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President Quayle?

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ESSAYS

PRESIDENT QUAYLE?

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A funny thing happened on the way to the White House in 1988. In keeping with powerful electoral trends over the last two generations, a large number of swing voters split their tickets in various ways—most prominently by voting for a Republican in the presidential contest and for Democrats in congressional races.[1] Various polls also suggested that many Americans preferred the Republican nominee for President, but the Democratic nominee for Vice President.[2] Yet, in sharp contrast to general electoral rules permitting ticket splitting in other contexts, voters were not allowed to split their tickets by voting for a Republican President and a Democratic Vice President. The funny thing is that Dan Quayle now stands a proverbial heartbeat away from the Oval Office, despite a real possibility that a majority of the 1988 electorate, if given a clear choice, would not have put him there.

Is there a reason for allowing voters to split their tickets in many other ways, but not between President and Vice President? Does the Constitution compel this result? Are there sound historical or policy reasons to support it? Does economic analysis, game theory, or social choice theory explain the seeming anomaly? Or is it, instead, simply a

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We dedicate this Essay to our parents, as evidence that we can indeed work together (if we try).

[1] Morris P. Fiorina, Divided Government 1 (1992) (discussing ticket splitting in the 1988 elections). Fiorina explains that those most likely to split their tickets between the two parties are moderates. Id. at 77 & n.22.

[2] See infra note 15 and accompanying text.

constitutional accident—President J. Danforth Quayle—waiting to happen? Maybe things aren't so funny after all.

Part I of this Essay sets the stage for analysis by identifying recent developments and patterns that make the issue of executive ticket splitting both meaningful and timely. In Part II, we discuss possible sources for the rule against ticket splitting in presidential elections and conclude that the prohibition is rooted in state law and practice, rather than federal statutory or constitutional law. Part III looks to theory, policy, and history to identify and question possible justifications for the rule. Our analysis indicates that the prohibition is far more difficult to justify than one might assume. Finally, Part IV posits some advantages of permitting voters to split their federal executive tickets.

Before we begin our analysis, however, let us make one thing clear: we intend no personal disrespect to Vice President Quayle. Indeed, we take no position on whether Quayle deserves more credit from the American public than he has received.[3] We simply mean to focus analytic attention on a troubling feature of the current scheme of presidential selection: a person who—fairly or unfairly—may not enjoy and may never have enjoyed the support of a majority of the American electorate has nevertheless been placed only a heartbeat away from the presidency.[4]

I. THE CURRENT ELECTORAL LANDSCAPE

Three features of contemporary election law and practice set the stage for our inquiry. First, current law provides voters with a broad range of options to split their tickets. Voters may, for example, vote for federal executive candidates of one party and federal legislative candidates of another. Citizens likewise are free to cross party lines in electing federal legislators—say by voting for a Republican for the U.S. Senate and a Democrat for the U.S. House of Representatives.

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[3] See, e.g., Bob Woodward & David S. Broder, Quayle's Reputation vs. the Record: Damaging Campaign Coverage was Sometimes Inaccurate, Wash. Post, Jan. 7, 1992, at A1 (one article in a seven-part series focusing upon Quayle and the fairness of public skepticism concerning his competence).

[4] Thus, a Quayle presidency can be termed a "constitutional accident" waiting to happen in much the same way that a Dukakis presidency in 1989 would have been a "constitutional accident," had Dukakis managed to win the electoral college despite losing the popular vote in 1988. See infra text accompanying note 87.

Moreover, no obstacle exists to voting for federal officials of one party and state officials of another. Indeed, the only noteworthy instance of vote tying outside the presidential context exists at the state executive level—between the offices of governor and lieutenant governor—and even there it exists in only some states.[5]

A second key feature of the current electoral landscape is the dramatic increase in ticket splitting generally by American voters over the last fifty years. In the twelve presidential elections between 1900 and 1944, on average, voters in only 11% of the congressional districts voted for a President of one party and a Representative of another.[6] For the period of 1946 through 1988, that number increased, on average, to 31.5%.[7] In 1984, almost half of all congressional districts supported House and presidential candidates from different parties.[8] Indeed, the dominant pattern over the last quarter of a century has been a Republican President and a Democratic Congress. This trend represents a major departure from the electoral patterns of American voters before World War II, when a "divided" government in Washington, D.C. was unusual. What was once an exception now appears to be the norm. Moreover, the numbers suggest that this shift in presidential/congressional voting patterns reflects a larger ticket-splitting trend. From 1952 to 1980, for instance, ticket splitting between House and Senate seats rose from 9% to 31% nationally.[9] In 1948, approximately 66% of voters interviewed indicated that they had voted a straight party line for all

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[5] A number of states constitutionally bind the eleetion of their top executive officials. See Fla. Const. art. 4, § 5; Haw. Const. art. 5, § 2; Ill. Const. art. 5, § 4; Ind. Const. art. 5, § 4; Iowa Const. art. 4, § 3; Kan. Const. art. 1, § 1; Md. Const. art. II, § 1B; Mass. Const. amend. art. LXXXVI; Mich. Const. art. 5, § 21; Minn. Const. art. V, § 1; Mont. Const. art. VI, § 2(2); N.M. Const. art. V, § 1; N.Y. Const. art. IV, § 1; N.D. Const. art. V, § 4; Ohio Const. art. III, § 1a; Pa. Const. art. 4, § 4; S.D. Const. art. IV, § 2; Utah Const. art. VII, § 2; Wis. Const. art. 5, § 3. Several states bind the elections of governor and lieutenant governor through statute. See Alaska Stat. § 15.15.030(5) (1988); Colo. Rev. Stat. § 1-4-204 (1973); Conn. Gen. Stat. § 9-181 (1958).

[6] Norman J. Ornstein, Thomas E. Mann & Michael J. Malbin, Vital Statistics on Congress, 1989-1990, at 53 (1990); Mark A. Zupan, An Economic Explanation for the Existence and Nature of Political Ticket Splitting, 34 J.L. & Econ. 343, 344-45 (1991).

[7] Ornstein, et al., supra note 6, at 53; Zupan, supra note 6, at 344-45.

[8] Zupan, supra note 6, at 344-45.

[9] Martin P. Wattenberg, The Decline of American Political Parties, 1952-1980, at 20-21 (1984). See also Jonathan R. Macey, The Role of the Democratic and Republican Parties as Organizers of Shadow Interest Groups, 89 Mich. L. Rev. 1, 8-9 (1990) (relying on Wattenberg's data).

offices on a ballot; by 1972, that figure had dropped to less than 40%.[10] Ticket splitting in state and local elections also has increased appreciably.[11] In 1988, three quarters of the American population lived in states with "divided" governments, and the absolute number of states with such governments hit an all-time high.[12] In short, as one commentator put it, "[t]icket-splitting has assumed massive proportions compared to the rate just two decades ago, and only a small minority of the electorate now believes that one should vote strictly on the basis of party labels."[13]

Political scientists have put forth many explanations for this general increase in ticket splitting, although most accounts focus on the recent pattern of a Democratic legislature and Republican executive. Some explanations rely on the relatively liberal fiscal platform of the Democratic party and the relatively conservative fiscal platform of the Republican party. Other explanations stress the roles of incumbency and gerrymandering. Still others turn on the importance of television in modern elections and the inability of the major parties to police themselves.[14] As we shall discuss in Part III, one's view about the wisdom of prohibiting ticket splitting in the federal executive may well depend upon one's precise explanation for the observed increases in ticket splitting.

The third and perhaps most dramatic development bearing on the federal executive ticket-splitting question was George Bush's selection of then-Senator Dan Quayle to be his vice-presidential running mate in 1988. It is no secret that many—perhaps most—American voters that year harbored serious reservations about Quayle's ability to serve competently as President in the event that Bush could not complete his term. Many polls suggested that the public's confidence in Quayle was significantly lower than its confidence in his Democratic opponent, Senator Lloyd Bentsen. Less than a month before the 1988 general election, three fourths of those polled thought that Bentsen was

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[10] James Q. Wilson, American Government: Institutions and Policies 189 (1980).

[11] Wattenberg, supra note 9, at 19-21 (noting that between 1952 and 1980 "[t]he proportion of voters splitting their tickets in elections for [various] state and local offices has gone from 27 to 59 percent").

[12] Fiorina, supra note 1, at 26.

[13] Wattenberg, supra note 9, at 23.

[14] See Fiorina, supra note 1, at 14-25, 64-82 (discussing gerrymandering, incumbency, and balancing arguments); Zupan, supra note 6, at 346-50 (discussing incumbency, television, and issue-voting).

"qualified" to take over the presidency; only two fifths thought Senator Quayle was.[15]

The public's uneasiness has not measurably subsided in the intervening three and a half years. A poll taken in April 1991, a week before President Bush was hospitalized for cardiac examination, disclosed that 67% of those voters questioned thought Quayle unqualified for the presidency; only 19% thought he was qualified.[16] Bush's hospitalization only increased the anxiety in the press and among the public. As one commentator put it, "[t]he mere contemplation of invoking the [Constitution's] disability clause temporarily transferring presidential power to the Vice President sent shivers through the American body politic."[17] Even more recently, a poll published in the *Los Angeles Times* on December 2, 1991 reported that only 35% of those voters queried found Vice President Quayle to be "qualified" for the presidency.[18] A number of press reports in the aftermath of President Bush's collapse in Japan in January of 1992 corroborate these numbers.[19] Whether the public's appraisal is justified, "perhaps never before has the vice president been held in such universally low esteem as is Dan Quayle."[20] And with another presidential election almost upon us, history threatens to repeat itself. Once again, Dan Quayle may be elected Vice President in the teeth of possible strong voter preference for his Democratic counterpart (whoever that might be).

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[15] George Skelton, The Times Poll, L.A. Times, Oct. 11, 1988, at A1. See also George Skelton, Democrats Face Uphill Lap, L.A. Times, Oct. 15, 1988, at A1 (citing nationwide survey findings that registered voters, by four to one, considered Bentsen to be "more qualified" to ascend to the presidency if necessary than Quayle and that even among Bush supporters Bentsen was favored by five to three). Similarly, a poll of one thousand viewers taken shortly after the debate between vice-presidential candidates Quayle and Bentsen revealed that 80% of those polled found Bentsen's performance to have been superior. Jules Witcover, Crapshoot: Rolling the Dice on the Vice Presidency 352 (1992). Interestingly enough, 80% of those polled also suggested that Quayle's poor performance would not influence their vote between the two main party tickets. Id.

[16] Time/CNN Poll: Public's Confidence Slipping, But GOP Strong, The American Political Network, Inc., Apr. 30, 1991, *available in* LEXIS, Nexis Library, Wires File.

[17] Witcover, supra note 15, at 5.

[18] James Gerstenzang & David Lauter, Quayle Set on Getting Last Laugh, L.A. Times, Dec. 2, 1991, at A1, A18.

[19] See, e.g., David Nyhan, For Bush: An Election-year Picture He'd Rather Erase, Boston Globe, Jan. 9, 1992, at 17 (citing poll figures that 51% of voters believe Quayle is not qualified for the presidency); Bob Woodward & David S. Broder, Waiting in the Wings for 1996, Wash. Post, Jan. 12, 1992, at A19 (stating that 50% of voters polled thought Quayle was not qualified to serve as President should something happen to Bush).

[20] Witcover, supra note 15, at 5.

All of this strongly suggests that a Bush/Bentsen option would have been attractive to voters in 1988, had they been free to split their executive tickets. It also suggests that many voters might welcome a ticket-splitting option in the upcoming presidential election. The questions then become, how and why does the law preclude this option?

II. THE SOURCE OF THE PROHIBITION

A. The Constitution of the United States

The logical starting point in the search for the source of the prohibition on federal executive ticket splitting is the federal Constitution, which sets forth relevant election procedures in Article II and the Twelfth Amendment. Article II, in its original form, provided:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .
>
> The Electors shall meet in their respective States, and vote *by Ballot for two Persons . . . . The Person having the greatest Number of Votes shall be the President,* . . . and if there be more than one who . . . have an equal Number of Votes, then the House of Representatives shall immediately chuse [sic] by Ballot one of them for President . . . . In every Case, after the Choice of the President, *the Person having the [next] greatest Number of Votes of the Electors shall be the Vice President.*[21]

The Twelfth Amendment changed this election scheme shortly before the election of 1804, by providing that:

> The electors shall meet in their respective states and vote by ballot for President and Vice-President . . . [T]hey shall name in their ballots the person voted for as President, and *in distinct ballots* the person voted for as Vice-President, . . . *The person having the greatest number of votes for President, shall be the President . . . . The person having the greatest number of votes as Vice-President, shall be the Vice-President . . . .*[22]

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[21] U.S. Const. art. II, § 1, cl. 2-3 (amended 1804) (emphasis added).

[22] U.S. Const. amend XII (emphasis added).

As originally drafted, the Constitution thus envisioned an electoral "college"[23] at which representatives selected by each state would elect federal executive officials by submitting ballots that named two separate persons, but did not specify an office for each person. The names were then counted, the leading vote-getter was proclaimed President,[24] and the second leading vote-getter was proclaimed Vice President. The Twelfth Amendment altered this procedure by requiring the electors from the states to vote *separately* for the President and Vice President. In other words, after 1804, the electors were to designate in their ballots one person as President and one person as Vice President.

Before analyzing these provisions in detail, we should note, of course, that the Constitution speaks only in terms of "Electors" selected by the states, and not of ordinary citizens voting in elections. Initially, states did not hold general elections for the presidency. By the 1820s, however, general presidential elections were commonplace in the several states.[25] And over time, many states enacted laws purporting to legally bind their electoral collegians to vote for the candidates selected by the state voters in the general election.[26] This set of practices is a basic feature of today's "unwritten" constitution, and appears to have the approval of both the country and the Supreme Court.[27]

With this current custom—an informal constitutional amendment of sorts—in mind, let us analyze the relevant constitutional provisions. As a textual matter, neither Article II nor the Twelfth Amendment obliges persons to vote for a President and a Vice President of the same party. Indeed, the Twelfth Amendment's decoupling of the selection of the President and Vice President, at least at first blush, seems more consistent with a regime in which those who cast ballots—electoral collegians and, ultimately, the citizen voters who today de facto stand behind them—are free to select the two candidates

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[23] Though it is common today to speak of the electoral "college," the Constitution, strictly speaking, does not use this word.

[24] This assumes that the leading vote-getter was listed as one of two names on the ballots of a majority of collegians. If not, the election was thrown into the House of Representatives.

[25] James W. Ceaser, Presidential Selection: Theory and Development 103 n.22 (1979).

[26] See, e.g., Cal. Elec. Code § 25105 (West 1989) (requiring electors to vote for candidates of the political party that they represent).

[27] See Ray v. Blair, 343 U.S. 214 (1952), discussed infra notes 44, 47 & 84 and accompanying text.

independently.[28] Nor do the circumstances surrounding the adoption of the Twelfth Amendment dictate a contrary result. In fact, the concerns underlying the amendment of Article II had little to do with the potential for a "split" executive.

As explained above, the original Constitution did not permit electors to specify their votes for the two executive offices. This did not mean that the electoral collegians, and the states and people whom they represented, did not care which of the two persons they voted for would become President. To the contrary, leaders of the two political factions (parties) that emerged shortly after the Constitution went into effect—the Federalists and the Republicans—often had strong views as to who should serve as President and who was better suited to the role of Vice President. But collegians who wished to elect a President and Vice President of the same party faced a problem under the original Constitution: if all of the party's collegians named the same two individuals and if the party constituted a majority at the electoral college, then a tie would result between the two leading vote-getters. Under the terms of Article II, the election would then be thrown to the always-unpredictable House of Representatives for resolution, where the party risked "inversion" of the two candidates. In other words, there was a good possibility that the House would elevate an individual who was intended to be the Vice President to the presidency.[29] This problem was exacerbated by the lack of a guarantee that the party dominating the electoral college would also com-

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[28] The Constitution does, of course, impose some restrictions on voting by electoral collegians. Both the President and Vice President must satisfy certain requirements set out in Article II, and the Twelfth Amendment provides that the electoral collegians from each state cannot vote for a President and Vice President who are both inhabitants of that state. Thus, if George Bush and Lloyd Bentsen were both "inhabitants" of Texas under the Twelfth Amendment, an issue raising intricate questions beyond the scope of this Essay, the Constitution would have prevented Texas' electoral collegians from voting for a Bush/Bentsen executive. See U.S. Const. amend XII.

[29] As early as 1788, Alexander Hamilton noted the inversion problem created by Article II in discussing the possible election of John Adams as George Washington's Vice President:

> If it should be thought expedient to endeavour to unite in a particular character [i.e., Adams for Vice President], there is a danger of a different kind to which we must not be inattentive—the possibility of rendering it doubtful who is appointed President. You know the constitution has not provided the means of distinguishing in certain cases & it would be disagreeable even to have a man treading close upon the heels of the person we wish as President [i.e., Washington].

See Letter from Alexander Hamilton to James Madison (Nov. 23, 1788), *in* 11 The Papers of James Madison 365, 366 (Robert A. Rutland & Charles F. Hobson eds. 1977).

mand a majority in the House. Indeed, many politicians appeared to expect, justifiably, that the opposite often would be true.

To guard against the possibility of inversion, early party leaders developed the technique of sloughing votes off the party's vice-presidential choice.[30] Party leaders would caucus throughout the country and convince collegians from certain states to delete the party's preferred vice-presidential candidate from the two-person ballots cast at the electoral college, naming instead someone who was not the party's choice. This technique would avoid a tie between the majority party's two choices, but it also enabled the minority party to elect its presidential candidate to the vice-presidency. That is, by sloughing off "vice-presidential" votes, the majority party created a window of opportunity for the minority party's most popular candidate to finish second in voting and thus capture the office of Vice President.

This is precisely what happened in the election of 1796. To avoid a possible tie vote and subsequent inversion of the candidates, various New England-based Federalist collegians intentionally diverted votes from the party's vice-presidential choice, Thomas Pinckney, to ensure that the party's presidential choice, John Adams, would finish alone at the top (which he did, with seventy-one electoral votes). As a result, the Republican presidential candidate, Thomas Jefferson, was able to finish in second place (with sixty-eight votes) and thus secure the office of Vice President. Pinckney finished third (with fifty-nine votes).[31]

Significantly, the outcome of the 1796 election did not stir up any real movement to amend the selection method set forth in Article II. To be sure, the specter of inversion caused some leaders to question the wisdom of the original "double-balloting" system.[32] Jefferson, in fact, apparently drafted an amendment to require electoral collegians to designate their votes for President and Vice President as early as 1797.[33] This proposal never got out of the House of Representatives.[34] Similar efforts were made in 1798 and again in early 1800,

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[30] See Lolabel House, Twelfth Amendment of the Constitution of the United States 20-40 (1901) (unpublished Ph.D dissertation, University of Pennsylvania).

[31] Id.; Witcover, supra note 15, at 19.

[32] See Witcover, supra note 15, at 23.

[33] Honse, supra note 30, at 39.

[34] Witcover, supra note 15, at 23.

"but they aroused little interest and the subject was dropped."[35] The major reason no reform efforts resulted from the 1796 election is that Jefferson and others did not see the original selection method's bias in favor of a split executive as a major drawback.[36] Jefferson himself believed that the Vice President would act only as a legislative and not as an executive agent.[37] Moreover, some who would later unsuccessfully oppose the Twelfth Amendment saw a great deal of virtue in having an intrabranch check within the executive. As Representative James Hillhouse of Connecticut would later urge, the President and Vice President should be of different parties "to check and preserve in temper the over-heated zeal of party. . . . If we cannot destroy party, we ought to place every check upon it."[38] Thus, the fact that the election of 1796 resulted in a split executive was not enough to trigger a serious move to amend the Constitution. Real interest would be stirred only after the election of 1800, which more starkly raised the inversion problem and the inadequacy of the "sloughing" system that had evolved to address it.

In 1800, for a variety of reasons that need not be delved into here, the Republican party's collegians failed to slough votes off Aaron Burr, their choice for Vice President. The result was a first-place tie between Burr and the Republican presidential candidate, Jefferson. The tie threw the election into the Federalist-controlled House of Representatives, where Federalist leaders threatened to elevate Burr to the presidency to spite Jefferson. After much wrangling and many ballots, the House ultimately selected Jefferson as President. But the real possibility of having Burr and Jefferson inverted soured Republicans (and many Federalists) on the selection system of Article II. Proposed in the aftermath of the Jefferson/Burr debacle, the Twelfth Amendment was ratified in time to avoid any possibility of a similar occurrence in the election of 1804.[39]

It is worth reiterating that the inversion problem, and not the tendency of the election scheme under Article II toward a split executive, was the primary motivating force behind the adoption of the Twelfth

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[35] House, supra note 30, at 39.

[36] Id. (citing draft amendments prepared by Jefferson).

[37] Letter from Thomas Jefferson to James Madison (Jan. 22, 1797), *in* 7 The Writings of Thomas Jefferson 108 (Paul L. Ford ed. 1896).

[38] House, supra note 30, at 50 (quoting Hillhouse's speech).

[39] Id. at 50-51; Witcover, supra note 15, at 25.

Amendment. As Gouverneur Morris from New York wrote in a letter in 1802, the primary "evil . . . in the present mode of selection" is 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."[40] Indeed, as noted above, some political leaders, most forcefully Connecticut Representative Hillhouse, considered the split-executive tendency of Article II as originally drafted to be its main virtue. These leaders saw the loss of this tendency 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.

None of this is to say, however, that the framers of the Twelfth Amendment did not recognize that it would enable one party more easily to capture both the presidency and the vice-presidency. Clearly they did.[41] But recognizing the inevitable and being happy about it are entirely different things. Moreover, the framers of the Twelfth Amendment never suggested that the new electoral system precluded individual electors (or states, for that matter) from preferring a President of one party and a Vice President of another. That is, even those who disliked the original system's bias toward a split executive never voiced an intent to replace it with an *absolute* bias in the other direction.[42]

In the end, then, the Twelfth Amendment makes the Constitution safe for strong parties and a "unitary"[43] federal executive, but in no way requires them. Although the Amendment was designed to enable

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[40] Witcover, supra note 15, at 24 (quoting an 1802 letter from Gouverneur Morris to the President of the New York Senate).

[41] House, supra note 30, at 50.

[42] In fact, the results of the second election after the ratification of the Twelfth Amendment show that collegians were not bound to tie their votes for President and Vice President. In the 1808 election, James Madison received 122 electoral votes, but his party's choice for Vice President, George Clinton, received only 113. See Witcover, supra note 15, at 28.

[43] 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—an issue beyond the scope of our remarks here. For an excellent analysis of that issue, see Steven G. Calabresi and Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153 (1992).

electors to more easily opt for a party ticket, it does not compel them to do so. By modifying the rules of Article II, the Twelfth Amendment eased the electoral triumph of a party's executive ticket *if that was what a majority of electors wanted*. When viewed in this light, the Amendment's ultimate message seems to be increased electoral choice, rather than a mandate of executive "unity."[44]

The constitutional custom of holding general elections for the presidency does not change this conclusion. Under any reading of the Constitution, states are certainly free to provide information—in the form of voter preferences—to their collegians. And nothing in the text or history of the Twelfth Amendment prevents a state from allowing its citizens to register their preferences for a split executive ticket. Many states, of course, go further and attempt to bind their collegians to the results of the general election,[45] but the constitutionality of this practice in no way depends on whether that election allows ticket splitting. In short, neither the words nor the spirit of the Twelfth Amendment mandates a "unitary" executive.

B. Federal Statutes

Another possible source for the prohibition on executive ticket splitting, federal statutory law, also fails to embody the prohibition. Instead, the most relevant statutory provisions provide only that each state shall choose electors, who in turn "shall meet and give their votes" at certain times and places and "shall vote for President and Vice President, respectively, in the manner directed by the Constitution."[46] These sections by their terms say nothing about ticket splitting and appear merely to incorporate the electoral college provisions of the Constitution, which, as we have seen, do not answer the ticket-splitting question.

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[44] See Ray v. Blair, 343 U.S. 214, 224 n.11 (1952) (observing that after the Twelfth Amendment, collegians "could vote the regular party ticket without throwing the election into the House. Electors could be chosen to vote for the party candidates for both offices, *and the electors could carry out the desires of the people, without confronting the obstacles which confounded the elections of 1796 and 1800*" (citation omitted) (emphasis added)). See also House, supra note 30, at 43, 47 (noting that the Amendment's framers sought to vindicate majoritarian popular will in selection of the federal executive); id. at 51 (noting that the possibility of a split executive under the Amendment is raised whenever an election is thrown into Congress).

[45] See supra note 26.

[46] 3 U.S.C. §§ 5, 7, 8 (1988).

Indeed, there is serious question whether Congress *could* comprehensively regulate the way in which electoral collegians are chosen or cast their votes. In *Ray v. Blair*, the Supreme Court apparently recognized the power of states to bind their collegians to vote a certain way,[47] notwithstanding what Justice Jackson described as an original understanding that collegians "would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices."[48] In doing so, however, the Court used language suggesting that states alone, and not federal lawmakers, have the power to regulate the behavior of collegians, subject to constitutional constraints such as the Fifteenth, Nineteenth and Twenty-Sixth Amendments:

> The presidential electors exercise a federal function in balloting for President and Vice President but they are not federal officers or agents any more than the state elector who votes for congressmen. They act by authority of the state that in turn receives its authority [to select electors] from the Federal Constitution.[49]

C. *State Law*

In the end, then, the real source of the prohibition on executive ticket splitting must be the laws in each of the fifty states—more specifically, those laws governing the structure of ballots.[50] Generally speaking, general election ballots ask voters to choose electoral collegians pledged to the listed party tickets. Although the names of the

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[47] In *Ray v. Blair*, the Court upheld Alabama's requirement that each person seeking to have his or her name placed on the Democratic party primary ballot as a candidate for presidential elector sign a pledge prior to the primary election. Under the pledge, candidates agreed to support the candidates for President and Vice President ultimately selected by the Democratic National Convention. Although the opinion's logic strongly supports a state's authority to require such a pledge before allowing an individual to run for presidential elector in a state's general election, the majority explicitly noted that the question of a would-be eleetor's right to a space on the general election ballot was not before the Court. 343 U.S. at 223 n.10.

[48] Id. at 232 (Jackson, J., dissenting) (citations omitted).

[49] Id. at 224-25 (citations omitted).

[50] Election codes in some states provide for vote tying betweeu the offices of President and Vice President on the general election ballot. See, e.g., Cal. Elee. Code § 10213 (West 1977); W.Va. Code § 3-6-2(d)(1) (1991). Other states do not explicitly codify vote tying in their election codes. Apparently, the decision to tie presidential and vice-presidential votes in these states is made by the executive agencies charged with designing the ballot. See collection of sample state ballots from the 1988 presidential election (on file with the Virginia Law Review Association).

collegians are sometimes printed on the ballot, more often they are not.[51] Ordinarily, the executive ticket that garners a plurality of votes then captures the state's electoral college votes, and the winning party's collegians vote for the party's candidates (assuming the candidates are living when the vote is taken).[52]

The ballots of some states, by allowing voters to "write in" candidates, present a minor wrinkle. This write-in option might be thought to give voters complete freedom to split their votes between executive candidates of different parties if they so desire. Such is not the case, however, for two reasons. First, in at least some states, the election codes and the instructions on the ballots do not allow voters to write in candidates who already appear on the ballot under one of the recognized parties.[53] Thus, a voter could register a preference for an executive split between obscure parties and individuals, but could not have voted for a Bush/Bentsen ticket in 1988.[54] Second, and more fundamentally, election ballots' use of party tickets itself profoundly changes how votes are counted and voter preferences aggregated. Imagine, for example, a vote distribution as follows: 34% for Bush/Quayle (Ticket A), 33% for Dukakis/Bentsen (Ticket B), and 33% for Bush/Bentsen (write-in Ticket C). In such a situation, the Bush/Quayle Republican ticket (A) would capture the state's electoral votes, even though 66% of the electorate (B and C) might have favored Bentsen over Quayle. In this example, the ballot's use of "tickets" itself results in a kind of undercounting of write-in votes for split tickets. (It also leads to the curious result that a 1% shift from Bush/Quayle to Dukakis/Bentsen would spell victory for Dukakis even though two-thirds of the voters might have preferred Bush.)

If, instead, we counted the above ballots by "untying" the ticket, Bush would win the presidential contest (67% to 33%) and Bentsen,

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[51] See Ray v. Blair, 343 U.S. at 229 (observing that in 1951, nearly half of the states did not print the names of candidates for electors on their general election ballots). See also sample ballots from Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Maine, Massachusetts, Missouri, New Jersey, New Mexico, New York, North Carolina, Rhode Island, South Carolina, Texas, Utah, and Washington (on file with the Virginia Law Review Association) (evidencing the practice of not printing names of candidates for electors on the ballot in the 1988 presidential election).

[52] See, e.g., Cal. Elec. Code § 25105 (West 1989).

[53] See, e.g., Cal. Elec. Code § 10228 (West 1989) (providing sample ballot and instructions).

[54] Requiring voters to "write in" certain options also raises the relative cost of these options vis-à-vis other options that can be voted for with less effort. At the margins, this increased cost appears to affect voter behavior. See infra note 85 and accompanying text.

the vice-presidential race (66% to 34%). Of course, counting votes for President and Vice President separately, by untying the ticket, can create oddities of its own—in this example, by electing a divided executive even though 67% of voters (A and B) seemed to cast their ballots for a unitary one.[55] We shall return to these oddities later. For present purposes, we simply note that the current method of counting "ticket votes," and not "vice-presidency votes," often renders write-in votes ineffective as ticket-splitting devices. Where the write-in ticket comes in second or third in the balloting, the split-ticket compromise will not prevail, even when a majority of voters prefers a split executive.

Identifying *how* states prohibit executive ticket splitting is the easy task; figuring out *why* is much more difficult. To that enterprise we now turn.

III. Possible Justifications and Explanations

A. Law and Economics Rationales

1. Prisoners' Dilemmas

Many state electoral mechanisms and decisions can be explained using concepts that are systematically studied under the "law and economics" rubric. The "prisoners' dilemma," in particular, may be a useful paradigm for understanding a number of state policies concerning federal elections. One good example is the fact that each of the fifty states—with an occasional, historical exception[56]—has given all of its electoral college votes to the winning ticket, rather than splitting the electoral votes between the various tickets in proportion to the popular vote. This winner-take-all approach to the electoral college appears eminently reasonable if we take as a premise each state's desire to maximize its own importance in the presidential election process. By providing each presidential candidate a large return (in

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[55] Current ballot forms do not tell us whether the 67% really prefer *any* unitary ticket to a split ticket. To answer this question, we would need to allow voters to register their second choices—that is, their preferences in the event their first choices do not prevail. As we explain later, a ballot that provides such information can be easily devised. See infra note 69 and accompanying text.

[56] Maryland and New York departed from the norm in 1828, as did New Jersey in 1860 and Michigan in 1892. See Wilson, supra note 10, at 186, 310. Maine may also be a departure from the norm. Id. See generally Congressional Quarterly Inc., Elections 88, at 74-75 (Jane Gilligan ed. 1988) (discussing historical departures from the norm).

the form of the state's entire electoral college vote) for the candidate's promises and platform planks targeted to the state's electorate, the state increases the likelihood that all candidates will take the state seriously and address its needs and concerns.

Assume, for example, that the swing (i.e., median) legislators in a state faithfully represent the swing voters in the state electorate. By embracing winner-take-all rules, state legislators maximize the clout of the state's median voters in the presidential election. The dilemma, of course, is that such winner-take-all rules make it much more likely that a presidential candidate could win a majority of the nation's popular votes, yet lose in the electoral college. This result would actually *prevent* the Chief Executive of the United States from representing the *nation's* median voters.[57]

Even if virtually all voters in all states thought such an outcome undesirable—a true democratic nightmare—no state might be willing to make a *unilateral* shift from winner-take-all to proportionality. To begin with, unilateral action by a single state might not reduce the probability of the nightmare materializing. More importantly, every state would have an incentive to encourage *other* states to shift to proportionality and yet retain winner-take-all itself, thus maximizing its clout. In equilibrium, each state would simply say to the others, "After you," and no state would take the proportionality bait. Without an enforceable proportionality rule binding all states—be it a federal statute (if constitutional[58]) or a federal constitutional amendment—each state has a strong incentive to defect from the optimal collective arrangement by embracing wiuner-take-all.

The prisoners' dilemma also helps to at least partially explain the hesitancy with which many states have moved in enacting term-limitation legislation with respect to federal legislators. Although term-

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[57] Even a proportional approach does not guarantee that the candidate garnering a majority of the popular vote will also win in the electoral college, for at least four reasons. First, the electoral college is skewed in favor of less populous states, because the number of electoral college votes given to a state depends on its number of representatives and senators. Less-populous states have disproportionate power because representation in the Senate is equal for all states. See U.S. Const. art II. Second, rounding errors exist both in the proportional allocation of electoral votes and in the apportioument of House of Representatives districts. Third, House districts are based upon population numbers rather than numbers of eligible voters in a region. And fourth, voter participation rates vary considerably across states, enhancing the relative voices of those who do vote in states having low voter turnouts.

[58] See supra notes 47-49 and accompanying text.

limitation laws have been proposed and considered in many states, very few have been enacted. One reason is that a state limiting the terms of its federal officials will be disadvantaged in the competition for federal pork barrel as against other states unbound by similar limitations. Federal legislators from states with term limitations will, on average, have less experience and seniority and, presumably, less clout in obtaining local benefits in the form of grants, contracts, public works, and so on. Even if a strong majority in each state (and, thus, the nation as a whole) agreed that term limitation is a good idea, we could expect each state to reject term limitations. Indeed, the dilemma is even sharper: voters in any given state might rationally prefer challengers to an incumbent year after year, but nevertheless vote for the incumbent simply to gain, rather than lose, competitive seniority and local pork.

There is an obvious constitutional irony in the fact that congressional term limitations, if desired, are likely to be adopted only via a constitutional amendment binding all states. At present, the Constitution provides for term limitations only in the Twenty-Second ("Two Term") Amendment, which applies only to the presidency.[59] Yet the presidential context does not present a prisoners' dilemma problem comparable to that found in the congressional context; an individual state, if it so desires, could choose to cultivate a reputation for being anti-incumbent—or at least not antichallenger—in presidential contests without necessarily diminishing its slice of the federal pork pie. Indeed, to shift metaphors, a slightly squeaky state with anti-incumbent leanings might get more grease from the incumbent, first-term President. Thus, from the perspective of the prisoners' dilemma model, the Constitution seems to have gotten things backward: constitutional term limitations might make more sense for members of Congress than for the President.[60]

There does not appear to be a strong prisoners' dilemma explanation for each state's decision to prohibit executive ticket splitting in

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[59] The Twenty-Second Amendment provides, in relevant part, that "[n]o person shall be elected to the office of the President more than twice . . . ." U.S. Const. amend XXII.

[60] There are, of course, other strong reasons, not rooted in the prisoners' dilemma model, for the term limitation embodied in the Twenty-Second Amendment. On the general subject of term limitation, see Roderick M. Hills, Jr., A Defense of State Constitutional Limits on Federal Congressional Terms, 53 U. Pitt. L. Rev. 97 (1991); James C. Otteson, A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution, 41 DePaul L. Rev. 1 (1991).

federal elections. If a state attempted to bind a voter to vote for a *Senator* and a *Representative* of the same party, perhaps a prisoners' dilemma story could be told—a state might think it would maximize the amount of pork barrel it receives if all of its officials in Washington are on the same team and pulling in the same direction. But the binding of votes within the federal executive does not appear to have a similar basis. That is, even if a President tries to reward those states that voted for him, each state would have little, if anything, to gain by casting its electoral votes for a Vice President of the same party as the President. A Vice President's access to a President of the same party does, it could be argued, give the Vice President marginal power to help reward states that voted for a winning unitary ticket, but this power does not seem great. For that reason, any state could experiment by permitting ticket splitting (and casting its electoral college votes for a split ticket) without fear of any real disadvantage as against other states, even in the event a unitary executive is elected.

2. *Spatial Differentiation, Cycling, and Agenda Manipulation Models*

Another set of models that might be thought to explain the prohibition on executive ticket splitting builds on the work of the twentieth-century political scientist Morris Fiorina and the eighteenth-century mathematician, the Marquis de Condorcet. Let us begin by making several simplifying assumptions to ease exposition. Assume that the political spectrum can be mapped onto a simple line segment, with one end point representing the extreme left and the other, the extreme right. Assume further that only two parties exist, that each party's candidates all hew to that party's platform, and that the platform signals to voters both the party's preferred position on the political spectrum and the party's ranking of other, less preferred positions. Under these assumptions, we could imagine a stable two-party system where the party platforms looked something like this:

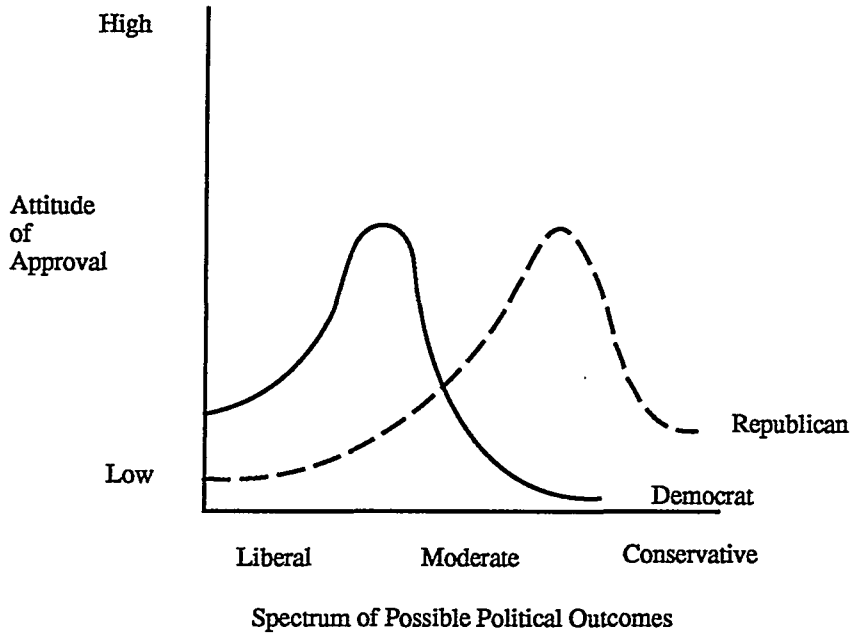

Figure One

In this simple diagram, the most preferred position of each party's platform is represented by the "peak" (the mode) of its curve, and its attitude toward other positions is shown by the shape of the curve. To simplify further, suppose that eligible voters' most preferred outcomes are arrayed continuously and equally across the political spectrum and that each voter casts her vote for the party whose "peak" is closest to her own most preferred outcome.

At first, it might seem that each party has a strong incentive to modify its platform and "move to the middle" to capture the median voter and thus, the election. This incentive structure would render the diagram in Figure One unstable. Yet, even casual empiricism indicates that the real-life Republican and Democratic parties, though obviously trying to appeal to middle-of-the-roaders, do not always converge in the center. In essence, each party must protect its flank. If the two parties met in the center—Tweedledum and Tweedledee—then voters on both the left and the right wings of the spectrum might

lose interest and not vote at all.[61] And these voters are especially important, given that: (1) they are more likely to vote in a party primary and thus influence who will bear the party standard and what her platform will be,[62] and (2) they may be more likely to contribute time and money than the middle-of-the-roaders, some of whom may simply care less about politics.[63] The crude mapping of Figure One thus does represent a stable but delicate balance in a two-party world: each party must move close enough to make credible appeals to the swing voters in the center—but not so close to its competitor that it loses its hard core of more ideologically extreme party members.[64]

Under these conditions, we begin to see why some voters might want to split their tickets. As Professor Fiorina has pointed out, the swing voters in many elections will often be middle-of-the-roaders whose preferred position lies somewhere between the party platforms' "peaks."[65] These voters might want to split their tickets—by voting for a Republican in the race for Office X and a Democrat for Office Y—in the hope that the ultimate mix of resulting policies will represent a compromise between the party platforms' "peaks," thus approximating the swing voters' most preferred position.

This explanation works for intra-executive as well as executive-legislative ticket splitting. If Office X is the presidency, Office Y can be understood as either Congress or the vice-presidency. It might at first

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[61] See Fiorina, supra note 1, at 123 & n.28. See also Jeane Kirkpatrick, The New Presidential Elite: Men and Women in National Politics 274-79 (1976) (noting that while each party had a "distinctive ideological flavor, none was so ideologically distinctive and homogeneous that it lacked any overlap with competing political groups").

[62] See, e.g., William Crotty & John S. Jackson III, Presidential Primaries and Nominations 92-95 (1985) (finding, based on an analysis of voter turnout in the 1980 primaries, that those voters at the extreme ends of the ideological continuum were most likely to vote in party primaries).

[63] See, e.g., id. at 116-37 (setting forth findings that those at the more extreme ends of the ideological spectrum were more likely to be "political elites" and to serve as delegates to the parties' national conventions); Kirkpatrick, supra note 61, at 277-78 (demonstrating that "elites" tend to be more ideologically extreme than the parties' "rank and file").

[64] Our basic model in Figure One builds on the classic work of the political economist Anthony Downs. See Anthony Downs, An Economic Theory of Democracy 114-41 (1957). Downs, in turn, borrowed from earlier work by economists Harold Hotelling and Arthur Smithies. See Harold Hotelling, Stability in Competition, 39 Econ. J. 41 (1929), *reprinted in*, American Economic Association, Readings in Price Theory 467 (George J. Stigler & Kenneth E. Boulding eds. 1952); Arthur Smithies, Optimum Location in Spatial Competition, 49 J. Pol. Econ. 423 (1941).

[65] Fiorina, supra note 1, at 77.

be thought that, unlike a Democratic Congress, a Democratic Vice President would be unable to force a Republican President to deviate from the Republican platform, because, unlike Congress, the Vice President lacks formal power to block presidential policies. How, then, could sophisticated swing voters think that an intra-executive ticket split will result in a compromise policy between the "peaks"? To begin with, even informal checks may affect presidential policy. The election of a forceful Democratic Vice President with her own electoral mandate from the American people may send a message to a Republican President about the scope of his *own* mandate. In addition, the very presence of such a Democrat in the executive branch, as a watchdog and monitor, may curb possible presidential partisanship. Further, the Vice President does have one awesome formal role—to replace the President in case of death, resignation, or incapacity. Sophisticated voters realize that they are voting for the probable set of presidential policies over the next four years, and that the presidential candidate's platform must be discounted by the possibility that he will not complete his term. Given this, the expected value of a split executive is indeed between the "peaks" and, thus, different from the expected value of a straight party ticket.

Thus far, the spatial differentiation story reflected in Figure One helps to explain why ticket splitting may be attractive to certain voters, but cannot explain why interbranch ticket splitting should be treated differently from intrabranch ticket splitting. However, the story is not complete. Various cycling and agenda manipulation models, which explain some of the weaknesses and simplifications of "The World According to Figure One," may tend to call ticket splitting into question. But, as we shall see, these models likewise fail to show why executive ticket splitting should be treated differently from interbranch ticket splitting, and thus cannot justify the *different* rules for ticket splitting reflected in current law.

One obvious simplification of Figure One is its conception of the political spectrum as a line segment—with the extreme left and extreme right graphed as polar opposites. Many commentators have noted that extremists from both wings—certain types of libertarians, perhaps—often have more in common with each other than with moderates. Perhaps the spectrum is better modeled as a circle than as a line segment—a model that, as Professor Saul Levmore and Elizabeth Cook illustrated in a related context, powerfully changes strate-

gic dynamics.[66] In the line-segment model reflected in Figure One, a system of majority rule in which outcomes are determined by median voters is stable.[67] Yet as Condorcet demonstrated centuries ago, under certain configurations of voter preferences, majority rule could lead to instability or "cycling." Even if each vote is by majority rule, rather than plurality rule, no stable majority outcome may emerge: the majority (or more precisely, successive majorities) may prefer inconsistent things.

Assume, for example, that voters must choose among three policy options on a particular issue, and have the following set of preferences:

TABLE ONE

	Voter group 1	Voter group 2	Voter group 3
First choice	A	B	C
Second choice	B	C	A
Third choice	C	A	B

In this world, if no voting group constitutes a majority of the electorate and outcomes are voted on in pairwise competition (to guarantee a majority outcome in each vote), which outcome will win? In pairwise votes, successive majorities will prefer outcome A to outcome B (with voter groups one and three in the majority); B to C (with voter groups one and two in the majority); and C to A (with voter groups two and three in the majority). The ultimate outcome of the election seems to depend on manipulation of the agenda. For example, even if voter group three constitutes only 2% of the electorate and the remaining groups each represent 49%, group three can achieve its preferred outcome (C), if A and B are voted on first, with the winner of this first heat (A) then paired against C.

A similar dynamic can occur in the ticket-splitting context. In Figure One, each of the two parties has a single-peaked platform. But suppose instead that the Democrats' preferences are double-humped, indicating that Democrats favor the modal Republican position over many compromises. That is, suppose Democrats' first choice is, of

[66] See Saul X. Levmore and Elizabeth E. Cook, Super Strategies for Puzzles and Games 27-37 (1981).

[67] This stability is a reflection of the fact that preferences are "single-peaked" along the continuum. See Duncan Black, The Theory of Committees and Elections 14-25 (1958).

course, the pure Democratic program (their "peak"), but that their second choice (a "foothill") is the pure Republican program, rather than any compromise in the middle. Suppose further that the Republicans' platform is symmetrical. Why might Republicans and Democrats have such "foothills"? Perhaps because each thinks that certain kinds of compromises are Solomonic baby-splittings leaving everyone worse off; that the "divided" government at the heart of such compromises leads to deadlock, finger-pointing, and the diffusion of governmental responsibility and accountability; or that if We cannot win a clean sweep of all offices, We prefer that They win a clean sweep, so that when things go wrong (as, of course, We believe they will), We can return to the American electorate with a triumphant "We told you so," and the electorate will have no one but Them to blame.

Under these circumstances, ticket splitting can enable the preferred outcome of a small group—say 2%—to prevail over the strong preferences of a large majority. Consider the following set of electoral preferences for Offices X and Y, respectively.

TABLE TWO

	Voter group 1 (Strong Democrats) 49%	Voter group 2 (Strong Republicans) 49%	Voter group 3 (Ticket-splitters) 2%
First choice	Democrat/Democrat	Republican/Republican	Republican/Democrat
Second choice	Republican/Republican	Democrat/Democrat	Democrat/Democrat (tie)
Third choice	Republican/Democrat	Republican/Democrat	Republican/Republican

If ticket splitting is allowed in this situation, a majority (comprised of voter groups two and three) will elect a Republican to Office X, and a different majority (comprised of voter groups one and three) will elect a Democrat to Office Y. The end result, however, is a split outcome (Republican/Democrat) that the overwhelming majority of voters—98%—considers the worst of all! This result occurs because two different issues are intertwined. Along one dimension—call it the traditional liberal/conservative dimension—ticket splitters are indeed the "swing" group between Democrats and Republicans. But along another dimension—that of "unitary officeholding"—ticket splitters are not between Republicans and Democrats, but eccentric outliers.

If, indeed, the real world looks more like Table Two than Figure One, perhaps ticket splitting should be prohibited. This could be

done by structuring the agenda in the following way. First, the electorate, in effect, votes (directly or indirectly through its legislature) on whether ticket splitting between Offices X and Y should ever be allowed. For this vote, Democrats and Republicans join together and overwhelmingly approve the ban on ticket splitting (98% to 2%). Once this ban is approved, Republicans and Democrats shift from allies to adversaries, each trying to woo the seemingly indifferent ticket splitters of voter group three.

But again, it is hard to see why intrabranch ticket splitting should be banned if interbranch ticket splitting is allowed. If Office X in Table Two is the presidency, Office Y can once again be seen as either Congress or the vice-presidency. Indeed, the double-humped pattern reflected in Table Two seems far more comprehensible in the *interbranch* context. As we have seen, one plausible rationale for this configuration focuses on concerns about deadlock and diffusion of responsibility—concerns that loom larger in the interbranch context than in the intrabranch interaction between the President and Vice President.[68]

Moreover, policymakers cannot really know whether the electorate's preferences will *always* resemble Table Two more than Figure One. Therefore, instead of enacting a permanent ban on federal executive ticket splitting, legislatures should allow voters to vote for President and cast *conditional* votes for Vice President. In 1988, for example, the ballot could have read as follows:

1. President
   Check One:
   — Bush
   — Dukakis
2. Vice President
(A) Check One:
   If Bush is elected President:
   — Quayle
   — Bentsen
(B) Check One:
   If Dukakis is elected President:
   — Quayle
   — Bentsen

[68] See infra notes 79-82 and accompanying text.

With this system in place, strong Democrats who believe in unitary government (members of voter group one) would, for example, have been able to vote for Dukakis for President, yet for Quayle as Vice President in the event Bush was elected.[69] If the actual pattern of preference were indeed akin to that in Table Two, a split ticket would not have been elected.

In the end, then, these models fail to explain the central anomaly:[70] why do we allow ticket splitting in virtually every electoral contest, but not between President and Vice President?

B. Political Theory and Policy Justifications

Not all state electoral decisions can be best explained or modeled by simple law and economics tools. The structure of primary elections in presidential campaigns, for example, reflects a public policy concern over the legitimacy of the officials who are ultimately elected; primaries narrow the field and thus ensure that the ultimate winners have a large enough percentage of the popular vote so as to have a tenable claim to electoral legitimacy. We now turn to examine some policy

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[69] We are aware that adding complexity to the ballot can increase "transaction costs" of voting and change overall voting behavior, see infra note 85 and accompanying text. Yet our proposed ballot does not seem overly complicated—at least in a two-party world—and would usefully focus every voter's attention on the real choice to be made: if my first-choice presidential candidate loses, would I still prefer my first-choice vice-presidential candidate? For a similar proposed use of conditional ballots in the corporate takeover context, see Lucian A. Bebchuk, Toward Undistorted Choice and Equal Treatment in Corporate Takeovers, 98 Harv. L. Rev. 1695, 1747-52 (1985).

If a conditional ballot were deemed too confusing, a roughly similar result could be obtained by simply holding the election for Vice President twenty-four hours after the presidential election results are tabulated.

[70] In discussing this "anomaly," we do not mean to suggest that all prohibitions on ticket splitting are equally feasible. Vote tying between the legislative and executive branches may raise constitutional issues not present when a state ties votes for President and Vice President. Interbranch conditional ballots also raise other complexities. It is not clear, for example, whether voters should vote for a President and then cast conditional votes for congressional representatives depending upon who wins the presidency, or vice versa. As a practical matter, this is not a real issue in the executive election context, where the President clearly comes first. And if the presidential election is conditioned upon the congressional election, should the presidential election in a state be based on that state's congressional outcome or on the nation's congressional outcome?

Although the constitutional and practical complexity of conditional ballots in the interbranch context might be thought to justify the "anomaly," most of these complexities (other than the ordering of offices) would not arise under our suggested "twenty-four hour waiting period," see supra note 69.

concerns that might animate the prohibition on ticket splitting within the federal executive. In assessing the adequacy of these possible justifications, bear in mind that the justifications must do more than suggest that a wise voter should toe the party line; rather, they must be so compelling as to justify removal of the choice from individual voters altogether. Ideally they also should distinguish the federal executive from the interbranch context (where ticket splitting is almost always permitted) and the state executive context (where some states allow voters to split their votes between parties[71]).

The strongest policy considerations relate to the consistency of the federal executive. In this context, consistency objections take two forms: internal and temporal. Internal consistency arguments counsel against a divided executive out of concern over the damage potentially done by a Vice President acting as a loose cannon—challenging, undermining, and contradicting the President's efforts to set policy. This concern distinguishes the federal executive context from that of the states, to some extent, because a loose cannon would be most dangerous in the foreign affairs domain, where state executives play no significant part and where the President often does speak in the voice of the nation.[72]

This internal consistency concern, although plausible, does not seem to justify the prohibition on ticket splitting. To begin with, loose cannons have existed under the current system.[73] Indeed, the current system may affirmatively tend to create loose cannons: a party might encourage its presidential candidate to pick as a running mate someone whose geographical ties and political leanings are somewhat different from (and thus in tension with) his own in order to "balance the ticket" and attract support from as broad an electoral base as possible. Moreover, the threat of a Vice President acting as a loose can-

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[71] See supra note 5.

[72] See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-21 (1936) (noting that in the international field, the President is the "sole organ" of the federal government). By invoking *Curtiss-Wright*, we do not necessarily endorse the entire opinion or all that it has come to represent.

[73] Aaron Burr is, ironically, a good example. As one commentator put it, President "Jefferson ignored Burr on all matters of state and even in questions of patronage involving Burr's home state of New York. As presiding officer of the Senate, Burr made clear he was not Jefferson's agent, breaking one tie vote against an administration bill." Witcover, supra note 15, at 22. Burr is by no means the only example. Both Franklin Roosevelt's first and second Vice Presidents, John Garner and Henry Wallace, were often at odds with the policies of the President they purported to serve. Id. at 69-83.

non in a split executive is not as great as some would imagine. Unlike state lieutenant governors, in whom state constitutions often vest real authority, the Vice President has little inherent authority and is, in reality, only as powerful as the President chooses to make him. The only constitutional function assigned to the Vice President is to preside over the Senate—a function that is, as the soon-to-be-Vice President Thomas Jefferson pointed out in January of 1797, more legislative than executive.[74] Thus, there are substantial legal constraints on a would-be loose cannon. There also are significant political constraints, at least on Vice Presidents who have further political aspirations.

Concerns about temporal consistency focus on the problems that arise when a President dies or leaves office during his term. Temporal consistency arguments stress the importance of continuity within a four-year administration, especially as it relates to foreign affairs and the way other nations perceive the United States. Like the concern over internal consistency, however, temporal consistency does not appear to justify the peculiar cluster of current rules about vote tying. First, a serious concern for temporal consistency is in tension with many features of our Constitution, including the four-year presidential term and the Twenty-Second Amendment, which limits Presidents to two terms. Recognizing temporal consistency as a major goal of our electoral system would also seem to require amendment of the statutes governing the succession of the President, so that succession would depend upon party affiliation.[75] Few have seriously advocated such a total overhaul of the current system. Second, as noted above, the current system—with its tendency toward "balanced" tickets—creates a significant danger of temporal inconsistency. This proposition, too, has historical support.[76]

A more general response, which applies to internal as well as temporal consistency, is that political consistency is just one important

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[74] See supra note 37 and accompanying text.

[75] Currently, for example, the Speaker of the House—in the last quarter of a century, typically a member of the opposing party—stands after the Vice President in the line of succession, only two heartbeats away. 3 U.S.C. § 19 (1988).

[76] There was little continuity when Vice Presidents John Tyler, Andrew Johnson, and Theodore Roosevelt replaced Presidents who died in office. See Bruce A. Ackerman, We the People 84 (1991); Witcover, supra note 15, at 35-37, 42-45. See also Ackerman, supra, at 333 n.7 (stating that "this kind of ideological instability is a systematic consequence" of the current system of vice-presidential selection).

factor among many to be weighed against experience and competence when citizens cast their votes. The important factors being weighed by the citizenry may well be changing, with the result being more general ticket splitting. Many commentators agree that the rise of television and the public's increased focus on individual personality, rather than party platforms, partially explain the increased incidence of ticket splitting.[77] If a key issue today is whether the people have confidence in a particular candidate (rather than her party), then an ability to instill such confidence would be a major qualification of the Vice President. In the event Bush died, became ill, or resigned, would the nation want Quayle rather than Bentsen speaking in its name? The polls suggest perhaps not, even though Bentsen's message might differ more substantially from that of Bush and, thus, raise consistency concerns.

Of course, if policymakers think consistency is an important consideration often overlooked by voters, paternalistically binding voters may make some sense. But if voters are not focusing on consistency, they are also probably failing to focus enough on the more general issue of presidential succession—which suggests that they are also not considering adequately a Vice President's presidential competence.[78] There is no reason to think that voters are focusing on competence without considering consistency. And if voters are focusing on neither competency nor continuity, untying the ticket would force them to do so.

A final policy concern raised by executive ticket splitting is the general specter of "divided" government.[79] Many lawyers and academies decry the current pattern of Republican Presidents pointing fingers at Democratic Congresses—and vice versa—with voters left wondering whom to credit for good things and whom to blame for bad ones.[80] Once again, however, this concern seems to prove too much. To begin with, complete acceptance of this critique seems to require rethinking and possibly even radical amendment of the main struc-

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[77] See supra note 14 and accompanying text.

[78] See Witcover, supra note 15, at 7-8 (suggesting that some voters did not pay enough attention to Quayle's competence to succeed Bush should Bush fail to complete his term).

[79] Indeed, concerns about internal and temporal consistency can be seen as particular aspects of this more general specter.

[80] Even Professor Fiorina, who offers various reasons for allowing ticket splitting, expresses some concern about the diffusion of responsibility and accountability created by divided government. Fiorina, supra note 1, at 109-11.

tures of our Constitution—federalism, bicameralism, and separation of powers. Each of those systems of checks and balances, after all, tends to diffuse responsibility and can increase the likelihood of deadlock. Indeed, Lloyd Cutler and other prominent critics of "divided" government have proposed various constitutional amendments to move America towards a parliamentary system that more closely ties congressional and presidential elections and renders cabinet officials eligible to serve in Congress.[81]

But, as these proposals themselves reveal, if divided government is the problem, perhaps voters should not be allowed to split their tickets between President and Congress or between House and Senate, as they currently can. The divided-government theory thus fails to explain the anomaly with which we began: why are voters allowed to split their tickets in other ways, but not between President and Vice President? Indeed, the divided-government justification suggests that, if anything, current ticket-splitting rules are exactly backwards. Allowing voters to elect legislative and executive officials of different parties creates real problems of deadlock and diffusion of accountability, but these concerns do not loom large in the intra-executive context. Excepting the now rare case of a Senate tie, the Vice President—unlike Congress—lacks formal power to block a presidential initiative. More importantly, voters know that the *President*, and not his Vice, is ultimately responsible for all executive policy. Vice Presidents simply have a voice, not a vote. Put another way, even the parliamentary model embraced by critics of divided government provides room for an opposition party in Congress. Because it lacks the votes to thwart the ruling government coalition, the opposition party cannot diffuse responsibility or deadlock policy. It can, however, serve as a useful watchdog, alerting the public to possible government misconduct and self-dealing. An opposition-party Vice President could serve a precisely analogous role within the executive.[82]

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[81] See, e.g., Lloyd N. Cutler, Now is the Time for All Good Men . . . , 30 Wm. & Mary L. Rev. 387, 400-02 (1989) (discussing various proposals); Lloyd N. Cutler, Party Government Under the Constitution, *in* Reforming American Government: The Bicentennial Papers of the Committee on the Constitutional System 93, 104-05 (Donald L. Robinson ed. 1985) (same).

[82] Of course, if the perceived problems of a divided government were great enough to move a majority of Americans to support vote tying between Congress and the presidency, it might not make sense to untie voting within the federal executive branch, because the majority's will could be undone if a Vice President from the opposition party were to succeed the President upon death or resignation.

C. *Historical Justifications*

It is, of course, virtually impossible to prove a negative—that is, to show that no good argument exists in support of the current system of highly selective vote tying. But nothing in the historical record that we have uncovered reveals a considered policy judgment by any state in support of the current anomaly. Although we have not undertaken an exhaustive state-by-state historical study, our analysis indicates that the vote-tying policy found in state election codes and ballots emerged as a direct result of the move in the early nineteenth century to a system of general elections for federal executive offices. Because the actual election of the President and Vice President was effected by electors at the electoral college, it made sense for states to structure the general elections to allow the general electorate to choose between electors pledged to particular presidential and vice-presidential candidates. And naturally, those persons who wanted to be electors were those most deeply involved in politics—party politics. As a result, the electoral college candidates were persons who had strong affiliations with one of the existing parties. Thus, the current system gradually evolved, in which the major parties themselves choose the electoral college candidates, who are then voted for at the general election. As noted above, ballots often do not include the names of the electoral college candidates themselves;[83] election code provisions in many states provide that a vote for a party's candidates is a vote for the electors pledged to that party.[84]

It should come as no surprise that evolving state electoral systems during the nineteenth century sought to take advantage of existing party structures and machinery. Remember, ticket splitting is essentially a phenomenon of the last fifty years.[85] In the nineteenth cen-

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[83] See supra note 51.

[84] See Ray v. Blair, 343 U.S. 214, 229 (1952) (stating that "in one form or another, [these states] allow a vote for the presidential candidate of the [party's] national convention[] to be counted as a vote for his party's nominees for the electoral college").

[85] See supra notes 6-13 and accompanying text. One set of reasons that "[t]icket-splitting was almost unheard of in the nineteenth century," Wilson, supra note 10, at 190, derives from the ballots then in general use. In the mid-nineteenth century, "unofficial" ballots were the norm. These ballots were printed by the parties themselves, and each party's ballot listed only its own candidates. A voter wanting to split his ticket had to engage in a complicated process of combining different parties' printed ballots, crossing out some printed entries and/or writing in others. In the late nineteenth century, states shifted to official ballots, printed by the government, that listed candidates of all parties; but many states structured these ballots by

tury, it made perfect sense for states to allow parties to put forth electors pledged to party tickets before the general election. But there is no reason a state could not restructure its ballot and election provisions so as to select collegians *after*, rather than before, the general election—and to select them based on the results of a general election in which voters are free to vote for a President and Vice President of opposing parties. Those states that permit write-in votes in the presidential election already implicitly recognize this option: because there are no known collegians pledged to a write-in ticket at the time of the general election, a state would be forced to select collegians *after* the general election if a write-in ticket were ever to garner a plurality of the state's popular vote. Because no presidential write-in ticket has ever won in any state, states have not clearly focused on their options in this regard.[86]

In short, the current system of selective vote tying seems more an inherited product of the nineteenth century's political climate and the twentieth century's inattention than a deliberate, self-conscious choice. No one seems to have clearly framed the question, or tried to answer it, as we have here. Mere inattention, however, is not the whole story; inertia also looms large in this area. For example, it is now widely understood that the current electoral system allows a candidate to win an outright majority of the popular vote, yet lose in the electoral college. Indeed, in the 1988 election, which Dukakis lost by more than 7 million votes, if fewer than 600,000 voters in certain key states had switched sides, Dukakis would have won in the electoral

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simply printing the parties' slates in parallel columns. To vote for every candidate of a single party, the voter merely had to mark the top of the appropriate column. In contrast to this "party-column" (or "Indiana") ballot, an "office-bloc" (or "Massachussetts") ballot lists all candidates by office; a voter cannot vote a straight party line by making a single mark. Unsurprisingly, states that use office-bloc ballots tend to experience more ticket splitting than those that do not. See Jerrold D. Rusk, The Effect of the Australian Ballot Reform on Split Ticket Voting: 1876-1908, 64 Am. Pol. Sci. Rev. 1220 (1970).

[86] As noted earlier, the constitutionality of state efforts to bind collegians to vote a certain way after the state's general election has not been definitively resolved, although the logic of *Ray v. Blair* strongly suggests that states can bind collegians any way they choose. See supra note 47. A state is certainly free, however, to pick collegians it *thinks* will vote a certain way at the electoral college. Picking collegians put forth by parties (regardless of whether such parties require prospective collegians to make a pledge) may give the states a comfortable margin of confidence, because party zealots are not likely to deviate from the party line when voting in the electoral college. But states surely could devise a means for picking collegians after the general election, who the states would be confident would abide by the wishes of the state's electorate, even if the electorate favored a split executive ticket.

college, even though Bush would have received more than 52 percent of the vote, compared to Dukakis' 46 percent.[87] Had this actually happened in 1988, who doubts that a serious crisis of democratic legitimacy might have arisen?[88] Who doubts that the Constitution might well have been swiftly amended in favor of de jure popular election, or something close, to prevent the repeat of such a democratic nightmare? But if all this is so, why, apart from inertia—blind inertia, stupid inertia—are we sitting around waiting for a constitutional accident to occur? Perhaps the same phenomenon is at work in the anomaly we have identified here. If, God forbid, something were to happen to President Bush, is there any doubt that the American electorate would seriously rethink the current vote-tying rules? And if not, why are we waiting for disaster to strike?

IV. Advantages of Allowing Ticket Splitting

The previous section attempted to debunk potential justifications for the prohibition on executive ticket splitting. In that section, we discovered not only that no obvious justification exists for a prohibition on ticket splitting, but also that several potential benefits accrue from a contrary rule. For example, allowing voters to choose their Vice President in an independent contest forces them to focus on a potential Vice President's presidential competence. Additionally, a Vice President from an opposition party, if selected, could serve as a watchdog for the American people by sniffing out possible executive misconduct and self-dealing. In this Part, we identify additional advantages that might be gained by rethinking the current system.[89]

First, a move away from the current system also moves us away from the phenomenon of ticket balancing. If ticket splitting were permitted, each party might well tend to choose presidential and vice-

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[87] See America Votes 1990, at 9 (Richard M. Scammon & Alice V. McGillivray eds. 1991) (showing that Dukakis could have won California, Pennsylvania, Illinois, Michigan, Missouri, Maryland, Connecticut, Colorado, New Mexico, and Vermont—and, thus, the presidency—if 600,000 voters cast votes for him rather than for Bush).

[88] Ironically, one possible democratic *deus ex machina* in this scenario—the mass defection of Dukakis-pledged electoral collegians in favor of Bush—may well have been foreclosed by the seemingly democratic practice of trying to legally bind electors on the outcome of *state* elections. See supra notes 26-28 and accompanying text.

[89] We do not intend this section to be an exhaustive discussion of all potential benefits of untying the executive ticket. Our purpose in this section, and throughout this Essay, is to provoke serious thought and discussion of the possible benefits and drawbacks.

presidential candidates who represented the same segment of the party. If (notwithstanding the voters' option to split the ticket) a party was able to capture both the presidency and the vice-presidency, the internal and temporal consistency concerns identified earlier would actually be ameliorated.

Even if a divided executive were elected, significant benefits might accrue. Most important among these would be a more bipartisan foreign policy. Many scholars, most notably Harold Koh, have commented on the shift in foreign-affairs power this century to the hands of the President.[90] One unfortunate consequence of this shift has been the loss of bipartisanship in the decisionmaking process, with the party outside the White House being frozen out. A split executive could lead to a broader-based foreign policy.

An even more important benefit of allowing ticket splitting, and one that obtains whether voters exercise the option, is the improved quality of vice-presidential candidates. If parties know that the vice-presidential candidate must compete directly against the opposing party's vice-presidential candidate, they will be less likely to put forth weak candidates for that office. Thus, had voters been free to vote for Bush and Bentsen together, it is very unlikely that Bush would have picked a running mate as untested as Quayle. This is not to say that Bush expected his choice of Quayle to be as controversial as it was; it is only to say that had voters been able to split their tickets, Bush never would have run the risk. In short, just as a President need not actually exercise his veto in order to shape legislation, voters need not exercise the split-ticket option to affect the quality of the candidates put forth by the parties.

Finally, and perhaps most importantly, allowing voters to elect executive officials from different parties reflects due respect for voter sovereignty. If, in a democracy, the voters truly prefer a divided executive—and we have seen good reasons why they might—why should the popular will be frustrated?[91]

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[90] See Harold Hongju Koh, The National Security Constitution 117-49 (1990).

[91] We have, of course, already anticipated and addressed two possible answers to this question: paternalism and voting paradoxes. See supra Part III.

V. CONCLUSION

In the end, we have been unable to find any obviously compelling reason for the prohibition on executive ticket splitting in federal elections. Each state is free to change its rules—tomorrow, if it so desires; such a change would not require a constitutional amendment or a change in federal law. Moreover, if even one state were to do so, the outcome of presidential and vice-presidential elections could conceivably be changed. Given the advantages of permitting choice that we have identified, combined with the strong preference for voter choice inherent in our constitutional democracy, one or more states may want to consider experimenting. At the very least, states should come up with a better reason for the status quo than unthinking inertia.

What would have happened if such an experiment had been tried in 1988? At first blush, it might seem that Lloyd Bentsen would be Vice President today, for he may well have beaten Quayle in an "untied" election. But, as we noted above, had ticket-splitting ground rules been in place in 1988, Quayle might well have never been nominated. At the very least, the Republican party would have vetted its potential vice-presidential candidates more carefully, perhaps in the presidential primary system or even via a separate vice-presidential primary. From the proper ex ante perspective, it is clear that the real winner in our hypothetical 1988 contest might not have been the Democrat Bentsen, but a Republican like Bob Dole or Jack Kemp. Indeed, Bush himself might have benefited greatly, even if Quayle had continued to be the vice-presidential nominee. Instead of being obliged to run a three-legged race with an electoral gimp, Bush would have been "untied" and might have received even more votes than he did.

As we hope these last points indicate, our explication of the ticket-splitting issue is not some sly attempt to manipulate sensible electoral rules in order to get Democrats into the White House through the back door of the vice-presidency. If a majority of voters prefer a unitary Republican executive, so be it. But even then, shouldn't our electoral rules be designed to put the *best* Republican Vice President in the White House?

Perhaps Dan Quayle is the best. Perhaps the American public has been unfair to him. Historically, Vice Presidents have been the butt of many unfair jokes. Yet, once again, this sad fact is a predictable consequence of the current electoral system. The Vice President has virtually no constitutional duties by which he can distinguish himself

once in office, and to make matters worse, he lacks any *personal* electoral mandate from the American people. The generic Vice President is inherently an awkward and slightly ridiculous figure, whose main asset is a beating heart and whose main job is sitting around the White House, unobtrusively waiting for the President to die. Of course, this role as next-in-line is an awesome one, worthy of great respect, but it is a role obscured by current ticket-splitting prohibitions. Instead of focusing on this key role, and this alone, by unbundling the executive ticket, current voting rules encourage voters to view the vice-presidential candidate as yet another plank in the *presidential* candidate's platform. Instead of giving him an independent electoral mandate,[92] current voting rules treat the Vice President more like a cabinet department head—which he is not—than the next President of the United States—which he may be.

If Dan Quayle had to run on his *own* this year and nonetheless won, maybe the jokes would stop.

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[92] At least one commentator has suggested a constitutional amendment to encourage the selection of better Vice Presidents. Witcover proposes that a general election be held only for the presidency, with the winner then submitting his or her vice-presidential choice to Congress for confirmation. See Witcover, supra note 15, at 415-17. Yet, under Witcover's scheme, the Vice President would still lack an independent electoral legitimacy—a factor Witcover acknowledges as contributing to the lack of respect and effeetiveness that plague many who hold the offiee. See id. at 416. Elsewhere, Witcover fleetingly touches upon allowing ticket splitting and concludes, without devoting any real attention or analysis to the possibilities, that it would be "too perilous to accept." See id. at 408.