislative priorities. See HATFIELD, *supra* note 90, at 254, 264–65, 273.

109 HATFIELD, *supra* note 90, at 247 (reporting that William Wheeler spent his Vice Presidency from 1877–1881 presiding over the Senate); RICHARD C. SACHS, CONGRESSIONAL RESEARCH SERVICE, *THE PRESIDENT PRO TEMPORE OF THE SENATE: HISTORY AND AUTHORITY OF THE OFFICE* 4 (2003); see Harold C. Relyea, *The Executive Office of the Vice President: Constitutional and Legal Considerations*, 40 *PRES. STUD. Q.* 327, 328 ("Throughout the nineteenth century, the vice presidency was regarded as a legislative position, the primary duty being to preside over the deliberations of the Senate.")

110 DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 11 n.36 (1997).

111 See CHRISTOPHER M. DAVIS, CONGRESSIONAL RESEARCH SERVICE, *THE PRESIDENT PRO TEMPORE OF THE SENATE: HISTORY AND AUTHORITY OF THE OFFICE* 3 (2012) ("During the period from April 1789 to March 1890, Presidents pro tempore usually served no more than a few consecutive days before the Vice President returned to displace them.")

112 1 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES* 256 (1938). When the opposing party or administration enemies held a Senate majority, some Vice Presidents, like Elbridge Gerry (1813), George Dallas (1845), Chester A. Arthur (1881), and Thomas Hendricks (1885), refused to vacate the chair. *Id.* at 257–58. Gerry, for instance, calculated that the Senate might elect an anti-Madison-administration president pro tempore, whereas House Speaker Henry Clay, who would be next in line, was a reliable supporter. See HATFIELD, *supra* note 90 at 67.

the duties of the chair only during vice presidential absence.<sup>113</sup> Nonetheless, Vice Presidents continued to regard presiding over the Senate as their primary job.<sup>114</sup>

In essence, then, under the original Constitution, the Vice President was an insignificant officer, essentially in the legislative branch, whose duty was to preside over the Senate when it was in session, absent extenuating circumstances. Although various constitutional amendments have affected the Vice Presidency,<sup>115</sup> the Constitution's text, insofar as it specifies ongoing vice presidential duties, has not been altered in more than 223 years.<sup>116</sup> Its original meaning makes it the Vice President's duty to preside over the Senate.

### B. *The Vice Presidency Transformed*

Yet, the Vice Presidency, as a constitutional institution, has changed dramatically, mostly in the last sixty years, and especially the last thirty-five. The office has gravitated to the executive branch, where it has become a highly consequential position the occupant of which helps guide and implement policy.<sup>117</sup> Notwithstanding the

<sup>113</sup> 21 Cong. Rec. 2153 (1890).

<sup>114</sup> See, e.g., 2 BYRD, *supra* note 94, at 167 ("From John Adams to Alben Barkley, presiding over the Senate was the chief function of vice presidents . . ."); *Marshall Opposed to Seat in Cabinet*, N.Y. TIMES, Dec. 5, 1920, at 4 (stating that Thomas Marshall said that the Constitution saw the Vice President simply as the Senate's presiding officer).

<sup>115</sup> Many believe that the Twelfth Amendment diminished the Vice Presidency by constructing an electoral system that separated the presidential and vice presidential elections, so that the Vice President was not the presidential runner-up. See, e.g., AMAR, *supra* note 18, at 343; Albert, *supra* note 60, at 844–45. The Twentieth Amendment made January 20 the beginning and ending date of presidential and vice presidential terms and provided for the succession of the Vice president-elect if the President-elect died and that the Vice president-elect would act as President if no President was chosen or if the President-elect failed to qualify. U.S. CONST. amend. XX, §§ 1, 3. The Twenty-Second Amendment, which prevented a President who had been twice elected or served six years from running again, made it easier for a second-term Vice President to plan to seek the Presidency. JOEL K. GOLDSTEIN, MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION 14 (1982). The Twenty-Fifth Amendment provided a means to fill a vice presidential vacancy and set forth procedures for handling presidential inability. See generally JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS (2d ed. 1992).

<sup>116</sup> The Twenty-Fifth Amendment clarifies the Vice President's role when various succession events occur, but that Amendment speaks explicitly to the Vice President's contingent role as presidential successor, not to his professional activities in normal times.

<sup>117</sup> GOLDSTEIN, *supra* note 115, at 134–35 ("Changes in American politics since the New Deal have drawn Vice Presidents into the presidential orbit."); Albert, *supra* note 60, at 812–13 (emphasizing the significance of the evolution of the Vice Presidency from a relatively insignificant office to the second most powerful command post in the nation, after that of the Presidency); Goldstein, *supra* note 60, at 509 ("When the architects of the Twenty-Fifth Amendment met in the mid-1960s, they conceived of the vice presidency much dif-

Constitution's original meaning, the Vice President's Senate role is now formal and infrequent, reserved for ceremonial occasions or when a tie vote seems possible.<sup>118</sup> The Vice President spends more time most weeks in the Oval Office than he spends during a year in the Senate's presiding chair. No one now views the Vice President as unimportant, no one now sees him as essentially a legislative figure, and, notwithstanding the Constitution's text and original meaning, no one complains that he never presides over the Senate.

Institutional change is often evolutionary, and that was true of the Vice Presidency. During the first three quarters of the twentieth century the vice presidency migrated to the executive branch, and the modern office developed. The office began to assume some small association with the executive branch near the beginning of the twentieth century and to attract more-credentialed people. Vice President Calvin Coolidge met regularly with the Cabinet in Warren G. Harding's administration.<sup>119</sup> The practice was interrupted when Coolidge's Vice President, Charles G. Dawes, declined a similar invitation in 1925<sup>120</sup> but resumed four years later, when Charles Curtis became

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ferently than had the framers 180 years before. They saw a robust office, firmly lodged in the executive branch, with a promising future. They crafted the Twenty-fifth Amendment based upon that vision.”); Joel K. Goldstein, *The Rising Power of the Modern Vice Presidency*, 38 PRES. STUD. Q. 374, 376 (2008) (arguing that the Vice Presidency had moved closer to the executive branch by 1976).

118 See HATFIELD, *supra* note 90, at xvi (“During the twentieth century, the role of the vice president has evolved into more of an executive branch position. Now, the vice president is usually seen as an integral part of a president’s administration and presides over the Senate only on ceremonial occasions or when a tie-breaking vote may be needed.”).

119 *Coolidge Agrees to Sit in Cabinet at Harding’s Wish*, N.Y. TIMES, Dec. 17, 1920, at 1 (reporting President-elect Harding’s request for Vice President-elect Coolidge to serve as an ex officio member of his Cabinet and Vice President-elect Coolidge’s agreement to do so). Not all viewed the practice favorably. See, e.g., *Marshall Opposed*, *supra* note 114, at 4 (detailing outgoing Vice President Thomas R. Marshall’s criticism of a Vice President regularly attending meetings of the President’s Cabinet and warning that such an arrangement would contravene the intent of the drafters of the Constitution and impede the Vice President’s role as the Senate’s presiding officer); *Vice President and Cabinet*, N.Y. TIMES, July 14, 1920, at 8 (expressing misgivings regarding Harding’s proposal, noting that while the Vice President would surely provide useful advice to the President, the Vice President would have no other power or responsibility while sitting in the Cabinet and could find more suitable uses for his time).

120 *Coolidge to Drop Harding Precedent*, N.Y. TIMES, Nov. 27, 1924, at 18 (describing the response to Dawes’s rejection of Coolidge’s invitation to sit on his Cabinet); *Dawes Is Unwilling to Sit in Cabinet*, N.Y. TIMES, Feb. 5, 1925, at 2 (reporting Dawes’s refusal to attend Cabinet meetings because the practice “involves a wrong principle”); *Dawes Won’t Sit in Cabinet, Refusing Coolidge Offer*, N.Y. TIMES, Nov. 26, 1924, at 1 (reporting Dawes’s refusal to regularly attend Cabinet meetings).

Herbert Hoover's Vice President,<sup>121</sup> and has continued ever since. Franklin D. Roosevelt used his first Vice President, John Nance Garner, as an occasional legislative adviser and made his second Vice President, Henry A. Wallace, chair of the Board of Economic Warfare and of the Supply Priorities and Allocations Board within the executive branch in 1941.<sup>122</sup> FDR sent Wallace on goodwill trips to Latin America and China.<sup>123</sup> In 1949, Congress made the Vice President a member of the recently created National Security Council.<sup>124</sup>

These steps towards the executive end of Pennsylvania Avenue did not make the office overly taxing. "A Vice President is bothered by nothing . . . . He has no work," Dawes declared in 1927.<sup>125</sup> Nor did these initiatives remove the Vice President from functioning as the Senate's presiding officer, a task which remained the central and acknowledged preoccupation of the Vice President. Dawes devoted his Vice Presidency to trying, unsuccessfully, to change the Senate's rules in order to limit debate. Curtis declared his pride in being called upon to preside over the Senate and judged it the desire of the Senate and the American people that he be "an integral part" of the Senate, not "remote" from it.<sup>126</sup> To administer the Senate's rules was, he said, "the whole scope and sphere of the Vice President."<sup>127</sup> Harry S. Truman was only Vice President for eighty-two days, but he devoted some part of virtually each day the Senate was in session to presiding over it.<sup>128</sup> He rarely met with FDR during that period, and no one bothered to alert him to the Manhattan Project to build an atomic bomb until after FDR's death.<sup>129</sup> Alben W. Barkley, Truman's Vice

121 *Curtis to Join in Cabinet Meetings; Will Participate in First One Today*, N.Y. TIMES, Mar. 8, 1929, at 1 (reporting Curtis's decision to attend Hoover's Cabinet meetings).

122 Mildred Adams, *Busy Mr. Garner Is Ready for Congress*, N.Y. TIMES MAG., Dec. 30, 1934, at 5 (reporting Garner's early return to Washington at Roosevelt's request to confer about the administration's legislative program).

123 HATFIELD, *supra* note 90, at 401-03.

124 50 U.S.C. § 402 (2006) (establishing the National Security Council).

125 *Vice President Has No Work to Bother Him, Dawes Asserts*, N.Y. TIMES, Aug. 16, 1927, at 1.

126 71 Cong. Rec. 3 (1929)

127 *Id.*; *Dawes and Curtis Disagree on Rules*, N.Y. TIMES, Mar. 5, 1929, at 4; *see also* Frank L. Kluckhohn, *Competing for Quasi-Oblivion*, N.Y. TIMES MAG., Sept. 20, 1936, at 8 (noting that presiding over the Senate is the vice president's most important routine duty); *Vice President Causes Stir*, N.Y. TIMES, Mar. 5, 1925, at 1, 4 (detailing Vice President Dawes's speech at his swearing-in ceremony, in which he emphasized that the Constitution conferred on him the significant duty of presiding over the Senate).

128 William R. Tansill, Memorandum, Number of Dates Certain Vice Presidents Actually Presided Over the Senate, Library of Congress Legislative Reference Service (June 27, 1955, 2).

129 *See* DAVID MCCULLOCH, TRUMAN 333, 337, 376-79 (1992) (stating that Truman was told of the Manhattan Project only after taking office as President); HARRY S. TRUMAN, MEMOIRS BY HARRY S. TRUMAN: 1945: YEAR OF DECISIONS 19-20 (1955).

President, recognized that the Constitution imposed on him the “duty” to be the Senate’s presiding officer but offered to assume “any such service as any branch of the Government, or both branches of the Congress, may feel I can render” in addition to that “mere technical” presiding duty.<sup>130</sup> Barkley was the last Vice President to devote much of his professional time to presiding over the Senate.<sup>131</sup>

Major changes in American society and government during the 1930s and 1940s fundamentally altered our political system, and ultimately, these changes affected the Vice Presidency. The New Deal, World War II, and the Cold War changed American government in ways that drew the Vice Presidency closer to the executive branch. The growth of the national government and America’s expanded international role drew power to the executive branch and weakened local political machines. The President’s domestic and international role increased, and technological change created new possibilities for, and expectations regarding, presidential activity and travel. Beginning in 1940, the President’s enhanced governmental role allowed presidential candidates to assume the leading role in selecting their running mates, a change which encouraged more compatible and interdependent pairings. These changes gave Presidents reason to involve Vice Presidents in their administrations and gave Vice Presidents reason to see the executive branch as salvation from the insignificant duty the Constitution prescribed.<sup>132</sup>

The tenure of Richard M. Nixon as Vice President (1953–1961) marked a turning point in moving the vice presidency to the executive branch. Dwight D. Eisenhower and Nixon built on precedents of earlier administrations and exploited technological advances to expand Nixon’s executive roles. In addition to Cabinet and National Security Council meetings, Eisenhower enlisted Nixon to undertake diplomatic missions, to serve as a party surrogate and administration spokesperson, to help with legislative work, and to chair some execu-

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<sup>130</sup> 95 Cong. Rec. 480 (1949).

<sup>131</sup> Interview by Donald K. Ritchie with Floyd M. Riddick, Senate Parliamentarian, 1964–1974, at 66 (July 12, 1978) (“Vice President Barkley stayed in the chair anywhere from, I’d say, fifty to seventy-five percent of the time.”); Interview by Donald K. Ritchie with Floyd M. Riddick, Senate Parliamentarian, 1964–1974, at 45 (June 26, 1978) (“Vice President [Alben] Barkley was the last Vice President who stayed in the chair anywhere from fifty to ninety percent of the time.” (alteration in original)); Estimated Presiding Time of the Vice Presidents From 1949–1958 (estimating that Barkley presided about 33% to 40% of the time).

<sup>132</sup> See generally GOLDSTEIN, *supra* note 115, at 301–08 (providing an overview of the Vice Presidency in a historical context and detailing the reasons why and ways in which Presidents granted more responsibilities to their Vice Presidents).

tive committees.<sup>133</sup> This work offered an ambitious Vice President like Nixon greater opportunity to use his office as a presidential springboard. Eisenhower insisted that Nixon discharged these duties “voluntarily” because the Vice President, “with the constitutional duty of presiding over the Senate, is not legally a part of the Executive branch and is not subject to direction by the President.”<sup>134</sup>

Form was, however, yielding to substance, and as other administrations followed suit, Vice Presidents were pulled from Capitol Hill to the other end of Pennsylvania Avenue, physically and constitutionally. Early in 1961, Lyndon B. Johnson became the first Vice President with an office in what is now the Eisenhower Executive Office Building near the White House,<sup>135</sup> so he could meet his executive “responsibilities most effectively.”<sup>136</sup> Johnson also assumed roles like those Nixon had performed, building on precedents which “tended to increase the identification of the Vice President with the executive branch and the general acceptability of a delegation of executive powers to him.”<sup>137</sup> When it was proposed, at Johnson’s urging, that he preside over the Senate Democratic Caucus, many of his former colleagues protested.<sup>138</sup> “I think it was absolutely unconscionable and ridiculous,” recalled Senator William Proxmire. “It was also unconstitutional, in my view. I mean, here you had the Vice President, representing the executive branch, coming down to run our caucus . . . .”<sup>139</sup> Proxmire and his colleagues had other reasons for their

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133 GOLDSTEIN, *supra* note 115 at 152, 159, 178, 184–85, 190–91.

134 DWIGHT D. EISENHOWER, *WAGING PEACE*, 1956–1961, at 6 (1965).

135 *Johnson to Get Offices in Sight of White House*, N.Y. TIMES, Mar. 1, 1961, at 18 (reporting that President John F. Kennedy had arranged for Johnson to have offices closer to the White House than his predecessors).

136 The President’s News Conference, 62 PUB. PAPERS 135 (Mar. 1, 1961).

137 Memorandum from Nicholas deB. Katzenbach, Assistant Attorney Gen., Office of Legal Counsel, to the Attorney Gen., Delegation of Presidential Powers to the Vice President, 2 (June 22, 1961), available at <http://www.fas.org/irp/agency/doj/olc/062261.pdf> (referring to delegations prior to 1961).

138 See Minutes of the Democratic Conference (Jan. 3, 1961), in MINUTES OF THE SENATE DEMOCRATIC CONFERENCE, 1903–1964, at 577–79 (1998) (describing Vice President Johnson’s former colleagues’ protests of Vice President Johnson’s proposal).

139 Transcript of William Proxmire Oral History Interview I, at 31 (Feb. 4, 1986) (on file with Lyndon Baines Johnson Library); see also ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PASSAGE OF POWER* 168 (2012) (quoting arguments against Johnson presiding over the caucus based on the constitutional concept of the separation of powers); Transcript of Hubert H. Humphrey Oral History Interview I, at 21 (Aug. 17, 1971) (on file with Lyndon Baines Johnson Library) (explaining Senator Humphrey’s misgivings about a Vice President being the chairman of the caucus on the basis of animosity among politicians in Washington and problems with separation of powers).

opposition,<sup>140</sup> and it is hard to see how presiding over a party caucus could violate the Constitution, but Proxmire's association of the Vice President with the executive branch suggested a new attitude regarding the office. It was moving.

In 1965, Congress proposed, and two years later, the states ratified, the Twenty-Fifth Amendment to the Constitution. It addressed vexing problems of presidential succession and inability, primarily by providing a means to fill a vice presidential vacancy and procedures to handle presidential inability.<sup>141</sup> It implicitly endorsed the movement of the office to the President's end of Pennsylvania Avenue. The Amendment rested on a vision of the Vice President as an integral part of the executive branch, a premise its second section confirmed by allowing the president to nominate someone to fill a vice presidential vacancy.<sup>142</sup> Whereas the original Vice Presidency had been deemed expendable, the Twenty-Fifth Amendment rested on the premise that the nation always needed a Vice President.<sup>143</sup> The Amendment presumed that a President was entitled to choose a Vice President with whom he was politically and personally compatible but that Congress should be able to confirm (or not) the President's choice in order to provide some democratic legitimacy.<sup>144</sup>

Johnson's four immediate successors, Hubert H. Humphrey, Spiro T. Agnew, Gerald R. Ford, and Nelson A. Rockefeller, increasingly operated from the Executive Office Building, a venue which represented their association with the executive branch. They discharged a mix of executive assignments like those Nixon and Johnson handled—committee chairman, foreign emissary, administration spokesman, partisan warrior, and legislative liaison. They almost never presided over the Senate. In February 1969, William Rehnquist, then Assistant Attorney General for the Office of Legal Counsel, advised that Nixon could make Agnew responsible for the

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140 See CARO, *supra* note 139, at 166–69 (discussing some Democratic Senators' resentment toward Johnson's exercise of power).

141 See FEERICK, *supra* note 115, at 105–08 (explaining the Twenty-Fifth Amendment's procedural guidelines for handling a situation in which the President is deemed disabled or unfit to continue in his position).

142 See Goldstein, *supra* note 60, at 530–34 (presenting evidence that proponents of the Twenty-Fifth Amendment viewed the Vice President as part of President's administration).

143 *Id.* at 526–30 (stating that the drafters of the Twenty-Fifth Amendment thought that the Vice President's position should be prominent).

144 GOLDSTEIN, *supra* note 115, at 234 (“It gave the President a leading role in choosing a new Vice President to help ensure compatibility between the two officers; it required congressional participation to introduce an element of democratic control.”); Goldstein, *supra* note 60, at 543.

Advisory Commission on Intergovernmental Relations. Although the Vice President “occupies a unique position under the Constitution” and “his status in the Executive Branch is not altogether clear,” Congress and different Presidents had given the Vice President various executive roles such that “his status may be characterized as Legislative or Executive depending on the context,” and his “availability” to serve as an executive branch member and chair of the body seemed clear.<sup>145</sup> Beginning with Agnew, Congress added a line in the executive branch budget to support vice presidential activities.<sup>146</sup> Although Vice Presidents had migrated to the executive branch, much of their time was spent doing make-work in an office, often more frustrating than influential.<sup>147</sup>

The Vice Presidency of Walter F. Mondale accelerated and greatly expanded the executivization<sup>148</sup> of the Vice Presidency.<sup>149</sup> Mondale envisioned his job as trying to help the President succeed, not preparing to succeed the President.<sup>150</sup> He conceived the Vice President as a close, across-the-board presidential adviser and troubleshooter. President Jimmy Carter gave Mondale a West Wing office only steps from the Oval Office. Mondale received copies of memoranda to Carter and could attend any meeting on the President’s schedule.<sup>151</sup>

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145 Memorandum from William H. Rehnquist, Assistant Attorney Gen., Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President, Advisory Commission on Intergovernmental Relations, at 2 (Feb. 7, 1969) (on file with author).

146 See LIGHT, *supra* note 78, at 69–72 (describing the development and impact of a vice presidential line in the executive branch’s budget); see also Relyea, *supra* note 109, at 330–32 (describing financial and support assistance given to Vice Presidents).

147 See Goldstein, *supra* note 60, at 543 (explaining that until the passage of the Twenty-Fifth Amendment and the subsequent granting of new powers to the Vice Presidency, Vice Presidents had little influence and obscure, inconsequential duties); Goldstein, *supra* note 117, at 376 (describing the arrangement whereby Carter gave Mondale critical resources including the right to attend important meetings and access to documents sent to Carter); Arthur M. Schlesinger, Jr., *On the Presidential Succession*, 89 POL. SCI. Q. 475, 478 (1974) (“History had shown the American Vice Presidency to be a job of spectacular and, I believe, incurable frustration.”).

148 Walter F. Mondale, Former U.S. Vice President, Sideman: Reflections on the Vice Presidency, Address at Macalester College, at 3 (May 6, 2002) (discussing the executivization of the Vice Presidency).

149 Goldstein, *supra* note 117, at 377–80 (discussing the transformative nature of Mondale’s Vice Presidency and the institutional change it created).

150 Memorandum from Walter F. Mondale, Vice President, to Jimmy Carter, President, The Role of the Vice President in the Carter Administration, at 1 (Dec. 9, 1976), available at <http://www.mnhs.org/collections/upclose/Mondale-CarterMemo-Transcription.pdf> (setting out roles for the Vice President that would contribute to the administration’s success).

151 WALTER F. MONDALE (WITH DAVID HAGE), THE GOOD FIGHT: A LIFE IN LIBERAL POLITICS 181 (2010) (“I got the president’s schedule every day and I was invited to every meeting.”); Goldstein, *supra* note 117, at 379 (“President Carter and Vice President Mondale

Whereas Mondale's predecessors during the prior quarter century had often operated outside the administration's inner circle, Mondale's service provided a model for a contributing Vice Presidency and created expectations of vice presidential engagement at the highest levels of policy formulation.<sup>152</sup> Since 1981, Mondale's five successors have retained the basic resources Mondale obtained and have functioned as integral parts of the executive branch.<sup>153</sup> Vice Presidents, and their top aides, take assignments from, and report to, the President. Vice Presidents chair consequential executive branch initiatives—the Competitiveness Council (Quayle), Reinventing Government (Gore), bilateral commissions with Russia (Gore), task forces on energy (Cheney) and guns (Biden), and so on. They have managed confirmations of Supreme Court nominees, the war against terror, engagement in, and disengagement from, Iraq, implementing the recovery plan, and negotiating the country back from the Fiscal Cliff.<sup>154</sup> They lobby congressmen to support presidential initiatives and brief them on confidential executive branch programs and decisions.

The White House Vice Presidency affords the President a high-level, across-the-board general advisor who largely shares the President's perspective, interest, and political destiny and a troubleshooter who can handle assignments that require high-level attention. Regular participation in the executive branch better prepares a Vice President for presidential succession should that need arise and allows a smoother transition than would occur if the Vice President was unfamiliar to, and with, high-level members of the administration inherited. As the office has become more substantial, it has attracted more able figures than would be the case if the main occupation was to sit and listen to Senators dissertate.

Quite clearly, the Vice Presidency has changed in a fundamental and enduring way. It is now a robust office in the executive branch.

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and their associates considered the resources that Mondale would need to succeed in that advisor/troubleshooter role. These included the West Wing office, regular meetings with the president, the right to participate in important meetings, access to information and paper and responsiveness of personnel, placement of Mondale aides in significant White House positions, and sufficient staff support.”)

152 Goldstein, *supra* note 117, at 380–81 (detailing the broad impact and influence that the Vice President began to have on administration policy).

153 *Id.* at 380 (stating that Vice President Mondale's successors retained the resources granted to Mondale during his tenure and that the changes enacted under Mondale's tenure increased the importance of the Vice Presidency).

154 *See id.* at 380–85 (detailing the crucial roles Vice President Mondale's successors played in executive branch initiatives). On Cheney, see generally BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY (2008).

Vice Presidents work in the White House and spend time several days (or more) each week with the President. They attend critical meetings in the Oval Office and Situation Room. Of course, the Constitution does not require that the President seek their advice or deploy them as trouble-shooters. Yet, the constitutional system, as it has evolved, gives the President enormous incentive to involve the Vice President. The increased demands on the Presidency add value to an associate with the stature and skill to shoulder responsibilities that must be handled at the highest level. The precedents from recent administrations have created expectations of vice presidential engagement such that deviation would require public explanation.

And, of greater importance in undermining the claims of original meaning, vice presidents rarely preside over the Senate anymore.<sup>155</sup> When they do, it makes news.<sup>156</sup>

And when they now claim to be part of the legislative branch, people are incredulous.<sup>157</sup> Yet no one, or almost no one,<sup>158</sup> suggests

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155 See, e.g., 121 CONG. REC. 639 (daily ed. Jan. 17, 1975) (describing how Majority Leader Mike Mansfield congratulated Vice President Rockefeller after Rockefeller presided over the Senate for four consecutive days in 1975, noting that Vice Presidents do not frequently preside over the Senate); Dom Bonafede, *Vice President Mondale—Carter's Partner with Portfolio*, NAT'L J., March 11, 1978, at 383 (reporting that Vice President Mondale presided over the Senate for only nineteen hours in 1977); *Nixon's Own Story of Seven Years in the Vice Presidency*, U.S. NEWS & WORLD REP., May 16, 1960, at 98–99 (estimating that Nixon spent five to ten percent of his time presiding over the Senate).

156 See, e.g., Reid J. Epstein, *Biden to Preside over Senate Gun Control Votes*, POLITICO (Apr. 17, 2013, 3:18 PM), <http://www.politico.com/politico44/2013/04/biden-to-preside-over-senate-gun-control-votes-161928.html> (describing Vice President Biden's decision to preside over the Senate due to the importance of the issue being considered by the Senate and the possibility of a very close vote); Ed O'Keefe, *Biden to Preside over Senate During Immigration Bill Vote*, WASH. POST, June 27, 2013, available at <http://www.washingtonpost.com/blogs/post-politics/wp/2013/06/27/biden-to-preside-over-senate-during-immigration-bill-vote> (stating that Vice President Biden rarely presides over the Senate); Sunlen Miller, *With VP Biden Presiding, Senate Passes Democrats' Tax Cut Plan*, ABC NEWS: NOTE BLOG (July 25, 2012, 6:29 PM), <http://abcnews.go.com/blogs/politics/2012/07/with-vp-biden-presiding-senate-passes-democrats-tax-cut-plan> (reporting about an instance in which Vice President Biden chose to preside over the Senate and noting the rarity of Biden doing so).

157 See, e.g., Julia Malone, *Cheney Asserts He's Part of the Legislative Branch*, BOS. GLOBE, (June 22, 2007), [http://www.boston.com/news/nation/articles/2007/06/22/cheney\\_asserts\\_hes\\_part\\_of\\_the\\_legislative\\_branch](http://www.boston.com/news/nation/articles/2007/06/22/cheney_asserts_hes_part_of_the_legislative_branch) (“Cheney has long maintained that he does not have to comply with an executive order on safeguarding classified information because his office is part of the Legislature.”). But cf. *Palin Says Vice President “In Charge Of” Senate*, ABC NEWS (Oct. 22, 2008, 7:51 AM), <http://abcnews.go.com/blogs/politics/2008/10/palin-says-vice> (stating that when vice presidential candidate Sarah Palin suggested an expanded role in the Senate, she was met with criticism given the limited role of the Vice President in the legislative branch).

158 But see generally Glenn Harlan Reynolds, *Is Dick Cheney Unconstitutional?*, 102 NW. U. L. REV. COLLOQUY 110 (2007) (asserting that the expanded role of the Vice President may, in

that the vice president should return to presiding over the Senate regularly. And no one suggests that the Vice President violates his oath or is derelict in his professional obligation by ignoring the Senate duty, even though it is the only ongoing responsibility the Constitution assigns him.

### III. THE COMMON LAW DYNAMIC OF CONSTITUTIONAL CHANGE

The experience of the Vice Presidency exposes important insights about constitutional change and about the efficacy of originalism. And what it suggests is, in short, that Article V is not the exclusive, or even the most common, means of constitutional change, that constitutional changes occur not only when the Constitution is silent or unclear but sometimes, too, when its original meaning is pretty certain but ill-advised, and that departures from at least some original constitutional meanings occur with widespread support because of their beneficial consequences.

In various contexts, others have pointed out that much constitutional change occurs independent of Article V.<sup>159</sup> The Vice Presidency presents another case study which illustrates this phenomenon. Article V's multi-layered, super-majority amendment process did not produce the constitutional change in the Vice Presidency. Congress never proposed relocating the office or relieving its occupant of its regular Senate-presiding duties, and the states neither initiated, nor took, any such amendatory action.

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some way, compromise his or her role as a replacement for the President if the President is impeached or resigns as a matter of policy); Glenn Harlan Reynolds, *Where Does the Vice President Belong?*, N.Y. TIMES, Oct. 27, 2008, at A27 (arguing that extensive vice-presidential involvement in the executive branch is unconstitutional).

159 See, e.g., WHITTINGTON, *supra* note 10, at 2–4 (suggesting that the Constitution guides political actors in forming public policy); Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 13, 13–32 (Sanford Levinson ed., 1995) (“To designate something as an interpretation . . . even if one is ultimately not persuaded by it, is to accord it a certain legal dignity that is absent if one rejects the very possibility of its having been offered as a ‘good faith’ exercise of interpretation. If one doubts the presence of good faith, or equally if one accepts interpretive sincerity but finds the actual effort to be manifestly incompetent, then one will be tempted to describe what is being offered as a surreptitious attempt to ‘amend’ the Constitution without going through the approved procedures by which inventions are accepted into the constitutional fabric.”); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1469 (2001) (“The first indication that the role of formal amendments may be less than meets the eye is how often important changes . . . occur without any formal amendment.”).

Instead, the transformation resulted from an informal political process that occurred over time. Various Presidents created precedents associating their Vice Presidents with their administrations. The initial involvements did not intrude on the Vice President's presiding role. Some precedents worked and were repeated, even expanded. Others failed and were abandoned. Vice Presidents became more visibly associated with the President's administration and spent more time doing things in or related to the executive, not legislative, branch. Americans grew accustomed to the Vice President operating at the President's end of Pennsylvania Avenue even before President John F. Kennedy gave Vice President Johnson an office in the Executive Office Building, an act which attached an Article II address to the change already underway. Experience produced knowledge, knowledge produced more understanding, understanding allowed improvement,<sup>160</sup> and ultimately, after decades of experimentation, the process culminated in a new vice presidential vision, the Mondale-model, White House Vice President. Mondale's prize West Wing office signified the Vice Presidency's move from the periphery to the inner core of the executive branch. America recognized this change as a positive development, and successive administrations have imitated it. The Vice President moved from the Senate's presiding chair to one only steps from (and often, in) the Oval Office, from Article I to Article II.

This development occurred through a non-judicial version of the common law process. Like the common law, the change evolved incrementally over time. Like the common law, it featured visible experimentation and responses to those efforts. Like the common law, it was the product of many hands and minds. Like the common law, it sought to produce pragmatic, workable, and beneficial solutions. Like the common law, precedents survived when they proved workable but were vulnerable to revision or even rejection when they did not function well.

The nineteenth century's recognition of the office's inherent problems had been insufficient to bring constitutional change. Reform did not occur until the new circumstances of the mid-twentieth century compelled new arrangements, and until an enhanced presidency provided an alternative, more sensible home and role for the Vice Presidency in the executive branch. The Vice President was

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<sup>160</sup> Cf. *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924) (Brandeis, J., dissenting) ("Knowledge is essential to understanding; and understanding should precede judging.").

then happy to relocate, the Senate was willing to see him go,<sup>161</sup> and, as Presidents from both parties appreciated the potential benefits, they welcomed the new recruit and drew him closer, especially once given a workable vision. The development presented a win-win-win-win, for President, Vice President, Senate, and public, with no one ready to complain.

The new White House Vice Presidency has claimed bipartisan support. Carter and Mondale invented it, but Ronald Reagan and George H.W. Bush embraced it. It describes the Vice Presidencies of Dan Quayle and Al Gore, of Dick Cheney and Joe Biden. It has developed because logic commends it, and it has endured because experience has confirmed that logic.

To be sure, the Vice Presidency that has emerged is consistent with the implicit vision of the Twenty-Fifth Amendment, which regards the office as an important part of the executive branch and as closely associated with the President. That consistency lends support to the constitutionality of the White House Vice Presidency.<sup>162</sup> Yet, the resemblance between that constitutional vision and the office's recent performance does not undermine the central points of this Article, that constitutional change occurs independent of Article V and sometimes at variance with original meaning. The Amendment confirmed, rather than initiated, the Vice Presidency's migration from the legislative to the executive branch.<sup>163</sup> That journey began in the early twentieth century well before the Twenty-Fifth Amendment was ratified or even proposed. Vice Presidents had largely abandoned their role as the Senate's presiding officer, had associated symbolically and politically with the executive branch, and had undertaken roles within it before the Twenty-Fifth Amendment was ratified in 1967. Indeed, it is not surprising that the Amendment rested on ideas and mimicked practices<sup>164</sup> that experience had suggested and that commanded acceptance. How else could it have achieved the multiple super-majority approvals Article V requires?<sup>165</sup>

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161 The Senate generally did not embrace the presence of a presiding officer that it did not choose and could not remove.

162 Goldstein, *supra* note 60, at 560–61 (“The Twenty-fifth Amendment signified a new constitutional appreciation of the vice presidency.”).

163 *Id.*, at 508, 525, 530 (“The Twenty-fifth Amendment recognized constitutional changes that had occurred in the vice presidency, especially during the previous few decades.”).

164 See Joel K. Goldstein, *Taking from the Twenty-fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 *FORDHAM L. REV.* 959, 987 (2010) (pointing out ways the Twenty-Fifth Amendment adopted existing practices).

165 See Strauss, *supra* note 159, at 1459, 1462–63 (arguing that constitutional amendments often ratify existing practice).

Moreover, vice presidential duties developed independent of, not because of, the Amendment's influence. Mondale, a central figure in the development of the White House Vice Presidency, had been one of only five senators to vote against the Amendment<sup>166</sup> and did not associate the White House Vice Presidency with its vision.<sup>167</sup> Neither have his successors. The Twenty-Fifth Amendment recognized and confirmed evolutionary changes underway and reflected their underlying premises, but the logic of those changes, not the Amendment, propelled them forward.

Finally, the text of the Twenty-Fifth Amendment did not override, or even address, the President of the Senate Clause. The language of that clause has not been changed since 1789, but Vice Presidents now ignore the duty its original meaning imposed. Instead, they preside over the Senate only when it suits their, or the administration's, purposes.

The migration of the Vice Presidency from the legislative to the executive branch reflects a significant constitutional change outside of Article V, but some separate steps on that journey might be viewed, with exceptions noted below, as the product of appropriate exercises of some versions of constitutional construction. It is surely possible to view some executive, vice presidential duties as consistent with, or permitted by, the original Constitution, even if it did not mandate them. Accordingly, some discrete vice presidential activities which occurred at the President's request, like some presidential advising, attending some meetings, or some diplomatic work, might be viewed as constitutional additions occupying space the original Constitution left open.

Yet the constitutional change of the Vice Presidency cannot be categorized as simply an instance of constitutional construction consistent with originalism for two reasons. First, the cumulative effect of these steps transformed an essentially legislative-branch job to an executive-branch position. Instead of the Vice President committing his time to helping the Senate function, the Vice President now spends his time trying to help the President succeed. In substance, the steps moved the office down Pennsylvania Avenue from Article I to Article II, and this relocation represented a constitutional change of kind, not simply of degree. Adams and Jefferson would not have recognized the office they held first and second.

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<sup>166</sup> 111 CONG. REC. 15, 596 (1965).

<sup>167</sup> See generally Memorandum from Mondale to Carter, *supra* note 150 (outlining Mondale's vision of the Vice Presidency without reference to the Twenty-Fifth Amendment).

Moreover, the Vice President's abandonment of the duty to preside over the Senate cannot be classified as simply constitutional construction. Most originalists seem to agree that original public meaning constrains constitutional construction,<sup>168</sup> that constitutional construction cannot override original meaning. The President of the Senate Clause is not, on its face, as definite as constitutional provisions which, for instance, prescribe an age for eligibility to hold office<sup>169</sup> or a number,<sup>170</sup> yet as original meanings go, it gives pretty precise instruction. The Vice President was supposed to preside regularly over the Senate. That original meaning can be ascertained with much more confidence, and it gives much clearer direction, than is true of most other constitutional clauses.<sup>171</sup> If the original meaning of a clause is as clear as the President of the Senate Clause and yet is not appropriate for interpretation, then the domain of original meaning is pretty small indeed.

If the original meaning of the President of the Senate Clause had been honored, the modern, West Wing Vice Presidency could not have occurred. The emergence and success of that model only became possible because Vice Presidents abandoned the presiding role that the Constitution's original meaning imposed so that they could devote their time to advising and trouble-shooting in the executive branch. Whereas reasonable persons like Adams and Jefferson understood that being President of the Senate compelled them regularly to preside, we now view that clause as conferring an honorific title and that role as entirely formal and ceremonial save for some rare occasions when a tie vote seems possible.<sup>172</sup> The text can comfortably bear that meaning once originalism is not treated as a trump card and other modes of constitutional analysis are considered. The modern view is entirely reasonable in the context of our times, but the White House Vice Presidency cannot be reconciled with original

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<sup>168</sup> Solum, *supra* note 5, at 26, 150 ("Almost all originalists will agree that constitutional construction should be constrained by constitutional interpretation.")

<sup>169</sup> See, e.g., U.S. CONST. art. I, § 2, cl. 2 (setting age and citizenship qualifications for members of the House of Representatives); *id.* art. I, § 3, cl. 3 (setting age and citizenship qualifications for members of the Senate).

<sup>170</sup> *Id.* art. I, § 3, cl. 1 (giving each state two senators).

<sup>171</sup> See, e.g., *id.* art. II, § 1 ("The executive Power"); *id.* amend. V ("nor be deprived of life, liberty, or property, without due process of law"); *id.* amend. XIV ("equal protection of the laws").

<sup>172</sup> It is, of course, possible to imagine situations which would undermine the White House Vice Presidency, such as the election of a President and a Vice President from opposite parties under the contingent election procedure set forth in the Twelfth Amendment. These contingencies seem unlikely to occur. Even if they did, it is not at all clear that the Vice President would spend much time presiding over the Senate.

meaning, unless requiring the Vice President regularly to preside is synonymous with making that activity totally at the Vice President's discretion. Original meaning has now yielded to practice reinforced by beneficial consequences and supported by structural arguments.

Of course, the transformation of the Vice Presidency may have been helped, in part, by the fact that originalism was not mobilized to oppose this constitutional change in the office's transformative years. Until recently, originalism commanded few adherents, its focus was on judicial behavior, and its arsenal featured original intent and expectations, not meaning. It was not able effectively to deploy historical fact to arrest the institutional development of the Vice Presidency.

Yet, originalists can take little comfort from the fact that their absence from the field may have contributed to the transformation of the Vice Presidency into an institution very much at odds with the Constitution's original meaning. Essentially no one suggests that the Vice President should return to the Senate-President model. Presidents and Vice Presidents of both parties have supported the new White House Vice Presidency by implementing it. Surely, new originalists will not now explain away the development of the Vice Presidency by saying that if only they had been better prepared for battle a few decades earlier, they would have prevented an experiment which is widely perceived on a bipartisan basis to have produced a better, more sensible second office, executive branch, and government.

And it would be surprising, indeed shocking, if a newly resurgent originalism acts to turn back the clock to reinstate the original meaning of the President of the Senate Clause, to reverse the Vice Presidency of Cheney and Biden, and to return to the days when John Adams and his successors regularly fulfilled the obligation the Constitution's original meaning imposed and presided over the Senate. Restoring the originally intended, expected, and meant Vice Presidency would reverse the conspicuous and positive trajectory of our nation's second office to the detriment of our government.

Originalists might accept the White House Vice Presidency as an appropriate case to deviate from original public meaning. Indeed, some new originalists have argued that public-meaning originalism is not undermined by the need to make some exceptions when the theory does not produce a palatable result. For instance, Solum argues that the "binding force of the original meaning of the Constitution can be defeasible," for instance, to address an "emergency or other

extraordinary circumstances.”<sup>173</sup> He suggests that one “extraordinary circumstance” might be to accommodate “long-standing historical practice that has generated substantial reliance”<sup>174</sup> but does not otherwise define the scope of that exception. Although the practice of Vice Presidents focusing on their executive branch and White House duties and ignoring their Senate assignment is gaining some age it is not clear that it “has generated substantial reliance.” Each new administration has concluded that the White House Vice Presidency is a model well worth preserving, yet each new set of incumbents embarks on their terms without any reliance on it. The abandonment of the Senate role would seem to be outside the “substantial reliance” exception unless, of course, that concept is broad enough to encompass the public’s expectations based on demonstrated beneficent consequences of patterns of institutional behavior.

To be sure, the Vice President is now expected to engage in the work of the executive branch, and that assumption helps propel the White House Vice Presidency from one administration to the next. Precedents create expectations, and it would be embarrassing for a new administration to explain why its Vice President did not enjoy the resources or roles of his or her predecessor.

But it would be surprising if new originalists intend to create such a large safety net under their theory.<sup>175</sup> For, if the exception is inclusive enough to accommodate non-originalist practices based on their good consequences, it would allow new originalists to excuse wide swaths of governmental behavior that are contrary to original public meaning simply on pragmatic grounds.

Such a chain of reasoning would ultimately be subversive of originalism.<sup>176</sup> Originalism, in many of its forms, ultimately assumes that historical fact should trump consequentialist reasoning. It cannot easily accept non-originalist outcomes based on their utilitarian appeal. Such pragmatism is, after all, what originalism has claimed to attack when others engage in more pluralistic modes of constitutional argument in service of a vision of a dynamic Constitution. The more willing originalists are to recognize pragmatic exceptions to the Con-

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173 Solum, *supra* note 5, at 35.

174 *Id.* at 35.

175 See, e.g., Barnett, *supra* note 22, at 266 (criticizing expansive recognition of reliance as a basis for overriding original public meaning, especially when applied to the “reliance of governmental actors or interest groups on the continued existence of unconstitutional powers or institutions”).

176 Cf. Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 13–14 (2006) (arguing that Justice Scalia is not an originalist because of his willingness to deviate from original public meaning to avoid unacceptable results).

stitution's original public meaning, the more malleable originalism becomes. Originalism has been criticized for not being able to accommodate certain doctrinal outcomes that enjoy widespread support. The story of the Vice Presidency suggests that non-justiciable constitutional institutions may also, with widespread support, act contrary to the Constitution's original meaning, presenting a further challenge for originalism and Article V formalists.

The Constitution, as Jim Fleming reminds us, includes "majestic generalities and abstract principles" rather than being "a code of relatively specific original meanings (as original expected applications)."<sup>177</sup> Yet even some "relatively specific" provisions have accommodated broader interpretations than original meaning would suggest in order to produce beneficial consequences and more workable government.<sup>178</sup> The evolution of the vice presidential role furnishes an example of the way that constitutional change occurs outside of Article V and outside of the courts. And it presents an occasion in which such change, even at odds with original meaning, endures with widespread acceptance because it contributes to more effective government and is consistent with other conventional forms of constitutional analysis.

The generation which produced the Constitution understood that its creation was imperfect. It minimized the consequences of inevitable error by providing for a formal means of constitutional amendment, by relying on Fleming's "majestic generalities and abstract principles," which invite interpretation and reinterpretation, and by regarding the Constitution as a flexible framework to allow workable government and to support political checks and balances, not as a strait-jacket to confine future generations to the preferences of the past.

The experience of the Vice Presidency suggests that constitutional institutions evolve through a common-law-like process, sometimes to perform functions quite different from, even inconsistent with, what their creators intended, imagined, or prescribed. The widespread

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177 Fleming, *supra* note 30, at 1184; *see also* BALKIN, *supra* note 10, at 14–15 ("We treat the Constitution as law by viewing its rules, standards, and principles as legal rules, standards, and principles.").

178 *See, e.g.*, U.S. CONST. art. I, § 8, cl. 5 (giving Congress the power "[t]o coin Money," interpreted to include producing paper money); *id.* art. I, § 8, cl. 8 (giving Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," interpreted to include musicians, photographers, and painters); *id.* art. I, § 8, cls. 12, 13 (giving Congress the power "[to] raise and support Armies" and "maintain a Navy," not interpreted to preclude the Air Force or a single army).

acceptance of the Vice President performing these functions suggests some appropriate willingness to accept some deviations even from pretty hard-wired constitutional provisions with clear original meanings in the interest of improving our government. That is part of what has allowed our Constitution to endure for as long as it has, and to make it here from Philadelphia, 225 years later.