CHAPTER 10

JOINING THE PARTY

America's Partisan Constitution

THE DECLARATION COMMITTEE (1776, AS DEPICTED IN 1876).

In 1776, even if Thomas Jefferson (far left) and John Adams (far right) were on opposite sides of a table, they were definitely on the same side of the great issue of American independence that lay before them. Twenty years later, these former friends vied for the presidency. Adams won, and Jefferson, as runner-up, became vice president. During Adams's presidency, a national two-party system intensified, making it hard for the two men to collaborate as before. After Jefferson bested Adams in a rematch in 1800–1801, the Twelfth Amendment restructured the election process for presidents and vice presidents.

A NATIONAL TWO-PARTY SYSTEM IS AS indelible a feature of modern America's landscape as the Great Plains, the Rocky Mountains, the Grand Canyon, or the Columbia River—though none of these things was part of George Washington's America. Although several prominent scholars have claimed that the written Constitution fails to address political parties, a close look at the text proves otherwise. A national two-party system in fact forms a vital part of the connective tissue tightly binding America's written and unwritten Constitution into a coherent and workable whole.[1]

The key point is that, where parties are concerned, today's Constitution dramatically differs from the document that Publius described in *The Federalist* in 1787–1788 and that Washington swore to preserve, protect, and defend in 1789. Washington strove mightily to stand above party, but in this regard today's presidents cannot and should not emulate Washington, despite the general teachings of Chapter 8. On certain issues, modern presidents must follow Jefferson and Lincoln, Andrew Jackson and Theodore Roosevelt, FDR and Reagan—partisans, all—because today's Constitution openly embraces a permanent national two-party system that was at odds with Washington's Constitution (and Washington's constitution).

The point extends far beyond modern presidents. Most of the rules and roles textually delineated in the original Constitution—for House members, senators, department heads, vice presidents, members of the electoral college, and so on—must today be reread through the prism of America's two-party system, even though the terse text does not quite say all this in so many words.

"Electors shall…vote…for two Persons"

THE INTRICATE ARTICLE II presidential-selection system cobbled together at Philadelphia was a calamity waiting to happen, because the framers failed to anticipate all the ways in which this system might malfunction once two antagonistic presidential parties appeared on the scene.

Under the Philadelphia plan, whoever came in second in the voting for president would automatically become vice president. Even if the leading presidential prospects did not run for election but merely stood quietly—with no organized attempts to mobilize supporters or to disparage rivals—some friction or frigidity would likely exist between two prominent leaders who had never chosen to stand together as a political team. Unless the electoral margin between America's leading man and his constitutional understudy was overwhelming (as indeed it was between Washington and Adams), it would not be unreasonable to imagine that at the next election the nation might well vault the current number two into the number one slot. This thought could hardly endear the vice president to the president. It would be a rare chief executive who would want to share his power or his secrets with a man whom he had not picked, whom he could not fire, who presumably coveted the top job, and who embodied perhaps the biggest obstacle to the president's own reelection. The vice president, in turn, was apt to have mixed emotions about the only man in America who outranked him. As Gouverneur Morris wryly observed at Philadelphia, any vice president who truly revered the president would be the world's "first heir apparent that ever loved his father."[2]

And then, even before Washington left the political stage, a national two-party system started to take shape. What had begun as a merely clumsy contraption for selecting the nation's two top men quickly became a dangerously dysfunctional device—a faulty constitutional gearbox apt to fail catastrophically. If a president from one party ended up with a vice president from the other party, and if each had won his seat only after fiercely opposing the other in a turbulent popular contest, relations between the nation's top two officers would likely be severely strained. Extremists seeking to reverse the election's outcome might even begin to dream about assassinations or partisan impeachments, whereby number two could become number one.

The fraught relationship between John Adams and Thomas Jefferson perfectly illustrated the structural problem. In 1796, these onetime friends had run against each other, but the Founders' rules ended up forcing these two now-rivals to cohabit, so to speak, as president and vice president, respectively. As frosty as relations between these two men were during their four years of enforced political cohabitation, the situation would have been

infinitely worse had both men been reelected—in either order—in their bitter rematch of 1800–1801. Yet such split tickets were easy to imagine under the Philadelphia framers' elaborate election rules. Any national party trying to capture both the presidency and the vice presidency had to find clever but risky ways of manipulating constitutional machinery that had been designed precisely to thwart electoral manipulation and interstate coordination. Even if both political parties—Federalists and Republicans, as they came to be known—strongly preferred that the top two executive-branch spots go to teammates rather than enemies, the Philadelphia rules could not guarantee that the outcome would be either two compatible Federalists or two compatible Republicans. King Solomon in his storied wisdom had never truly sought to split the baby, but the Philadelphia rules in their stark unwisdom actually could lead, time and again, to painful split verdicts and odd inversions that almost no one wanted.[3]

WHY DID THE PHILADELPHIA FRAMERS fail to foresee what seems to us in hindsight inevitable, namely, the emergence of two highly organized national parties that would routinely vie for the presidency (and lots of other positions as well) in energetic electoral contests that might well inflame the passions of political leaders and ordinary voters alike? After all, Whigs and Tories existed in eighteenth-century England, and many states were home to political competitions between various coalitions.

In fact, political competitions in the Anglo-American world circa 1787 were often patterned, but not always organized—at least by today's standards of political organization. Elections and politicking were not tightly configured around large-scale, institutionalized parties with stable membership lists, official nominees, written platforms, issue-oriented campaigns, and well-oiled mechanisms for mass fund-raising and fund-disbursement. Instead, political life was typically connected to shifting personalities and local concerns. For much of the eighteenth century, an unelected English king picked his own ministers as he saw fit, using a grab bag of monarchial prerogatives to manage, manipulate, flatter, bribe, and punish members of Parliament into supporting his pets. Only in the next century would a new English system visibly and enduringly emerge in which Parliament would elect the prime minister and his cabinet, and organized parties would openly compete to control Parliament and the machinery of government.

In most post-Independence states, political life was also local and personal, often pitting allies of a charismatic governor (John Hancock in Massachusetts, George Clinton in New York, Patrick Henry in Virginia, and so on) against a wide and loose assortment of adversaries. No permanent interstate political networks existed; and few places had anything like today's modern two-party system, with two long-standing and highly visible political organizations routinely fielding competing slates of candidates, and each party winning some of the time.[4]

To see the framers' world from another angle, we should recall that, although the politics of the 1760s and early 1770s had become more organized—and had witnessed the first iteration of intercolonial coordination and coalition-building—the two main "parties" that had emerged were the Patriots, who would ultimately revolt, and the Loyalists, who continued to back King George. After 1776, the Loyalists dissolved as a viable political force in independent America. Political power flowed to the Patriots, who had all been on the same side—in the same "party," so to speak—during the great sorting-out that was the American Revolution.[5]

Most likely, the Constitution's framers did not envision a modern national two-party system for the simple reason that this system began to take shape only after and because of the Constitution itself. Before 1789, no strong interstate two-party competition existed because no strong interstate offices existed. Each state picked its own members of the Confederation Congress, and Congress lacked a strong continental presidency worth fighting for via the two-party system as we now know it. The Constitution itself created a powerful national government with powerful national offices—beginning with the presidency—and a national two-party system soon emerged in response.

AT THIS POINT IN OUR STORY, it might seem that the scholars who claim that the written Constitution makes no mention of parties are dead right. But wait. What these scholars miss is that America's written Constitution is not now—and for more than two centuries has not been—the text drafted at Philadelphia. Rather, America's written Constitution consists of the original text *and its written amendments*.

"distinct ballots"

FROM START TO FINISH, both on the surface and between the lines, these amendments are all about political parties.

The first ten amendments—generally known today as the Bill of Rights, although this caption does not explicitly appear in the federal text—began with a textual affirmation of the right of citizens to organize politically via "speech," "the press," "assembl[ies]," and "petition[s.]" Although the term "political parties" does not explicitly appear in this amendment, the idea is nevertheless implicit. After all, parties engage in "speech." Parties publish their opinions and appeals via "the press"—and when these words were written into the Constitution, many of America's leading printers were political operatives. Parties routinely coordinate signatures in "petition" drives and "assemble" in parks, street rallies, meeting halls, convention centers, and so on. More generally, the grand idea unifying all these First Amendment clauses is that citizens have a right to communicate with each other and to criticize government officials even if these expressions are one-sided—even if, that is, the speakers, printers, assemblers, and petitioners are *partisan*.

The man who played the largest role in getting the First Amendment enacted, James Madison, is also the man who shortly thereafter cofounded America's oldest continuous national political party—the Republican Party of the 1790s, the forerunner of today's Democrats—which succeeded in delivering the vice presidency in 1796 and the presidency in 1800–1801 to their party chieftain, Thomas Jefferson. Tellingly, the partisan politician Madison and his partisan partner Jefferson were the most vigorous champions of the First Amendment when its principles (and its principals) came under assault from the Sedition Act of 1798, at the precise moment that these two men were building their party. And as soon as Jefferson and Madison ascended to the presidency and the cabinet, respectively, in 1801, the stage was set for another written constitutional amendment, the Twelfth, that would further enact and further entrench the prominent and legitimate role of political parties in the American constitutional system.[6]

PROPOSED IN LATE 1803 and ratified in mid-1804, the Twelfth Amendment rewrote the rules for picking presidents and vice presidents. Although

the term "political parties" does not appear in the amendment's explicit text, here, as elsewhere, we must read between the lines. When we do, we quickly see that this amendment was designed precisely to accommodate the recent emergence of a system of two national presidential parties in the Adams-Jefferson/Federalist-Republican elections of 1796 and 1800–1801.

The key Twelfth Amendment reform allowed each member of the electoral college to cast two "distinct ballots"—one ballot for the president and a wholly separate ballot for the vice president. This amendment freed each national political party to run a slate of two candidates openly presenting themselves to the voters as a team, one running for president and the other for vice president, with no need to manipulate balloting, as had become necessary under the Philadelphia plan. If a national party had enough clout to get its top man elected president, the party could ordinarily rest assured that its second man would win the vice presidency, so long as this team win was indeed what most American voters truly wanted. No more would Americans have to routinely risk dysfunctional political cohabitations of the sort exemplified by Adams and Jefferson in the late 1790s.

Once the president and the vice president began to see themselves as "running mates"—as men who had successfully partnered up to win a three-legged race in the last election and who might need to partner up again in the next election—it became somewhat less awkward for the president to bring his vice president into his inner circle of confidants and counselors. Still later amendments adopted in the twentieth century (amendments that we shall explore momentarily) intensified the relationship between America's top two executive-branch officers, with the result that today's vice presidents typically have much closer relationships with presidents than Adams had with Washington or than Jefferson had with Adams. In actual government practice in the twenty-first century, the vice president is ordinarily a key member of the president's inner circle, and by statute plays an important role in National Security Council deliberations.[7]

The Twelfth Amendment did not merely bring a national two-party system into the written Constitution because of what the amendment said, explicitly and implicitly. The amendment also constitutionalized parties in a deeper way, via what it did. Its very enactment was partisan, with the fledgling two-party system playing a large and visible role in the amend-

ment's drafting and ratification. Jefferson's Republican Party backed the proposed new rules, and the main opposition came from New England members of the Federalist Party.

These Federalists were right to resist. The amendment's new rules, while designed to fix several problems that had been highlighted by the Adams-Jefferson rivalry (and by the complicating ambitions of Jefferson's supposed teammate, Aaron Burr), left intact and thereby entrenched one of the Philadelphia system's most glaring defects. Via the three-fifths clause of Article I, section 2, the Constitution gave slave states extra seats in the House of Representatives—and therefore also in the electoral college—above and beyond the proper allotment warranted by these states' free population. As the elections of 1796 and 1800 had made clear, this disgraceful rule of extra seats for extra slaves had generally benefited Jefferson's party—the Republicans.[8]

Unsurprisingly, Republicans ignored the pleas of New England Federalists to fix this Philadelphia flaw along with other Philadelphia flaws being repaired. Once the amendment's new rules were ratified, the Federalists, who had in effect won the first three presidential elections—and perhaps might have won the fourth, absent the proslavery skew of the Philadelphia plan—never again won the presidency. The next three presidential elections were won by the cofounders of the Republican Party, Jefferson and Madison. This party and its eventual successor, the Jacksonian Democrats, dominated presidential politics until 1860, thanks in no small part to the rules of the Twelfth Amendment that had been drafted by this party and for this party.

Thus, the Twelfth Amendment, both in process and in result, was partisan hardball. Pretty or not, this amendment proves that a national two-party system has been a central feature of the written Constitution, both in its amendatory texts and in its amendatory deeds, for more than two centuries.

"race…sex…age"

WHAT GOES AROUND COMES AROUND. The next three amendments were even more partisan in both the substance of their constitutional vi-

sion and the enactment process by which they sprang to life. This time, however, a different Republican Party—the party of Lincoln, not Jefferson—prevailed.

Proposed in early 1865 and ratified later that year, the Thirteenth Amendment abolished slavery and thereby marked the fulfillment of the official 1864 Republican Party platform: "[W]e are in favor...of such an amendment to the Constitution, to be made by the people in conformity with its provisions, as shall terminate and forever prohibit the existence of Slavery within the limits of the jurisdiction of the United States." The Democrats' official platform had offered voters a starkly different vision: "[T]he aim and object of the Democratic party is to preserve the Federal Union and the rights of the States unimpaired."

In the Senate, which had passed the amendment before the November election, all Republicans had said yes, while most Democrats had voted no. In the House, which passed the amendment after the election, virtually every Republican supported the amendment, and roughly three-quarters of the Democrats opposed it. The few Democrats who voted yes were generally latecomers to the parade—men who had previously voted against the amendment and who reversed course only after the voters handed the Republican Party a sweeping victory.[9]

When the next Congress convened in late 1865, it quickly became obvious that the Republican Party could not simply rest on its laurels. The abolition of slavery meant that freed slaves would now count for five-fifths in apportioning congressional and electoral-college seats, even though the freedmen were generally not allowed to vote. Unless something was done, and done soon, southern antiblack politicians—Democrats committed to undoing the Republican Party's vision of liberty and justice—could end up with more seats and more power than ever. Republicans thus cobbled together another constitutional amendment, the Fourteenth, which was proposed by a true-blue Congress in mid-1866 and ratified by three-quarters of all the states in mid-1868.

This amendment was a partisan product from start to finish. Its opening paragraph sweepingly guaranteed a broad range of basic rights against state governments, including the rights to speak, to print, to assemble, and to be treated fairly. The most obvious and immediate intended beneficiaries of

this sweeping guarantee were Republicans and Republican sympathizers in the South. For years, various Democrat-controlled state governments in this region had trampled basic rights, in effect criminalizing the Republican Party. The amendment's second paragraph reduced congressional and electoral-college apportionment for any state that disfranchised adult male citizens. This provision penalized states that refused to let freedmen vote; put differently, the provision incentivized states to enfranchise freedmen. Freedmen, of course, were likely to vote for the party that had voted for them—Republicans. Thus, states that enfranchised likely Republicans would get more seats than states that did not. The third section of the amendment barred various rebel leaders from high-level public service. Almost all the banned leaders were Democrats, and the only federal branch authorized by this section to lift the ban was the one branch controlled overwhelmingly by Republicans: Congress. (Democrats at the time not only held the presidency, in the person of Andrew Johnson, but also retained a slim majority on the Court.) The amendment's fourth section repudiated debts that had been incurred by rebel (that is, Democrat-controlled) governments—debts especially apt to be held by rebel sympathizers (again, largely Democrats)—while guaranteeing repayment of federal debts that had been incurred by previous Republican Congresses. The amendment's fifth and final section gave Congress sweeping enforcement powers at the very moment that Republicans enjoyed veto-proof majorities in both houses.

The amendment's enactment process was even more partisan than its substance. Much of the amendment was hammered out in a Republican Party caucus that closed its doors against Democrats. Ultimately, not a single congressional Democrat voted for the amendment, and only one congressional Republican voted against it. In the 1866 elections, the proposed amendment functioned as the Republicans' de facto party platform, much as the hoped-for Thirteenth Amendment had furnished a large plank in the official quadrennial platform two years earlier. In several state legislatures deciding whether to ratify the proposed amendment, Republicans rammed the measure through with minimal deliberation and little direct engagement of the objections raised by Democrats, whose party chieftain, Andrew Johnson, was crusading against the proposed amendment with

unprecedented venom and vigor. And let's not forget that many southern political leaders, overwhelmingly Democrats, were excluded from the Congress that drafted the Fourteenth Amendment and were barred from reentry until their states said yes to the measure and also agreed to enfranchise blacks, who would likely vote Republican. In blistering language, the Democratic Party Platform of 1868 proclaimed that Congress's recent interferences with state suffrage laws via the Reconstruction Acts of 1867 were "an usurpation, and unconstitutional, revolutionary, and void."[10]

In the first general election held after the Fourteenth Amendment became law, Republican Ulysses Grant won the presidency even though a majority of whites nationwide had apparently backed the Democratic candidate, Horatio Seymour. Aware that newly enfranchised southern blacks had voted overwhelmingly for their party, Republicans responded with yet another constitutional amendment, this one guaranteeing race-neutral voting laws in state and federal elections. Proposed in early 1869 and ratified in early 1870, the Fifteenth Amendment aimed not merely to reinforce the rights of blacks who were already voting in the South, but also, and more pressingly, to extend the vote to disfranchised blacks in the North—blacks apt to join their southern cousins in voting Republican. Almost all congressional Republicans supported this final Reconstruction Amendment, and virtually every congressional Democrat opposed it. In the ratification process, Republican whips in state legislatures generally ensured that party members followed the party line.

To stress that all three Reconstruction Amendments were intensely partisan measures is not to condemn these provisions, but rather, to give credit to the role that political parties at their best can play and have played in the American constitutional order. The Reconstruction Amendments contain some of the noblest elements of the American Constitution. These provisions should remind us that a national two-party system does not exist at odds with the written Constitution, but has long operated in sync with it, and has indeed been the main engine driving formal changes to its text over time.

THE PRECISE ROLE PLAYED BY PARTIES within the amendment process has changed in important ways over the centuries. As we have seen, America's first set of amendments—the Bill of Rights—emerged from a

pre-partisan process. While Americans at the Founding had witnessed an epic continental debate between Federalists and Anti-Federalists, it was not immediately clear that these two temporary camps would harden into permanent parties. In fact, many backers of the Bill of Rights in the First Congress were hoping to find common ground that could reunite the camps. The next momentous set of amendments—the Twelfth through the Fifteenth—emerged from a *strictly partisan process* in which one party simply steamrolled to victory under the banner of reform. As we shall now see, America's most recent amendments have generally emerged from a *bipartisan process* in which both major parties have worked together to achieve the political supermajorities ordinarily required by Article V—two-thirds of each house of Congress plus three-quarters of the states.

The Sixteenth Amendment, explicitly authorizing a federal income tax, was endorsed by the Democratic Party platforms of 1908 and 1912 and by Republican presidents Theodore Roosevelt and William Howard Taft. (Although presidents have no formal vote or veto in the amendment process, they nevertheless command considerable authority as de facto leaders of their party.) Even politicians who were skeptical of a federal income tax found it hard to resist the prevailing political winds. In 1909, the amendment breezed through the Senate unanimously, and passed the House on a vote of 318 to 14. Over the next four years, the amendment received enough state ratifications to become the first textual addition to the Constitution since Reconstruction.

Both Democrats and Republicans had found it in their interest to appeal to a rising twentieth-century progressive movement whose members generally favored a progressive income tax. A few years later, an analogous dynamic unfolded on the issue of woman suffrage. As it became increasingly imaginable that suffragists might ultimately prevail, the prophecy became self-fulfilling, thanks in part to partisan competition. Both parties wanted to win the allegiance of the new voters, and support for a Woman Suffrage Amendment was crucial to winning that allegiance.

In 1916, the parties hedged their bets. Each party platform endorsed both the principle of woman suffrage and the right of every state to decide for itself. Four years later, competition for women's allegiance intensified and the parties raised their bids. The Republican Party platform reminded voters that "the Republican Congress…submitted to the country the con-

stitutional amendment for woman suffrage, and furnished twenty-nine of the thirty-five legislatures which have ratified it to date." Not to be outdone, Democrats—whose outgoing party leader, President Woodrow Wilson, had crusaded for the federal Suffrage Amendment—inserted the following plank in their 1920 platform:

> We endorse the proposed 19th Amendment of the Constitution of the United States granting equal suffrage to women. We congratulate the legislatures of thirty-five states which have already ratified said amendment and we urge the Democratic Governors and Legislatures of Tennessee, North Carolina and Florida and such states as have not yet ratified the Federal Suffrage Amendment to unite in an effort to complete the process of ratification and secure the thirty-sixth state in time for all the women of the United States to participate in the fall election.

Later that summer, the parties' wish came true when Tennessee became the decisive thirty-sixth state to say yes.

Similar stories can be told about more recent amendments. In the middle years of the twentieth century, American blacks were a swing constituency wooed by both parties. Before 1932, blacks voted overwhelmingly for Republicans; by 1972, they had generally become reliable Democrats. In the years in between, neither party could confidently count them in or count them out. Unsurprisingly, this era witnessed three voting-rights amendments that disparately benefited black voters—the Twenty-third Amendment, folding the District of Columbia (with its large black population) into the electoral college; the Twenty-fourth Amendment, condemning various systems of tax-based disfranchisement (systems that had notoriously been used to dampen black suffrage); and the Twenty-sixth Amendment, which guaranteed the right to vote to young adults (who were then and who still are disproportionately nonwhite). All three amendments won broad support among both Democrats and Republicans.

THREE OTHER TWENTIETH-CENTURY AMENDMENTS intertwined even more tightly with party politics, with the written Constitution's formal rules both reflecting and reinforcing specific protocols of America's two dominant political parties.

By providing for direct popular election of senators, the Seventeenth Amendment, ratified in 1913, constitutionalized a practice that was already in place in various states where one party dominated the political landscape and routinely held primary elections to determine its choice for senator. In such states, these primaries functioned as direct senatorial elections, de facto, even before the amendment came along.

A similar story can be told about the vice-presidential selection process. For most of the nineteenth and early twentieth centuries, party conventions did not invariably rubber-stamp the running mate most preferred by the presidential nominee himself. More recently, both major parties have consistently invited the presidential nominee to handpick his vice-presidential running mate. In perfect harmony with this emerging party practice, the Twenty-second Amendment, ratified in 1951, limited presidents to two terms, thereby giving presidents more reason to work closely with their vice presidents. For a second-term president seeking to extend his policies and cement his legacy, personal re-reelection is no longer an option, but election of his own handpicked running mate remains permissible. Whereas the vice president under the Philadelphia plan was apt to embody the president's biggest obstacle, the vice president under the new rules is apt to embody the president's best opportunity—an opportunity to win a third (and even fourth) term by proxy.

The Twenty-fifth Amendment, ratified in 1965, further tightened the relationship between presidents and vice presidents by encouraging presidents undergoing routine surgeries and the like to temporarily hand off power to their handpicked running mates. Another section of the amendment formalized the highly personal tie between America's two top officers by providing that in the event of a vice-presidential vacancy, the president would name his own protégé, subject to congressional confirmation—a written rule mirroring unwritten party norms giving a presidential nominee the right to name his running mate, subject to the approval of the party convention.

ALAS, THE CURRENT PRESIDENTIAL-SUCCESION STATUTE violates the spirit of the Twenty-fifth Amendment, not to mention the letter of the original Constitution. Enacted in 1947, this statute provides that if both the president and vice president are unable to function because of death, dis-

ability, removal (via impeachment), or resignation, presidential power devolves to the speaker of the House. The first big problem with this statute is textual: It runs counter to the Constitution's succession clause—Article II, section 1, paragraph 6, which empowers Congress to specify "what Officer" should take over in succession situations. A member of Congress, such as the House speaker, is simply not an eligible "Officer" within the meaning of the succession clause, which was designed to enable cabinet officers, not congressmen, to step up to fill the breach.

The second big problem with the statute implicates the spirit of the Constitution—the "post-Georgian" Constitution, the one we must nowadays read through the prism of America's party system. Above and beyond the formal textual separation of powers—the distinction between Article I legislators and Article II "officers"—we must also attend to the informal but no-less-important separation of *parties*. Crucially, the president and the speaker may often be leaders of opposing parties. Indeed, except for Jimmy Carter, every one of America's eight most recent presidents has for at least part of his time in office faced an opposition-party speaker. The 1947 statute threatens to return America to the instability of the original Philadelphia plan, with a potential political enemy of the president improperly positioned to gain presidential power in the event of mishap. Shades of Adams and Jefferson! (And let's not forget Ben Wade in the Johnson impeachment trial.) Cabinet succession, by contrast, coheres with the officer-means-officer letter of the original succession clause and with the executive-branch-teamwork and party-continuity spirit of the Decision of 1789, the Twelfth Amendment, and the Twenty-fifth Amendment. In general, if a president cannot complete his term, it should be completed by a party mate whom he has chosen, either personally or by proxy.[11]

It might be thought that the very existence of this 1947 statute represents a large exception to this book's thesis that America's actual system of government generally coheres with America's written Constitution. But, in fact, this statute has never been triggered. This law thus lacks the authority enjoyed by statutes that have passed the tests of time and implementation and thereby acquired the weight of custom and practice. The statute's serious and multiple departures from the written Constitution's letter and spirit make it doubtful that things will actually work smoothly in a future

crisis. Ours remains a culture that worships at the shrine of a written Constitution. Those who are serious about the American constitutional project, and who would like to see the document's text mesh with actual practice in a way that ultimately strengthens both text and practice, should strive to repeal and replace this misshapen statute before anyone gets hurt.

"any primary…election"

ALTHOUGH THE ROLE OF POLITICAL PARTIES in nominating presidents and vice presidents was not explicitly visible in the text of the Twenty-second and Twenty-fifth Amendments, that role lay only inches below the surface of the text for those with eyes to see. In the intervening Twenty-fourth Amendment, political parties actually found their way into the text itself. Proposed in 1962 and ratified in 1964, the Twenty-fourth Amendment outlawed poll-tax-related disfranchisement in all federal elections, including "any *primary*…election" (emphasis added)—that is, any election in which a *political party* teamed up with government to let voters decide whom the party would nominate in the general election.

The explicit language of the Twenty-fourth Amendment invites us to revisit four other amendments, all of which feature the same key phrase as the Twenty-fourth—"the right of citizens of the United States to vote"—or a close variant. None of these four other amendments explicitly mentions primary elections. Were it not for the language of the Twenty-fourth, it might well be an open question whether these other citizen-right-to-vote amendments in fact properly apply in government-run party primary elections. But thanks to the explicit language of the Twenty-fourth, all five citizen-right-to-vote amendments should indeed apply to primary elections, even though in four of the five instances, this application is… unwritten. Put a different way, although the Twenty-fourth Amendment's words explicitly apply only to the narrow question of poll-tax-related disfranchisement, the amendment's unwritten spirit invites us to read all preceding and subsequent citizen-right-to-vote language as applicable to both primary and general elections alike.[12]

The Twenty-fourth Amendment does not apply to all elections. Rather, it proclaims that poll taxes may not operate to abridge the right of citizens

of the United States to vote in the following elections: "any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress." Left conspicuously unmentioned were, among other things, elections for state and local positions (such as state governors, state legislators, state judges, mayors, city councilmen, and county sheriffs) and noncandidate elections (such as initiatives, referendums, and bond measures).* By contrast, the Fifteenth, Nineteenth, and Twenty-sixth Amendments sweepingly proclaim that the right of citizens of the United States to vote may never be abridged on account of race, sex, or age, respectively—in *any* election of *any* sort at *any* level of government. These amendments clearly cover more elections than does the Twenty-fourth. Given that the Twenty-fourth Amendment plainly applies to primaries, surely it follows—*a fortiori*, in legalese—that these three universal amendments must also apply to primaries.[13]

The only other citizen-right-to-vote provision in the Constitution is located in section 2 of the Fourteenth Amendment. That section reduced congressional and electoral-college apportionment for states that disfranchised various adult male citizens. The more widespread the disfranchisement in a given state, the greater the apportionment penalty. But only certain elections counted for this apportionment-penalty clause, namely, "any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof."

Are primary elections encompassed by this clause? Imagine that a state, in tandem with a political party, disfranchises some group in a state-run presidential primary election, but allows this group to vote in the general presidential election. Should the state pay an apportionment penalty under

* Nothing in the amendment explicitly endorsed or authorized poll-tax-related disfranchisement in nonfederal elections. Instead, the amendment left these elections to be addressed by state and federal statutes and by earlier federal constitutional provisions, including the republican-government clause and the Reconstruction Amendments. In mid-1965, a year and a half after the ratification of the Twenty-fourth Amendment, Congress passed a sweeping Voting Rights Act that invited the judiciary to invalidate all poll-tax-related disfranchisements. In 1966, the Warren Court, in *Harper v. Virginia*, accepted that invitation, striking down state poll-tax disfranchisements as violative of the Fourteenth Amendment. The 1965 act and the 1966 case are discussed in more detail in Chapter 4, text accompanying nn. 55–62.

section 2? If we simply laid section 2 alongside the Twenty-fourth Amendment for comparison, we might at first think that section 2 was plainly designed to be inapplicable to primary elections. After all, section 2 speaks only of "any election for the choice of electors for President," and, strictly speaking, primary elections do not directly pick presidential "electors"—that is, members of the electoral college. These electors are picked only in the general (November) election. Indeed, the Twenty-fourth Amendment itself can be read as plainly contradistinguishing "a primary election…for President" from the general (November) "election…for *electors* for President."

Had section 2 and the Twenty-fourth Amendment been adopted at the same moment, we might have good reason to view this key textual distinction as decisive, and it might make sense to read section 2 as purposefully excluding primaries by pointed negative implication. But section 2 was in fact adopted a century before the Twenty-fourth Amendment. The latter amendment took pains to clarify that government-run primary elections and general elections should be governed symmetrically precisely because the twentieth-century experience had demonstrated that primary elections might well be the main event. (Were it not for the 1960 primary elections, which JFK swept in dramatic fashion, it is doubtful that he would have persuaded enough party insiders to support him, despite his youth and Catholicism. And in many notable twentieth-century electoral contests for state and congressional positions, the decisive races had occurred in party primary elections, not the November general elections.)

If primaries and general elections merited symmetric treatment under a 1960s amendment safeguarding "the right of citizens of the United States to vote," then they also merited symmetric treatment under an 1860s amendment that also aimed to safeguard "the right to vote" of "citizens of the United States." The omission of any specific mention of primaries in the 1860s amendment was not purposeful or pointed. Rather, primary elections were neither specifically mentioned nor explicitly omitted for the simple reason that these elections were not a particularly prominent feature of American politics in the 1860s, and only became so later on.

True, if we interpolate "primary elections" into the express provisions of section 2 of the Fourteenth Amendment, we are, in effect, reading between the lines. But if we do not do so, the Constitution as a whole fails to make

sense. Like the Fifteenth, Nineteenth, and Twenty-sixth Amendments, section 2 of the Fourteenth has a far wider textual catchment basin than does the Twenty-fourth Amendment. Ordinary state elections for state legislators, executives, and judges fall within the plain sweep of section 2 but lie beyond the explicit scope of the Twenty-fourth Amendment. Unless we interpolate "primary elections" into section 2, we reach the perverse result that section 2 covers less ground than the Twenty-fourth Amendment.[14]*

In short, later amendments often contain a powerful, albeit unwritten, gravitational pull that invites reinterpretation of earlier amendments so that the Constitution as a whole coheres as a sensible system of rules and principles. To borrow a phrase from John Marshall, we must never forget that it is a Constitution—a single rational document, as opposed to a pile of unconnected clauses—that we are expounding. In previous chapters, we confronted the question of gravitational pull where voting rights and women's rights were concerned. For now, let us not lose sight of the remarkable fact that no fewer than five of the fifteen amendments ratified after Jefferson's tenure in office explicitly or implicitly address primary elections, and therefore directly address political parties.[15]

"The…Manner of holding Elections for Senators and Representatives"

A SIMILAR PICTURE COMES INTO VIEW when we venture beyond the words and deeds of America's constitutional amendments to examine the formal and informal structure of daily governance in America. Here, too, political parties have in fact tightly and enduringly woven themselves into the very fabric of the American system—so tightly and enduringly that we

* Nor is this the only aspect of section 2 that needs to be reread through the prism of later amendments. Section 2 explicitly penalizes states only when they disfranchise *males*. Surely this pointed and purposeful exclusion of females from the scope of protection cannot survive the subsequent adoption of the Woman Suffrage Amendment, ratified in 1920—an amendment explicitly prohibiting the federal government from discriminating on the basis of sex in the domain of voting rights. After 1920, any literalistic federal enforcement of section 2—protecting the right of males to vote more vigorously than the right of females to vote—would itself violate the letter and spirit of the Suffrage Amendment. Similarly, section 2's age limit of "twenty one years" was silently repealed by the Twenty-sixth Amendment, ratified in 1971, which in effect (albeit not expressly) substituted the new age limit of eighteen years into the penalty clause of section 2. For more analysis, see n. 14.

should regard the current two-party system as a basic element of America's Constitution.

For over a century, framework statutes regulating the American administrative state have explicitly taken political parties into account in an effort to maintain a carefully balanced two-party system. The Federal Election Commission, which was redesigned after the Court's 1976 ruling in *Buckley v. Valeo*, contains an even number of voting members—six, to be precise. By law, no more than three commissioners "may be affiliated with the same political party." Various other statutes governing commissions comprising an uneven number of members—typically five or seven—have tried to prohibit any political party from controlling more than a bare majority of commissioners. Of the seven seats on the United States Sentencing Commission, for example, no more than four may be held by "members of the same political party." Likewise, the notable 1914 law creating the Federal Trade Commission provides that no more than three of its five commissioners "shall be members of the same political party." Identical language appears in the statutes creating the Federal Energy Regulatory Commission (a reorganized version of the earlier Federal Power Commission), the Equal Employment Opportunity Commission, the Commodity Futures Trading Commission, the Nuclear Regulatory Commission, and several other independent agencies—including the Securities and Exchange Commission, whose enabling statute also provides that "in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable." The Federal Communications Commission statute has slightly different wording, but it, too, prohibits any party from having more than three out of five members. The statute structuring the Consumer Product Safety Commission features language regulating party "affiliat[ion]" rather than "member[ship]"; thus, no more than three of the five commissioners may be "affiliated with the same political party." Deploying yet another verbal formula echoing the landmark 1887 act that established the once famous, but now defunct, Interstate Commerce Commission, the enabling statute of the Federal Maritime Commission proclaims that no more than three of its five members may be "appointed from the same political party." This language also appears verbatim in the statute creating the National Transportation Safety Board.[16]

Most of these statutes might at first seem easy to evade. Formally, a

clever president is free to propose an appointee who is only nominally connected to (or independent of) a given party. In practice, however, opposition-party senators are often able to deter any sly evasions that presidents might envision.[17]

The law of bipartisan replenishment of independent agencies is thus enforced through congressional party politics, which in turn are shaped by bipartisan rules and laws regulating the structure of Congress and the election of congresspersons. For a century and a half, Congress has been dominated by the same two major parties, Republicans and Democrats, who have alternated in power. In an intricate meshwork of statutes, house rules, and customary practices, this two-party system has threaded itself into durable formulas and folkways determining how many seats and staffers each party will have on each house committee, how party leaders will interact on committees and on the floor, and so on. These formulas and folkways both presuppose and help ensure that at any given moment, each house of Congress will consist of two main groups—one "majority" party and one "minority" party.[18]

This basic dichotomy is visible in the very architecture of each house chamber, with members of one party traditionally sitting together on one side of the chamber and members of the other party likewise clustered on the other side, with an aisle literally and metaphorically separating the two groups. This remarkably steady, stable, stolid two-party system stands in sharp contrast to the kaleidoscopic arrangements one sees in many leading democracies around the globe, where three or more parties routinely win a significant number of seats in the national legislature, new parties arise with some frequency, and major parties occasionally collapse.

AMERICAN ELECTION LAW has created conducive conditions for this entrenched Republican-Democrat duopoly. The cornerstone of this legal foundation is a simple rule in the United States Code that disaggregates each state into single-member congressional districts. For example, if a state is entitled to twelve seats in the House of Representatives, it must have twelve congressional districts, each of which picks one House member. The state may not divide itself into, say, three districts, each of which elects four House members. Nor may the state create a system in which all

twelve seats are filled in a single statewide election, with each voter allowed to cast one vote. Each district must have one and only one representative, and in this system it is hard for more than two parties in any district to thrive in long-term equilibrium.

Students of political science will recognize this empirical regularity as "Duverger's Law." The basic mechanisms driving the regularity identified by Professor Duverger are not hard to understand. When one and only one seat is up for grabs in a given congressional district, the victor must win a majority, or at least a plurality, within this district. Most sophisticated voters understand that a vote for a third-party candidate is usually a wasted vote, for several reasons.[19]

First, a start-up party, by definition, has no track record of past victory—only the two established parties can claim such a track record—and the need to achieve a district-wide majority or plurality sets the bar of success quite high for the start-up entrant. Second, even a voter who sincerely prefers a third-party candidate should understand that a vote for this candidate, instead of a vote for the lesser-evil of the two major-party candidates, may increase the odds that the voter's least favorite (greater-evil) major-party candidate will prevail.* Third, even if these two factors do not initially sway a given voter, that voter should understand that these factors will likely sway other sophisticated voters, and that fact, in turn, provides an additional reason to think that a third-party vote would be a wasted or perverse vote. Thanks to the dynamic and reinforcing interplay of these three factors, the prophecy that the two established parties will continue to be the only realistic options becomes largely self-fulfilling—a stable equilibrium that can be disrupted only by a massive external jolt, the political equivalent of an asteroid strike.

Separation of powers and federalism further reinforce this equilibrium. Because America has one and only one president, and because this one-

* Consider a simple example from the presidential contest of 2000: Any ultraliberal voter who cast his ballot for his first-choice candidate, Ralph Nader, instead of his second choice, Al Gore, thereby increased the odds that his least favorite candidate, George W. Bush, would prevail. Symmetrically, any ultraconservative voter who cast his vote for his first choice, Pat Buchanan, instead of his second choice, Bush, thereby increased the odds that his least favorite candidate, Gore, would win. Similar dynamics operate in any single-member-district House election.

man executive is elected independently of Congress, Duverger's Law predicts that two and only two major presidential parties will survive in the long run. A similar dynamic ensures that within any given state two parties will routinely vie for gubernatorial control. The great majority of state legislatures also use single-member districting systems. The fact that virtually every congressional district has the *same* two parties today—Republicans and Democrats—is a product of certain electoral economies of scale and the ticket-system facilitated by the tight coordination of state and national elections.

In a multi-member districting system, by contrast, more parties may be able to thrive if friendly voting rules are in place. Imagine a district with four seats to be filled, and suppose further that each voter is given only one vote. In this system, any party with slightly over 20 percent of the vote is guaranteed to win a seat. (If Party X has more than 20 percent, it must necessarily be among the top four parties; if there were four other parties, each of which got more votes than Party X, the total votes would exceed 100 percent—a mathematical impossibility.) The victory threshold is thus much lower than a district-wide majority or plurality. In such a multi-member district, as many as five different parties could survive in long-term equilibrium, in a musical-chairs game with, say, three parties at 21 percent apiece and two slightly smaller parties credibly vying for the last remaining chair. More generally, any multi-member district with n seats and friendly voting rules can sustain, in the long run, as many as $n + 1$ parties. Multi-member district systems and variants thereof are used throughout the world, and many national elections abroad feature robust multiparty competitions year after year.

American congressional elections, by contrast, narrow the playing field to two major parties. In any given district, there is one seat to be won in the musical-chairs game, and thus in the general election there are typically only two contestants—one Democrat and one Republican—plausibly vying for the seat. (We should recall here the critical winnowing role of primary elections and/or party caucuses, which enable the typical general election to become a focused contest between one Republican and one Democrat.)

The federal law that laid the foundation for this two-party congressional system was first enacted in 1842, pursuant to Article I, section 4,

which authorizes Congress to legislate rules governing the "manner" of congressional elections. According to this statute, House members were to be elected "by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, *no one district electing more than one Representative*." Over the ensuing century, Congress repeatedly revisited its election laws in connection with the decennial House reapportionment mandated by Article I, section 2. Most of the time, Congress reenacted the 1842 statute or some close cousin, but occasionally Congress allowed the single-member-district law to lapse, only to revive the law in a later reapportionment cycle. Since 1967, the single-member-district statute has been a fixed feature of the U.S. election code, a politically entrenched and politically entrenching provision cementing in place the current two-party system about as effectively and enduringly as any explicit constitutional text could ever hope to do.[20]

To be clear: There is no constitutional text that explicitly or implicitly requires a two-party system. Nor is there any constitutional text that explicitly or implicitly requires single-member districts, with or without the gloss of the past 170 years of actual government practice. Congress has the power to create single-member House districts, but not the duty to do so. Nothing in the 1842 law, or the 1967 law, or any of the districting laws in between invites us to read any specific constitutional clause in a manner that suggests that House members must be elected this way or that way. Rather, this long string of laws merely confirms that Congress can choose to require single-member House districts if it wants to.

But that is enough, for once single-member districts took root and solidified a two-party system in Congress, Congress lost almost all incentive to change the basic structure. Thus, this structure became deeply entrenched—a self-perpetuating element of America's unwritten Constitution far harder to change than, say, the current size of the Supreme Court. To change the Court size, Congress need only pass an ordinary law, and it is actually imaginable that some future Congress might wish to do this—imaginable precisely because such a change in law would not necessarily harm congressional incumbents in any obvious way. To change the current two-party system, Congress likewise need only pass an ordinary law, but it is almost unimaginable that a future Congress might wish to do this—almost unimaginable because such a change would indeed harm

incumbents by opening the door to new parties that might threaten the existing duopoly enjoyed by the two major parties tied to these incumbents.* If ever it makes sense to call something a "constitutional" rule even though this rule does not in fact appear in the written Constitution, America's basic two-party system is such a thing.

DESPITE ALL THAT WE HAVE seen, it cannot be said that the Constitution directly addresses political parties in a comprehensive fashion. Is this because, as some scholars have claimed, the document's rules concerning elections and the political process—especially its provisions governing presidential politics and presidential authority—are the petrified fossils of an eighteenth-century world, wholly ill-fitting the political realities of modern America?

The evidence suggests otherwise. At the very moment that national parties arose, they began to integrate themselves into the Constitution in both text and deed. America's modern presidency is not the product of eighteenth-century mistakes that later Americans have simply been unable to comprehend or correct. Although the presidency was originally designed for a nonpartisan figure—George Washington—the office was repeatedly redesigned, via many different amendments adopted over the course of many decades, to fit the rise of more partisan chief executives, including Thomas Jefferson, Abraham Lincoln, Franklin Roosevelt, and Lyndon Johnson. Most of the rules of presidential power are robust. These rules first worked without an entrenched two-party system and now work within such a system.

To put the point another way, virtually all states have created governorships that look amazingly like the presidency, and most states created these presidential look-alikes after the rise of America's two-party system. Almost no state constitution comprehensively regulates political parties, even though many written state constitutions are quite detailed and relatively easy to amend.

All this evidence suggests that there is a different reason why politi-

* In this book's final chapter, I shall try to imagine the virtually unimaginable by sketching one theoretical scenario in which incumbent members of Congress might see fit to change the existing two-party duopoly.

cal parties receive rather spotty treatment in America's fifty-one written constitutions, state and federal. The explanation, quite simply, is that it is far from clear what a more comprehensive constitutional regulatory framework should look like.

True, several advanced democracies across the oceans feature more detailed constitutional regulations of political parties, but few of these foreign constitutions provide models for easy American emulation. Most foreign regimes lack America's special combination of an entrenched two-party system and an executive elected independently of the legislature. The fifty state constitutions are more obvious models for possible federal constitutional rules, precisely because all fifty-one constitutions, state and federal, share a great deal in common (including electorally separated branches and two major parties). But, to repeat, virtually no state constitution regulates political parties in dramatically different fashion than does the federal Constitution. Unless and until several state constitutions come along and demonstrate a better mousetrap for addressing American-style political parties, most Americans are unlikely to view the federal Constitution as defective in this regard.

There may well be deep wisdom in America's piecemeal approach to political parties, which are, after all, multifarious, protean, and complex creatures. Consider just a few of the complications that could confound a proposal to regulate parties in a more truly systematic fashion: America's two alternating governing parties are qualitatively different from its wide assortment of fringe parties. The boundaries between official political parties and broader social movements are porous. At any instant, official party membership lists will only imperfectly reflect real partisan allegiance and inclination. Sometimes a particular party may be tightly knit and ideologically pure; at other times, less so. A party that opens its primaries to independent voters will likely act differently than one that operates only closed primaries. Other matters of internal party governance—whether the party favors primaries or caucuses, whether it strongly privileges party chieftains or is more open to insurgents, whether it embraces plurality rule or proportional representation in picking delegates to its conventions, whether conventions in turn follow majority rule or supermajority rule in selecting party nominees—introduce additional

wrinkles. Parties often operate differently within Congress than within the executive branch.

In periods of "unitary" government when one party controls both Congress and the presidency, distinctive political possibilities and pathologies arise that are usually dormant in eras of "divided" government, which present their own classic routines and rhythms. Within any chamber of government, the ruling party often confronts opportunities and temptations not faced by the loyal opposition, and vice versa. Partisanship may play out differently in moments of extreme ideological polarization and high-stakes reform—as during the Jeffersonian revolution of the early 1800s or the Reconstruction of the 1860s—than in eras of relative quiescence, when party ideologies are blurred and patronage looms larger than principle.

Sometimes parties need to stand wholly outside government with clear rights against the formal legal order. (Think of the First Amendment.) Other times, a government works so closely with a party that it may be hard to determine where one ends and the other begins. (Think of certain kinds of primary elections covered by the five citizen-right-to-vote amendments.) In still other ways, parties operate as unique intermediary institutions, formally operating outside government even as the law specially facilitates or specially restrains partisanship within government. (Think of the Twelfth and Twenty-fifth Amendments, or the string of independent agencies with party-membership rules.)

Given all these complications and complexities, the absence of a more comprehensive constitutional grid regulating American political parties is not some horrible and incurable eighteenth-century goof, but the considered choice of many generations of Americans ever since Jefferson's ascension—and a sensible choice at that.