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# The Second American Revolution in the Separation of Powers

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# The Second American Revolution in the Separation of Powers

David Fontana\*

*The American Constitution creates three branches of government and ensures that there will be sufficiently great amounts of ideological diversity among these branches of government. Despite this regime ensuring external heterogeneity, the American system, uniquely among the world's major constitutional democracies, rarely creates the same degree of heterogeneity at the highest levels of the Executive Branch that it does among the highest levels of the various branches of government. This Article discusses the distinctiveness of the homogeneous high-level American Executive Branch and the events that led to such a situation. At the first key moment defining the separation of powers in the new American Constitution, the time of the creation of the Constitution, there was still support for an Executive Branch composed of a diverse range of leaders, and the rules of the new Constitution did not hinder this ambition. At the second key moment defining the separation of powers in the new Constitution, the creation of the Twelfth Amendment in 1804, a series of new rules and the political and legal realities that followed resulted in the highest levels of the Executive Branch becoming far more homogeneous than the one that preceded the Twelfth Amendment.*

## I. Introduction

When Democratic President Barack Obama ran for the presidency in 2008, he promised to appoint members of both political parties to his cabinet if he became President.<sup>1</sup> After his election, President Obama retained Republican President George W. Bush's Secretary of Defense, Robert Gates,<sup>2</sup> appointed as his Secretary of Transportation former Republican member of the House of Representatives Ray LaHood,<sup>3</sup> and tried (unsuccessfully) to appoint as his Secretary of Commerce Republican

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\* Associate Professor of Law, George Washington University Law School. My thanks go to Sanford Levinson and the editors of the Texas Law Review for inviting me to present at their symposium on constitutional design. For comments, my thanks to Richard Hyland, Johanna Kalb, Chip Lupu, Mike Seidman, and Peter Smith.

1. See, e.g., Sarah Baxter, *Barnstorming Obama Plans to Pick Republicans for Cabinet*, TIMES (London), Mar. 2, 2008, at 22 ("Obama is hoping to appoint cross-party figures to his cabinet such as Chuck Hagel, the Republican senator for Nebraska and an opponent of the Iraq war, and Richard Lugar, leader of the Republicans on the Senate Foreign Relations Committee.").

2. Peter Baker & Thom Shanker, *Obama Planning to Retain Gates as Defense Chief*, N.Y. TIMES, Nov. 26, 2008, at A1.

3. Matthew L. Wald, *Panel Approves Transportation Nominee*, N.Y. TIMES, Jan. 22, 2009, at A22.

Senator Judd Gregg of New Hampshire.<sup>4</sup> Obama's decision to retain Secretary Gates and to appoint Secretary LaHood means that Republicans<sup>5</sup> will be overseeing two of the major areas of policy activity for the Obama Administration: Secretary Gates will oversee the withdrawal of American forces from Iraq and the intensification of American efforts in Afghanistan,<sup>6</sup> and Secretary LaHood will oversee the billions of dollars of infrastructure spending that are part of President Obama's stimulus package.<sup>7</sup> The current situation—in which two members of the party that lost the last election for President hold high-ranking executive office—is rare in the United States, even though it is common at the highest levels of most of the world's other major constitutional democracies.<sup>8</sup>

Why is this so? Why are the central players (who are the focus of this Article, rather than the entire Executive Branch) in the American Executive Branch so homogeneous, in terms of partisanship and therefore also usually in terms of ideological positions? There are many kinds of explanations for this homogeneity. Part of it may have to do with the way we view elections and our desire to give the party that wins elections control of the branch that they won. Part of it may have to do with our distinctively political rather than bureaucratic idea of executing the laws.

But part of the explanation of the internally homogeneous American Executive Branch is historical and has to do with a centrally important—but generally misunderstood and ignored—constitutional transformation: the transformation that followed the enactment of the Twelfth Amendment in 1804. After the American presidential election of 1800, in which a close election resulted in the House of Representatives choosing Thomas Jefferson as President and the Senate choosing Aaron Burr as his Vice President,<sup>9</sup> the Twelfth Amendment was added to the Constitution to change the rules used to select the President and Vice President of the United States. Before the Twelfth Amendment, electors cast ballots for two individuals, without identifying which particular office they wanted those individuals to hold, and

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4. Jeff Zeleny, *2nd Pick to Run Commerce Dept. Withdraws Bid*, N.Y. TIMES, Feb. 13, 2009, at A1.

5. While both Secretary Gates and Secretary LaHood are Republicans, Secretary LaHood probably counts as *more* of a Republican because he has been elected for office as a Republican. See, e.g., Wald, *supra* note 3 (“Mr. LaHood [is] a Republican former congressman from Illinois . . .”). Secretary Gates has long worked for Republicans, but he is not a registered Republican. See *Late Edition with Wolf Blitzer* (CNN television broadcast Nov. 9, 2008), available at <http://transcripts.cnn.com/TRANSCRIPTS/0811/09/le.01.html> (transcribing an interview with Senator Reid in which he explains that Secretary Gates has “never been a registered Republican”).

6. See Peter Baker, *In Announcing Withdrawal Plan, Obama Marks Beginning of Iraq War's End*, N.Y. TIMES, Feb. 28, 2009, at A6 (discussing President Obama's plan to withdraw troops from Iraq and shift resources to Afghanistan).

7. Wald, *supra* note 3.

8. See *infra* section II(B)(2).

9. For a discussion of the political and constitutional controversy surrounding this, see generally Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551 (2004).

the person finishing in second place nationally (if they had a certain minimum number of electoral votes) became Vice President.<sup>10</sup> The Twelfth Amendment required electors casting ballots for these national offices to separately designate their choice for President and their choice for Vice President.<sup>11</sup> We study the separation of powers regime created by the original Constitution in 1787 for what it did to separate power among the branches of government. But the separation of powers regime that resulted when the Twelfth Amendment was created—and the series of political and legal changes that followed it—was another revolution in the American separation of powers, this one with major implications for the “internal separation of powers.”<sup>12</sup> In general, though, as Sanford Levinson and Ernest Young have noted, “[t]he Twelfth Amendment is a Rodney Dangerfield of the Constitution: it gets no respect. Indeed, it gets little discernible attention at all.”<sup>13</sup> Steven Calabresi perhaps summarizes the conventional wisdom about the Twelfth Amendment the best when he writes that “[t]he Twelfth Amendment was a relatively nontransformative amendment because it made one small technical change.”<sup>14</sup>

Part II of this Article explores the dynamics that lead to diverse high-level executive branches in most of the world’s major constitutional democracies and a substantially less diverse high-level Executive Branch in the United States. Part III discusses the Founding Era and finds that those involved in the creation of the Constitution in 1787 did not mean to create this form of homogeneity within the Executive Branch. Part IV then turns to a discussion of how the creation of the Twelfth Amendment resulted in a change in the composition of the highest levels of the Executive Branch.

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

11. *Id.* amend. XII.

12. See Neal Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319–22 (2006) (explaining the need for internal checks within each branch of government).

13. Sanford Levinson & Ernest A. Young, *Who’s Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 925 (2001).

14. Steven G. Calabresi, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. CHI. L. REV. 469, 475 (2006) (reviewing BRUCE A. ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005)). Bruce Ackerman discusses the changes in understandings about the Executive Branch following the election of 1800, but more in terms of how the presidency was understood and not how the Executive Branch in general would operate. See BRUCE A. ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 143–44 (2005) (“The presidential office also lacked the plebiscitarian symbolism it has since acquired . . . . This rhetorical development was only at its beginning in 1800.”).

## II. The External Heterogeneity and Internal Homogeneity of American Separation of Powers

### A. *External Heterogeneity*

As a large, sprawling, and diverse country, it would be surprising not to find a range of partisan and ideological perspectives in the American federal government, and the constitutional system that was created in 1787 ensures that a variety of viewpoints do often manifest themselves in important positions of the American federal government. The manner in which we elect our leaders—and the breadth of the powers these leaders exercise—substantially increases the possibility of creating a range of perspectives between the branches of government.

A major reason for this external diversity has to do with the rules governing elections to the federal government. For one thing, those holding the top elected positions in the federal government are elected at different times.<sup>15</sup> Members of the House of Representatives are elected every two years.<sup>16</sup> The President of the United States is elected every four years.<sup>17</sup> Members of the Senate are elected every six years.<sup>18</sup> Because they are elected at different times, the members of the different branches of government will represent different national and regional moods. American voters cared much more about the economy during the presidential election of 2008, for instance, than they did during the congressional elections of 2002.<sup>19</sup> The much more pro-war electorate in 2002 was quite different than the more anti-

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15. Steven Calabresi has written that the difference in timing for these elections is one of the defining virtues of the American regime of separation of powers. See Steven Calabresi, *Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 57 (2001) (“Our Madisonian system of staggered elections every two years for the House of Representatives, every four years for the presidency, and every six years for one third of the Senate is a much more sophisticated way of sampling the popular will than that offered by the German system. It gauges and recalibrates not only the geographical spread of particular viewpoints but also the intensity with which opinions are held.”).

16. U.S. CONST. art. I, § 2.

17. *Id.* art. II, § 1.

18. *Id.* art. I, § 3.

19. Even before the financial crisis hit in September of 2008, polls indicated that Americans cared the most about a candidate who was good on economic issues. See, e.g., LYMARI MORALES, GALLUP, AMERICANS PRIORITIZE THE ECONOMY OVER TERRORISM: MAJORITY VIEWPOINT PERSISTS ACROSS ALL INCOMES AND AMONG INDEPENDENTS (2008), <http://www.gallup.com/poll/108415/Americans-Prioritize-Economy-Over-Terrorism.aspx> (indicating that 56% of Americans favored a candidate whose greatest strength was fixing the economy versus 39% who favored a candidate whose greatest strength was protecting the country from terrorism). In 2002, by contrast, American policy towards Iraq was more important to voters than the economy. See, e.g., GEORGE GALLUP, THE GALLUP POLL: PUBLIC OPINION 2002, at 337 (2003) (citing a Gallup poll from October 2002 indicating that the public at large was slightly more concerned with the economy than the war, but that those “most likely to vote” ranked the Iraq war as their higher priority by a margin of 47% to 39%).

war electorates of 2006 and 2008.<sup>20</sup> Thus, the members elected to the House and Senate in 2008—and President Obama—represent a different set of passions and priorities than those members of the House and Senate elected in 2002.

In addition to the timing of elections, the three different elected parts of the American federal government represent different political constituencies. The President of the United States is elected by the entire nation.<sup>21</sup> The Senate of the United States was elected historically by state legislatures<sup>22</sup> and is now elected by the voters of states.<sup>23</sup> The House of Representatives is elected by districts in particular states.<sup>24</sup> Different political constituencies will elect political officials of different political factions, and with different political opinions. The voters from rural Alabama might prefer a different type of politician to represent them in the House than do the voters from New York City, and the voters from northern Alabama might prefer a different president or different member of the Senate than the entire state of Alabama put together.

This diversity in the politics of elected officials is only increased by the separation of functions created by the Constitution. The Constitution creates a “classification of governmental power into three categories [and] allocat[es] . . . authority to three different institutions” to exercise those different powers.<sup>25</sup> The Constitution identifies and allocates legislative, executive, and judicial powers, and assigns them largely to the Legislative, Executive, and Judicial Branches, with some powers being exercised by more than one branch of government.<sup>26</sup> This recognition of different forms

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20. See PEW RESEARCH CTR., COUNTRY IS “LOSING GROUND” ON DEFICIT, RICH-POOR GAP: WAR SUPPORT SLIPS, FEWER EXPECT A SUCCESSFUL OUTCOME 1 (2007), <http://people-press.org/reports/pdf/304.pdf> (indicating that 55% of those polled in August 2006 said that the war in Iraq was “not going well” and 46% favored bringing soldiers home); PEW RESEARCH CTR., EVEN AS OPTIMISM ABOUT IRAQ SURGES, DECLINING PUBLIC SUPPORT FOR GLOBAL ENGAGEMENT 1 (2008), <http://people-press.org/reports/pdf/453.pdf> (indicating that 43% of those polled thought that going to war was the right decision and 50% supported bringing the soldiers home); PEW RESEARCH CTR., MIDTERM ELECTION PREVIEW: AMERICANS THINKING ABOUT IRAQ, BUT FOCUSED ON THE ECONOMY 3 (2002), <http://www.cfr.org/> (search “Midterm Election Preview”; then follow “Acrobat Distiller, Job 26” hyperlink) (“Roughly six-in-ten (62%) currently favor military action against Iraq.”).

21. See U.S. CONST. art. II, § 1 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”); *id.* amend. XII (“The Electors shall . . . vote by ballot for President . . .”).

22. *Id.* art. I, § 3.

23. *Id.* amend. XVII.

24. See *id.* amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers.”).

25. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1132 (2000).

26. See *id.* (“[T]he Constitution contains celebrated departures from pure separation, usually dubbed checks and balances: the Senate’s advise-and-consent functions, thought to be executive in nature; Congress’s involvement in the judicial function of impeachment; and the President’s power to approve or veto legislation, involving him in the legislative function.”).

of governmental authority—and allocation of most of those forms of authority to one branch of government or another—permits voters to identify particular parties or ideologies that they feel are better suited for one branch of government or another. While voters might feel that Democratic Senator Edward Kennedy or former Texas Republican Representative Tom DeLay can be trusted with the legislative power, they might not want either to be the Commander in Chief of the country.<sup>27</sup> This is why governors have done so well in presidential elections: voters often choose a candidate with state executive experience to assume a federal executive position.<sup>28</sup>

In other words, while it is not guaranteed, it is often the case that a range of ideologies are represented in the different branches of the federal government. The range of rules that dictate who is elected to office and what they do once elected to office substantially increases the possibility that there will be partisan and ideological heterogeneity in the American federal government—when viewed from the perspective *among* the federal branches of government.

### B. *Internal Homogeneity*

1. *American Internal Homogeneity.*—By contrast, while a comparison of the branches of government at any given time is likely to indicate substantial partisan (and therefore ideological) heterogeneity, a comparison of the various essential officials in the Executive Branch reveals substantial partisan and ideological homogeneity. Simply put, while the Democratic and Republican parties alternate control of the Executive Branch, at any given time all of the top officials in the Executive Branch are Democrats, and Democrats of a very similar sort—or all of the top officials are Republicans, and Republicans of a very similar sort.<sup>29</sup> There have not, to the best of my

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27. This ability to identify which politician would be better at particular governmental functions is furthered by the Constitution's decision to prohibit any Executive Branch officials from serving in the Legislature, and vice versa—therefore prohibiting them from exercising multiple forms of authority beyond those overlapping powers provided by the Constitution. See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel*, 79 CORNELL L. REV. 1045, 1062–65 (1994) (specifying the limitations the Incompatibility Clause imposes on government officials). This interpretation of the Constitution has recently been criticized by Seth Barrett Tillman. Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1 (2008), <http://www.law.duke.edu/journals/DJCLPP/index.php?action=downloadarticle&id=79>.

28. See, e.g., Pete DuPont, *Can Kerry Execute?*, WSJ.COM, Aug. 12, 2004, <http://www.opinionjournal.com/columnists/pdupont/?id=110005433> (“Among the 20th-century presidents, five of those with executive experience—Teddy Roosevelt, Franklin D. Roosevelt, Ike, Ronald Reagan and Woodrow Wilson—ranked as great or near great. . . . Which leads to the conclusion that America is usually better off with a president who has had executive experience before reaching the White House.”).

29. My purpose here is not to highlight or critique the alleged normative virtues or vices of this uniformity. Much of this normative territory is covered by articles that are part of the recent revival of interest in what Neal Katyal has called the normatively beneficial regime of “internal separation

knowledge, been any studies of the precise number of cross-party, high-level Executive Branch officers over the course of American history, but we can safely say it is quite rare, for the reasons discussed below.

One of the primary reasons for the internally homogeneous American executive is the central role that a single figure, the President, plays in defining the key personnel of the Executive Branch, a situation I have described elsewhere.<sup>30</sup> The Constitution guarantees the President the authority to appoint—subject to senatorial advice and consent—the “principal officers of the United States.”<sup>31</sup> This means that a singular official is guaranteed by the Constitution the right to appoint—and potentially the right to remove—the major officials of the Executive Branch. Even beyond these particularly high-level appointments, the President appoints, by some counts, as many as 8,000 of the other top Executive Branch officials.<sup>32</sup> This creates a system in which one person—the President—selects essentially almost all of the top Executive Branch officials. Unsurprisingly, then, the top officials in a presidential administration reflect the party and the outlook of a singular official, the President.<sup>33</sup>

There are, of course, constraints on the President’s ability to appoint a homogeneous Executive Branch. For one thing, the President cannot personally make all 8,000 of these political appointments and so must essentially delegate a large number of these appointments to other individuals—presenting a classic principal–agent problem, and leading to perhaps a less homogeneous Executive Branch than would exist if the President had to appoint these officials himself. Still, though, over time the President has

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of powers.” See Katyal, *supra* note 12, at 2316 (discussing the virtues of “executive v. executive” disputes and checks and balances). William Marshall has highlighted the role of internal separation of powers in state constitutions. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006). Katyal’s and Marshall’s normative considerations regarding the internal separation of powers might equally apply to the internal separation of perspectives. Many of the benefits—and detriments—of dividing up powers between different executive actors might also apply to ensuring that these actors have a range of partisan and ideological perspectives.

30. David Fontana, *The Permanent and Presidential Transition Models of Defining Political Party Policy Leadership*, 103 NW. U. L. REV. 393, 398–404 (2009).

31. See *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring in the judgment) (“The President has the sole responsibility for nominating [principal officers] . . .”); see also U.S. CONST. art. II, § 2 (“[The President] shall have Power . . . [to] nominate, . . . by and with the Advice and Consent of the Senate, . . . Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . .”).

32. See, e.g., Lois Romano, *In Any Guise, Podesta a Smooth Master of the Transition Game*, WASH. POST, Nov. 25, 2008, at C1 (noting that President Obama will likely oversee over 8,000 appointments).

33. See Anthony Bertelli & Sven E. Feldmann, *Strategic Appointments*, 17 J. PUB. ADMIN. RES. & THEORY 19, 22 (2007) (noting that Presidents typically appoint ideological analogues to lead executive agencies); Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996*, 43 AM. J. POL. SCI. 1122, 1122 (1999) (stating that Presidents typically appoint ideologically compatible party loyalists to pivotal positions).



centralized this appointments process in the White House Personnel Office and other individuals that the President deputizes to identify desirable political appointees.<sup>34</sup> Presidents also sometimes face congressionally created limitations on their power to appoint<sup>35</sup> or to remove<sup>36</sup> high-ranking executive officials.

The President must answer to various political interests in making his appointments, and these political interests can disagree with one another and favor a broad range of officials for top Executive Branch positions—particularly in a system like the United States where the political party that the President comes from is large, federal, and diverse.<sup>37</sup> The interest groups that the President will pay attention to, though, will obviously skew heavily in favor of interest groups that share his party and his ideology.<sup>38</sup> Both political parties are themselves becoming more ideologically coherent and homogeneous,<sup>39</sup> so over time that inevitably means the President has faced demands to appoint individuals who much more rarely disagree with the President on major issues.

That explains the demand side. On the supply side, those qualified to fill high-level executive positions are homogeneous as well, particularly recently because of the attitudinal polarization of the American elite in general<sup>40</sup> and a series of factors (such as the creation of political primaries and more polarized electoral districts) that have polarized those elected to state and federal office in particular.<sup>41</sup>

This is why the story of the Vice President becomes so important. The Vice President is one of only two (at least potentially) Executive Branch

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34. See THOMAS J. WEKO, *THE POLITICIZING PRESIDENCY: THE WHITE HOUSE PERSONNEL OFFICE 1948–1994*, at 11 (1995) (detailing the centralization of appointments with the advent of the White House Personnel Office and emphasizing the importance of political appointments).

35. See, e.g., 28 U.S.C. § 505 (2000) (“The President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties.”).

36. See, e.g., 12 U.S.C. § 242 (1992) (stating that members of the Federal Reserve Board can only be removed for “cause”).

37. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 277 (2000) (stating that American parties are highly decentralized collections of state and local organizations unified under a common interest in the national elections, with broad positions flexible enough for enormous disagreement).

38. See, e.g., Jacob Weisberg, *Interest-Group Conservatism*, SLATE, May 4, 2005, <http://www.slate.com/id/2118053/> (noting the influence of liberal interest groups during Democratic presidencies and conservative interest groups during Republican presidencies).

39. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2312, 2311–12 (2001) (claiming that the political middle has “fallen out” of Congress due to party polarization).

40. See MORRIS P. FIORINA WITH SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR? THE MYTH OF A DIVIDED AMERICA* 77 (2004) (arguing that the American political elite has polarized but that this does not reflect similar polarization among the electorate).

41. See Mark Tushnet, *Forward: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 42–46 (1999) (discussing the effects of primaries and ideologically homogeneous districts in influencing the partisan divide).

officials<sup>42</sup> clearly mentioned in the Constitution. With time, the Vice President has come to exercise substantial powers,<sup>43</sup> and the Vice President has become first in line to run in later elections for President.<sup>44</sup> In other words, perhaps as a formal matter, but certainly as a practical matter, the Vice President is an important part of the Executive Branch. If the Vice President was of a different party than the President, that would substantially further the diversity of the Executive Branch. Indeed, not only would there be a powerful member of the Executive Branch with a different perspective, but since the Vice President often has a role in empowering other powerful members of the Executive Branch,<sup>45</sup> that diversity could extend beyond simply the person of the Vice President. Even if the President were from a different political party than the Vice President, the inherent prominence of the Vice President—particularly in recent history—means that a Vice President from a different party than the President would have certain substantial executive powers.

2. *The Exceptionalism of American Internal Homogeneity.*—The degree of homogeneity among top-level executive officials is high by almost any comparative measure. The American state executive features many other directly elected officials besides simply the governor. Forty-three of the fifty states feature independently elected state attorneys general, which sometimes results in an attorney general of one party and a governor of another party.<sup>46</sup> A similar structure exists in the constitutions of other countries, known as “semi-presidentialism.” In semi-presidential systems, rather than there being more than one *directly* elected executive official, there is a single directly elected executive official and then another executive official appointed by the directly elected legislature.<sup>47</sup>

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42. There is, of course, some question about whether the Vice President is an executive official in the first place. Former Vice President Richard Cheney argued that the Vice President was part of the Legislative Branch. Scott Shane, *Agency Is Target in Cheney Fight on Secrecy Data*, N.Y. TIMES, June 22, 2007, at A1. Thomas Jefferson made a similar point hundreds of years ago. See Letter from Thomas Jefferson to Elbridge Gerry (May 13, 1797), in 8 THE WORKS OF THOMAS JEFFERSON 283, 284 (Paul Leicester Ford ed., 1904) (“I consider my office as constitutionally confined to legislative functions . . .”).

43. See generally JOEL K. GOLDSTEIN, THE MODERN AMERICAN VICE-PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION 134–202 (1982) (discussing the ways in which the American Vice President has become more powerful over time).

44. *Id.* at 249–71.

45. See Dana Milbank, *In Cheney’s Shadow, Counsel Pushes the Conservative Cause*, WASH. POST, Oct. 11, 2004, at A21 (describing the prominent role of David Addington, Cheney’s top lawyer and aid, in pushing for increased executive power).

46. See COUNCIL OF STATE GOV’TS, THE BOOK OF THE STATES 268 tbl.4.19 (37th ed. 2005) (listing the state attorneys general and the method by which each was selected).

47. See Cindy Skach, *The “Newest” Separation of Powers: Semipresidentialism*, 5 INT’L J. CONST. L. 93, 96 (2007) (describing semi-presidential systems as those in which “a popularly elected president with a fixed term of office” coexists with “a prime minister who is subject to a vote of no confidence in parliament”).

American states and countries with semi-presidential systems create the potential<sup>48</sup> for a heterogeneous high-level executive by providing for directly or indirectly elected additional members of the executive branch. In parliamentary systems, in which the executive is the legislature—and therefore is the winner of the election—the executive is often internally diverse because the executive is composed of a coalition of several different political parties. In many countries, several parties join together before an election,<sup>49</sup> and most of the time in most of the major European democracies, the executive branch is composed of members of more than one party.<sup>50</sup> Consider, similarly, the situation before the recent elections in Israel, in which one of the far-right leaders, Avigdor Lieberman, was a Deputy Prime Minister,<sup>51</sup> and one of the more far-left leaders, Ehud Barak, was the Defense Minister.<sup>52</sup>

In presidential systems, it is often the case that the vice president is nominated by the president and so can be closely affiliated with the president,<sup>53</sup> and this has become the informal norm recently in the presidential system of the United States.<sup>54</sup> Even then, though, in other countries it can be the case that the vice president comes from another political party and so is more likely to disagree with the president. In Argentina, for instance, Vice President Carlos Alvarez resigned in 2000 because of disagreements with President Fernando de la Rúa over fighting corruption,<sup>55</sup> and just last year Vice President Julio Cobos voted against President Cristina

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48. A state attorney general and governor could be of the same political party and political persuasion; likewise, the president and prime minister in a semi-presidential system could have the same political profile. But the American internal executive homogeneity is essentially permanent and constant; the potential for executive heterogeneity created by state constitutions and semi-presidential constitutions means those constitutions create temporary executive heterogeneity rather than permanent executive heterogeneity.

49. See James E. Alt & David Dreyer Lassen, *Fiscal Transparency, Political Parties, and Debt in OECD Countries*, 50 EUR. ECON. REV. 1403, 1425 n.34, available at <http://ideas.repec.org/a/eee/eecrev/v50y2006i6p1403-1439.html> (“In those countries with the most frequent coalition governments, 46 per cent of elections from 1980–2000 feature pre-electoral pacts among parties receiving significant votes.”).

50. Wolfgang C. Müller & Kaare Strøm, *Introduction to COALITION GOVERNMENTS IN WESTERN EUROPE* 1, 2–3 (Wolfgang C. Müller & Kaare Strøm eds., 2003).

51. Rory McCarthy, *Hardliner Avigdor Lieberman Set to Become Israel's Foreign Minister*, GUARDIAN, Mar. 17, 2009, at 23.

52. *New Israel Defence Minister Named*, BBC NEWS, June 15, 2007, [http://news.bbc.co.uk/2/hi/middle\\_east/6757305.stm](http://news.bbc.co.uk/2/hi/middle_east/6757305.stm).

53. See, e.g., CONSTITUIÇÃO FEDERAL [C.F.] art. 77, para. 1 (Braz.), translated in 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Rüdiger Wolfrum & Rainer Grote eds., 2009) (“[E]lection of the President of the Republic includes election of the Vice President registered with him.”); *id.* art. 79, para. 1 (“[T]he Vice President of the Republic . . . assist[s] the President whenever called by the President for special missions.”).

54. Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 874 (2005).

55. Clifford Krauss, *Argentine President Is Trying to Keep Coalition Together*, N.Y. TIMES, Oct. 9, 2000, at A4.

Fernández de Kirchner's politically controversial attempt to raise taxes on farm exports.<sup>56</sup>

In addition, in American state constitutions and constitutions of other countries of all forms—parliamentary, semi-presidential, and presidential—executive branches are made heterogeneous by the presence of more civil-service, nonpolitical figures exercising high-level executive powers. Sometimes these civil-service figures are “heads of state,” who are separate from “heads of government” and exercise substantial powers.<sup>57</sup> Sometimes they are civil-service executive officials of a more bureaucratic temperament who, because their promotion stands apart from the vagaries of electoral politics, might be more likely to represent a range of perspectives—and as mentioned before, the American Executive Branch is distinctive in the low number of such officials that it possesses.<sup>58</sup>

### III. The First Founding Moment for the Separation of Powers

What explains this difference in the structure of the American Executive Branch? The last two Parts of this Article will focus on historical and institutional explanations—although there are surely explanations that are cultural or political. This Part will discuss how, at the time of the creation of the Constitution, there was at worst ambivalence, and at best approval, for the idea of a diverse high-level executive. The main change in executive structure that was a source of discussion at the time of the creation of the Constitution was not how diverse high-level executive officials would be, but rather whether the Executive would be a collegial, horizontal Executive—composed of multiple members of roughly equal power—or a hierarchical Executive, *also* composed of multiple members, but multiple members not of equal power. This orientation persisted, even immediately before and during the debate leading to the enactment of the Twelfth Amendment. But, as a result of the Twelfth Amendment, and its interactions with the legal and political fabric at the time and thereafter, the American federal Executive became both hierarchical and homogeneous.

#### A. *From the Horizontal to the Hierarchical Executive*

Scholars writing about the creation of the American presidency at the Constitutional Convention have generally agreed that earlier failures of

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56. Alexei Barrionuevo, *Vote Creates Unlikely Foe for Leader of Argentina*, N.Y. TIMES, Nov. 30, 2008, at A6.

57. Indeed, as one article discusses, the range of prominent powers held by presidents can include “the president’s exclusive discretion to dissolve parliament (Italy), the requirement of countersignatures of cabinet decrees (Italy), suspensory veto over legislation (Czech Republic, Slovakia), the power to decree new laws (Greece for some time after 1975), and appointments to high offices, sometimes (as in the Czech Republic and Slovakia) including ministries.” Scott Mainwaring & Matthew S. Shugart, *Juan Linz, Presidentialism, and Democracy: A Critical Appraisal*, 29 COMP. POL. 449, 451 (1997).

58. See *supra* note 29 and accompanying text.

executive power in state constitutions and under the Articles of Confederation meant that the founders wanted to create an executive stronger than the one that existed under the Articles of Confederation regime.<sup>59</sup> But while this preference for a stronger executive might have meant a preference for an executive with broad appointment and removal powers (a subject of much scholarly debate),<sup>60</sup> it is a different question altogether whether, as part of that preference for a stronger executive, the founders also preferred a homogeneous executive. In fact, the founding generation seemed to welcome a diverse executive, but one of a different structure than the diverse executives that preceded the creation of the new federal Constitution.

An executive branch composed of more than one person could be structured in one of two ways. First, the executive branch could feature a “horizontal executive,” in which the multiple members of the executive branch are roughly equal or at least concurrent in exercising powers granted to them. Second, the executive branch could feature a “hierarchical executive,” in which there are other members of the executive branch, but there is a singular figure that rules over the other members of the executive branch. The switch in the form of the executive in 1787 was from horizontal to hierarchical, but even a hierarchical executive was meant to create the potential for heterogeneity among high-level executive officers.

The state constitutions that predated and in many ways informed the 1787 federal Constitution largely featured horizontal executives.<sup>61</sup> In many state constitutions, there was a separate and independent governor, but the governor had to obtain the approval of an executive council of some sort to

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59. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 30–39 (2008) (noting the historical accounts of the long-standing preference for strong executive power by Gordon Wood and Charles Thach). This Article is not meant to agree or disagree with arguments made by those like Calabresi and Yoo in favor of a unitary executive. I am not making an argument about the historical understanding of the President over other Executive Branch officials; I am merely discussing historical understandings about the range and diversity of those in the Executive Branch, not their relative power compared to one another. Also not making an argument about the relative power of the Executive Branch, Akhil Reed Amar and Vik Amar state:

We use the term “unitary” executive to refer only to a White House in which the President and Vice President are of the same party. The term has a different meaning in cases and literature addressing the extent to which separation of powers principles give the President countermand or removal power over individuals and agencies who are located in the executive branch or who are exercising executive power . . . .

Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 923 n.43 (1992).

60. See, e.g., Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1271–72 (2006) (arguing that textual evidence suggests that the framers did not intend for the President to have such broad powers).

61. See, e.g., Michael Sevi, *Original Intent, Timetables, and Iraq: The Founders’ Views on War Powers*, 13 TEX. REV. L. & POL. 73, 80 (2008) (finding that seven of eight states that adopted new constitutions between 1776 and 1787 included provisions for reducing executive power, including, inter alia, “destroying the unity of the executive office and instituting an executive council, which made the governor more a chairman of the board than a singular leader”).

take action on important matters.<sup>62</sup> All of the state constitutions in effect in 1787, with the exception of New Hampshire and New York, featured a state executive council whose task it was to “advise the Governor in the execution of his office.”<sup>63</sup> These councils were not as powerful as the governors’ councils of the colonial period;<sup>64</sup> but in all the state constitutions that provided for councils, gubernatorial activities required their approval for major actions.<sup>65</sup> With other horizontal executives in state constitutions, there was no singular governor; instead, the office of the governor was itself a multimember body, rather than the multimember body external to and advising the office of governor. The influential 1776 constitution from Pennsylvania, for instance, had a twelve-member executive, and all twelve members were elected separately.<sup>66</sup> Likewise, the Federal Articles of Confederation did not feature an executive branch.<sup>67</sup> Instead, it featured a rather extreme example of a horizontal executive, with several thousand (formally equal) legislative committees administering the executive power of the federal government.<sup>68</sup>

The failure of these horizontal executives was keenly on the minds of the founders when they met in Philadelphia to draft the language for the new federal Executive.<sup>69</sup> But their response was not to abolish a heterogeneous

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62. *See, e.g.*, WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 265 (Rita Kimber & Robert Kimber trans., expanded ed., Rowman & Littlefield Publishers, Inc. 2001) (1973) (discussing provisions of South Carolina’s constitution of 1776 requiring council approval of certain executive decisions); MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 120 (1997) (discussing provisions of an early version of the constitution of Maryland requiring the governor to obtain the approval of an executive council).

63. *See* 5 *FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES* 2791 (Francis Newton Thorpe ed., 1909) (quoting language from the North Carolina constitution as representative of state constitutional treatment of these councils).

64. ADAMS, *supra* note 62, at 272–73.

65. *See* CALABRESI & YOO, *supra* note 59, at 31 (“The majority of these state constitutions required governors to obtain the consent of a council of state chosen by the legislature before taking any major executive action.”).

66. PA. CONST. § 19 (1776) (repealed 1790); *see also* J. PAUL SELSAM, *THE PENNSYLVANIA CONSTITUTION OF 1776*, at 194–95 (1971) (discussing the plural executive created by Pennsylvania’s 1776 constitution and its provisions for separate and staggered elections for councilors).

67. *See* ARTS. OF CONFEDERATION art. X (describing the executive powers of the “committee of the States”); *see also* PAUL CHRISTOPHER MANUEL & ANNE MARIE CAMMISA, *CHECKS & BALANCES?* 60 (1999) (remarking that the Articles of Confederation did not have a separate executive branch).

68. *See* ARTS. OF CONFEDERATION art. IX, § 5 (stating that Congress has the power to appoint a “Committee of the States” and “such other committees . . . as may be necessary for managing the general affairs of the United States”).

69. *See, e.g.*, CALABRESI & YOO, *supra* note 59, at 30 (noting the framers’ “disdain for the weak executive branches created for the federal government by the Articles of Confederation and for the states by the post-1776 state constitutions”).

Executive Branch; it was simply to create a hierarchical Executive Branch with a clearer line of authority between the chief executive and the other Executive Branch officials. The founding Constitution meant to create more than one member of the Executive Branch. Some Executive Branch cabinet members of some sort were clearly anticipated.<sup>70</sup> The Vice President of the United States, in addition to breaking ties in the Senate<sup>71</sup> and counting electoral votes for President,<sup>72</sup> would also exercise executive power if he succeeded to the presidency, as anticipated if there were problems with the President of the United States under the 1787 Constitution.<sup>73</sup>

In fact, there were many constitutional rules in place at the time that even seemed to encourage a result in which one of the multiple members of the Executive Branch would have a different political orientation than the chief executive. It was around this time that states began to create independent attorneys general,<sup>74</sup> with Rhode Island providing for the popular election of their attorney general.<sup>75</sup> States revising their constitutions after 1787—or new states drafting their first constitutions—included provisions for separately elected executive officials,<sup>76</sup> with these officials being subordinate to a Governor.

The rules regarding the Vice President in the original Constitution were also consequential, because they seemed to invite a heterogeneous Executive Branch. Even though the Constitution did not formally identify the Vice President as an Executive Branch official, early vice presidents participated in the activities of the Executive Branch. For example, early vice presidents participated in cabinet meetings,<sup>77</sup> and the first Vice President was a prominent politician, John Adams. It is true that sometimes vice presidents

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70. See U.S. CONST. art. II, § 2 (“The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”).

71. See *id.* art. I, § 3 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”).

72. See *id.* art. II, § 1, amended by U.S. CONST. amend. XII (“The Electors shall meet in their respective States . . . . And they shall make a List of all the Persons voted for, and of the Number of Votes for each . . . . 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.”).

73. See *id.* art. II, § 1, amended by U.S. CONST. amend. XXV (“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 . . . .”).

74. See Marshall, *supra* note 29, at 2451, 2450–51 (noting that the office of attorney general existed in all thirteen states at the time of the founding and that “[a]s the nation matured, many states created independent attorneys general and afforded the Office even greater autonomy by making it a popularly elected position”).

75. See Office of the Attorney General, <http://www.state.ri.us/govtracker/index.php?page=DetailDeptAgency&eid=3877> (reporting that the office has been an elected position since its creation in 1650).

76. See Marshall, *supra* note 29, at 2451 (citing Ohio’s first constitution as an example of a state dispersing the executive power over several independent officers).

77. Charles O. Paullin, *The Vice President and the Cabinet*, 29 AM. HIST. REV. 496, 496–500 (1924) (discussing the history of the vice-presidential role in cabinet meetings).

would be less powerful,<sup>78</sup> but sometimes vice presidents would be quite powerful.

The rules regarding the selection of the Vice President made it highly possible that the Vice President, exercising at least some degree of executive influence some of the time, would be from a different political faction than the President. The Vice President was not required to win any election, but only to finish second in the balloting for President.<sup>79</sup> Indeed, this might have been the first “proportional representation” rule in the United States, since it substantially increased the chances of a losing political party obtaining a position in the government by granting the vice presidency to the person who received the second most votes for the presidency, rather than the most votes for that office—which is why the minority political party at the time of the debate over the Twelfth Amendment opposed changing this rule.<sup>80</sup>

Given an Executive Branch of more than one person and an Executive Branch that was structured to permit if not even encourage internal diversity, how can the repudiation in Philadelphia of the state collegial executive of the pre-1787 period be explained? There was certainly still some support for a horizontal executive in Philadelphia.<sup>81</sup> The Virginia Plan included an executive council, similar to the model used in state constitutions, which had the executive power to veto laws,<sup>82</sup> and the New Jersey Plan contemplated a horizontal executive as well.<sup>83</sup> Eventually, though, a motion to have a single executive passed the Committee on Detail.<sup>84</sup>

78. An example from around the time of the Twelfth Amendment serves to prove this point. Aaron Burr, serving as Vice President during President Thomas Jefferson’s time in office, was widely ignored, and in retaliation Burr once cast a tie-breaking vote as President of the Senate against Jefferson’s wishes. See JULES WITCOVER, *CRAPSHOOT: ROLLING THE DICE ON THE VICE PRESIDENCY* 22 (1992).

79. See U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XXII (“The Electors shall . . . vote by Ballot for two persons . . . . The Person having the greatest Number of Votes shall be the President . . . . [A]fter the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President.”).

80. 13 ANNALS OF CONG. 178 (1803) (statement of Sen. Tracy) (“[T]he ruling party of the day, ha[s] brought forward this amendment, for the purpose of preventing the choice of a Federal Vice President at the next election.”); see also ACKERMAN, *supra* note 14, at 204 (“By requiring the electors to vote separately for the two offices, they would prevent the Federalists from slipping their man into second place.”).

81. Statements in support of a plural executive were made by several members of the Committee on Detail debating the matter. FOUNDING THE AMERICAN PRESIDENCY 31–32, 33 & n.3 (Richard J. Ellis ed., 1999).

82. See JAMES MADISON, *DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 25 (Gaillard Hunt & James Brown Scott eds., Oxford University Press 1920) (1893) (“[T]he Executive and a convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection.”).

83. See FOUNDING THE AMERICAN PRESIDENCY, *supra* note 81, at 33 (“The New Jersey Plan left unspecified the number of persons who would make up the federal executive, but it clearly anticipated that it would be more than one person.”).

84. See *id.* at 37 (stating that a one-person executive resulted from the vote).



But the change in thinking at the time of the federal founding was not from an embrace to a rejection of a diverse Executive Branch. Instead, it was from an embrace of the horizontal executive to a rejection of it and an embrace of a hierarchical executive. The chief concern in Philadelphia about the Executive Branch was not its internal diversity, but its impotence because of its horizontal structure.<sup>85</sup> As a result, the Constitution creates a clear leader of the Executive Branch: “A President of the United States of America.”<sup>86</sup>

Indeed, there are many reasons to believe that a diverse Executive Branch was still embraced even after the creation of the singular office of the President of the United States. The first President after the Constitution came into effect, George Washington, asked the ideologically opposed Alexander Hamilton and Thomas Jefferson both to be in his cabinet.<sup>87</sup> This heterogeneous Executive continued into the Adams Administration. Republican Thomas Jefferson was elected Vice President, to serve under the Federalist President John Adams.<sup>88</sup> Adams tried to convince Jefferson to travel to Paris to negotiate with France, the key foreign policy issue of the time; and when Jefferson declined, Adams considered another Republican, James Madison.<sup>89</sup>

Part of this seemingly heterogeneous Executive at the time had much to do with the idea that politics was not meant to include parties, factions, and ideology, but was simply a process of notables called to serve.<sup>90</sup> But by 1796, if not before, the notion that there were no partisan or ideological factions was not a realistic view of the world.<sup>91</sup> And by the end of the Adams Administration, party voting levels were “extremely high . . . , well

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85. See CALABRESI & YOO, *supra* note 59, at 30 (discussing how the framers’ disdain for the weak executive branch in the Articles of Confederation led them to the theory of the unitary executive).

86. U.S. CONST. art. II, § 1 (emphasis added).

87. See ACKERMAN, *supra* note 14, at 19 (“Washington . . . included both Hamilton and Jefferson in his first cabinet, and desperately sought to keep these great rivals in harness. But it was not to be. By the end of his first administration, Jefferson and Hamilton were already locked in bitter conflict.”).

88. See JOHN FERLING, *JOHN ADAMS: A LIFE* 332 (1992) (reviewing the results of the election, in which Adams received seventy-one votes to Jefferson’s sixty-eight).

89. See *id.* at 341 (recounting Adams’s attempts to include the two Republicans in the envoy to Paris).

90. See, e.g., THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961) (“[A]mong the numerous advantages promised by a well-constructed union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.”); John F. Hoadley, *The Emergence of Political Parties in Congress, 1789–1803*, 74 AM. POL. SCI. REV. 757, 778 (1980) (“[W]hen the new government was created by the Constitution, most political leaders shared a strong anti-party tradition. Parties were perceived as agencies which would hinder the progress of good government . . .”).

91. See, e.g., DAVID BRION DAVIS & STEVEN MINTZ, *THE BOISTEROUS SEA OF LIBERTY* 259–60 (1998) (noting that despite a belief that parties were evil, divisions among national leaders emerged as early as 1791 and the first political party evolved in 1794).

above levels . . . in modern times.”<sup>92</sup> Yet still, during the 1790s there were cabinets composed of a range of officials, and from 1797 to 1801 a President and Vice President from diametrically opposed political parties.

The creation of the Federal Constitution in 1787, then, was not meant as an impediment to the reality of a heterogeneous corps of elite executive officials. The repudiation of the weaker, more horizontal Executive Branch of pre-1787 was meant to be replaced by a stronger, more hierarchical Executive Branch, but one that featured a degree of diversity. The heterogeneous nature of the American Executive during its earlier years—both before and after the advent of parties and partisanship—was the practical result of this. It was up to the second founding to change that.

#### IV. The Second Founding Moment for the Separation of Powers

The constitutional settlement of 1787 had substantial implications for the division of power between the three branches of the federal government. But many issues were not resolved by the text of 1787, the Bill of Rights that followed it, or the decade of constitutional practice after that. It took the “revolution of 1800”<sup>93</sup> and the constitutional changes that followed to further shape the new American separation-of-powers regime. For it was the Twelfth Amendment, and the legal and political context in the years to come, that eradicated the diverse high-level Executive Branch.

##### A. *An Alteration in Constitutional Form*

The primary concern of those drafting the Twelfth Amendment was not the elimination of a heterogeneous Executive Branch; it was the issue of “designation,” making sure that a political official holds the office that the electors selected them for, not another office.<sup>94</sup> No less a figure than Gouverneur Morris wrote that the major problem with the mode of federal elections before the Twelfth Amendment was the possibility that “at some time or other a person admirably fitted for the office of President might have an equal vote with one totally unqualified, and that, by the predominance of faction in the House of Representatives, the latter might be preferred.”<sup>95</sup> No version of the Amendment included language prohibiting another Adams–Jefferson Administration, or something else like it; and earlier versions of the

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92. JOHN F. HOADLEY, *ORIGINS OF AMERICAN POLITICAL PARTIES 1789–1803*, at 144 (1986).

93. See Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 15 *THE WRITINGS OF THOMAS JEFFERSON* 212, 212 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) (“The revolution of 1800 . . . was as real a revolution in the principles of our government as that of 1776 was in its form; not effected indeed by the sword, as that, but by the rational and peaceable instrument of reform, the suffrage of the people.”).

94. See Lolabel House, *A Study of the Twelfth Amendment of the Constitution of the United States* 42 (1901) (unpublished Ph.D. dissertation, University of Pennsylvania) (recapping the legislative genesis of the Amendment’s requirement that votes be designated for a specific office).

95. DAVID K. WATSON, *2 THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY, APPLICATION AND CONSTRUCTION* 1557 (1910).

Amendment simply made sure to resolve this designation issue.<sup>96</sup> Many of those responsible for the Twelfth Amendment, then, “saw the loss of [the chances of a diverse executive] as a cost to be borne in order to remedy the inversion problem, rather than a benefit to be obtained as a result of the new amendment.”<sup>97</sup>

Indeed, the spirit of the heterogeneous executive persisted in American constitutional life. As William Marshall has noted, “as the nineteenth century unfurled, most new states provided in their constitutions for the popular election of an attorney general (and other executive branch officials) while many of the established states amended their constitutions to the same end.”<sup>98</sup> The text of the Constitution itself is clear that the Vice President is to be elected separately from the President,<sup>99</sup> which certainly leaves open the possibility of a Vice President from one party and a President from another party. If the electoral votes do not settle the election, then certainly the House of Representatives is free to vote for a President from one party<sup>100</sup> at the same time that the Senate votes for a Vice President of a different party.<sup>101</sup> Many voted against the Twelfth Amendment because they felt it would be much more unlikely to have a President of one party and a Vice President of another party after the Twelfth Amendment became part of the Constitution,<sup>102</sup> and this is why the Twelfth Amendment had to be introduced several times in Congress before it received the requisite two-thirds majority.<sup>103</sup>

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96. See House, *supra* note 94, at 42 (quoting an earlier version of the Amendment which stated “[t]hat in all future elections of President and Vice-President, the persons shall be particularly designated, by declaring which is voted for as President and which as Vice-President”).

97. Vikram David Amar, *The Cheney Decision—A Missed Chance to Straighten Out Some Muddled Issues*, 2004 CATO SUP. CT. REV. 185, 204. As Mike Seidman pointed out to me in commenting on a draft of this Article, even as they resolved the issue of designation, the drafters of the Twelfth Amendment could have made it more likely to have a President from one party and a Vice President from another party, because they could have created one set of electors to choose the President and one set of electors to choose the Vice President.

98. Marshall, *supra* note 29, at 2452.

99. See U.S. CONST. amend. XII (“The Electors shall meet in their respective states and vote by ballot for President and Vice-president . . . and they shall make *distinct lists* of all persons voted for as President, and of all persons voted for as Vice president . . .”) (emphasis added).

100. *Id.*

101. See House, *supra* note 94, at 51 (discussing how this scenario is possible if an election is decided by Congress).

102. For instance, John Quincy Adams objected to the Twelfth Amendment because he felt it was “intend[ed] to prevent a federal Vice President from being chosen.” NEAL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE’S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICA AND THE DIRECT VOTE ALTERNATIVE* 43 (1981) (quoting 13 ANNALS OF CONG. 128 (1803)).

103. A similar proposal had been discussed in 1797 in both houses of Congress, 1798 in the Senate, 1799 in the House of Representatives, and was passed by the House of Representatives on May 1, 1802 but did not receive the requisite two-thirds majority. *Id.* at 42. Part—but not all—of the disagreement was from the Federalists, because all Federalists (except Alexander Hamilton) opposed the Twelfth Amendment. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829*, at 40 (2001).

*B. A Revolution in Constitutional Reality*

Whatever the intentions of the Twelfth Amendment, the reality was stark: It became very difficult for there to be a Vice President from one party and a President from another party (Democratic Vice President Andrew Johnson serving with Republican President Abraham Lincoln functioning as a notable exception.)<sup>104</sup> The Twelfth Amendment on its own terms did not do this. This new reality, one present only after the Twelfth Amendment, was because of how the Twelfth Amendment interacted with a series of political and legal changes that were to follow.<sup>105</sup>

Akhil Reed Amar and Vik Amar have argued that there were two reasons for this reality: no desire on the part of voters to split their ballot for President and Vice President, and no opportunity for them to do so because of state laws that prevented voters from voting for a President of one party and a Vice President of another party.<sup>106</sup> One could add to the legal reasons why a split executive was not impossible the increasing reality of state laws (or strong norms) that prevented electors themselves from splitting their ballots, not just voters.<sup>107</sup> But in some ways this is overstating the case. However true it is that “[t]icket-splitting was almost unheard of in the nineteenth century,”<sup>108</sup> in close elections it would not have taken many electoral votes choosing one party’s candidate for President and the other party’s candidate for Vice President to make the vice-presidential candidate on the second-place presidential ticket have the most votes for Vice President.

The reasons, then, are much deeper than Amar and Amar acknowledge. There is no doubt that the Twelfth Amendment, on its own terms, would make it harder to have a heterogeneous high-level Executive Branch. Before the Twelfth Amendment became a part of the Constitution, finishing second was sufficient to become Vice President. After the Twelfth Amendment, only a first-place finisher (for vice presidency) could become Vice President. For a Vice President to be from a party different than the President—and to

104. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL’Y 667, 738 (2003) (recounting Lincoln’s decision to add Johnson to the ticket to appeal to Northern Democrats and border-state Unionists).

105. In this way, then, the Article tells a story about constitutional change different from that told by David Strauss, who argues that constitutional amendments have proved to be largely irrelevant. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459 (2001) (“[C]onstitutional amendments have not been an important means of changing the constitutional order.”). In the case of the internal structure of the Executive Branch, the Twelfth Amendment—or perhaps more importantly, the Twelfth Amendment’s rules plus how those rules interacted with subsequent political and legal realities—did have significant consequences.

106. Amar & Amar, *supra* note 59, at 925.

107. See Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 690 (1996) (“In the first 150 years of the nation’s history, assertions were made in judicial proceedings that electors *must* cast their ballots in accordance with the popular vote of their states. These assertions relied on common law theories of contract or public officer duties.”).

108. JAMES Q. WILSON, *AMERICAN GOVERNMENT: INSTITUTIONS AND POLICIES* 190 (1980).

finish first in a race for Vice President in the same election as a member of the opposing party finished first in an election for President—there had to be a candidate popular enough, on his own, to attract many votes.

In reality, though, vice-presidential nominees became inconsequential figures that no one paid attention to in the first place.<sup>109</sup> After luminaries like John Adams and Thomas Jefferson as Vice President, according to one writer, John Calhoun was “the only American statesman of the first or second rank who held the Vice-Presidency in the century between its occupancy by Jefferson and by Roosevelt.”<sup>110</sup> There was no compelling figure drawing attention and worthy of attracting voters—or electors—to rally behind a Vice President from a different political party than the political party of the President. And so even in those states that permitted voters or electors to split their ballots for President and Vice President, there was little desire to do so—and there was little desire to persuade the states that legally prevented split ballots to change their rules to accommodate a pervasive desire to vote for a President from one party and a Vice President of another party.

Also, the Twelfth Amendment made it easier for powerful institutions like political parties to control who would run for Vice President—and also to ensure that candidates for Vice President shared the ideological views of the party and of the candidate for President. As mentioned before, the issue of “designation”—of identifying who was running for what office—was at the core of the rationale for creating the Twelfth Amendment.<sup>111</sup> And given the increasing power of formal political parties, there was no better institution to make it clear who was running for what office than the newly powerful political parties that emerged around the time of the Twelfth Amendment.

With political parties controlling who would become the nominee for Vice President, it was increasingly difficult to have a vice-presidential nominee with a compelling—and separate—identity from the political party that nominated the Vice President and nominated the presidential candidate.<sup>112</sup> Since a Vice President needed to finish first after the creation of the Twelfth Amendment (in the election for Vice President), rather than second (as was the case before the Twelfth Amendment), the support of an institution like a

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109. See Albert, *supra* note 54, at 831–32 (cataloguing the slights upon the vice presidency from all manner of American statesmen).

110. LOUIS CLINTON HATCH, A HISTORY OF THE VICE-PRESIDENCY OF THE UNITED STATES 71 (1934).

111. See *supra* notes 93–97 and accompanying text.

112. See Amar & Amar, *supra* note 59, at 943, 943–44 (arguing that the system of tying presidential and vice-presidential candidates “seems more an inherited product of the nineteenth century’s political climate and the twentieth century’s inattention than a deliberate, self-conscious choice”).

political party became more important, and insurgent campaigns for Vice President therefore became even more difficult.<sup>113</sup>

After the creation of the Twelfth Amendment, parties controlled the nomination of the Vice President, and “[p]residential nominees often were either unable or unwilling to dictate who would fill the second spot.”<sup>114</sup> In the latter part of the twentieth century, presidential nominees gained greater ability to nominate a candidate of their own choosing, apart from the candidate the party preferred. Still, a similar dynamic continued—rather than the party controlling the choice of the Vice President, the President did, so there was still an incentive towards conformity, but now with the President and not with the party of the President. And just like parties before, now presidential candidates had little reason to pursue changes in state law that made it easier to split votes for President and Vice President. The source of homogeneity had changed from the party to the President, but the reality and the result remained the same.

## V. Conclusion

At the time of its creation, there was no office in the world like the American President. The moment that the possibility of a single executive official at the apex of the pyramid of the Executive Branch was mentioned, there was a silence in the room of the Constitutional Convention in Philadelphia.<sup>115</sup> Years later, while the idea of a single, powerful, elected chief executive has become more common, the homogeneity of the American Executive Branch has not. The Executive Branch in Washington is dominated by those from the same party and from the same wing of that party.

If we want to know how this came to be, we can look back at history and see the unintended consequences of a constitutional amendment as partly responsible. During the early years of the republic, the founders altered and modified executive power, and engaged in lengthy discussions about the nature of the Executive Branch. While they wanted a more powerful President, they also wanted a President surrounded by a range of cabinet and other officials—and this was still the case after the creation of the Twelfth Amendment. Over the two-hundred years plus since the Twelfth Amendment, however, the reality has become something different, and the hurdles that the Twelfth Amendment created for a divided Executive have become nearly insurmountable.

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113. See House, *supra* note 94, at 50–51 (“The enormous consequence of [the Twelfth Amendment] has been to make party government constitutional. It has made it imperative that the President and Vice-President be party representatives and practically impossible that they be chosen at the outset from different parties, unless the election devolves upon the House or Senate.”).

114. GOLDSTEIN, *supra* note 43, at 47.

115. CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* 55 (1966).