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# YALE LAW & POLICY REVIEW

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## Unelectable Is Ineligible

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*Debates over a three-term president have largely centered on the text and history of the Twenty-Second Amendment. Some argue that the Twenty-Second Amendment, in its plain language, merely precludes a twice-elected president from being “elected” to another term, but not from occupying the Office of the President altogether. Yet much of this modern conversation overlooks an earlier, and more foundational, constitutional moment—the Federal Convention of 1787. The final voted-on language of Article II’s Executive Eligibility Clause used the word “eligible” in its first half and “elected” in the second. Throughout the Convention, the Constitution’s Framers used “elected” and “eligible” interchangeably to describe the president. At the time of the Constitution’s ratification, it was understood that one could not be electable to the presidency without being eligible for it, and vice versa. This semantic history, largely unexamined in Twenty-Second Amendment scholarship, provides further support for the view that a two-term president is not only barred from election, but is ineligible altogether.*

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## INTRODUCTION

Since the start of President Trump’s second term, legal and political commentators have entertained various theories under which a two-term president might seek a third term in office.<sup>1</sup> Perhaps Trump and those around him are not serious about his seeking a third term.<sup>2</sup> Or perhaps they are.<sup>3</sup> In any event, third-term aspirations are not unique to Trump—Presidents Grant, Theodore Roosevelt, and Franklin Delano Roosevelt

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1. See, e.g., Alia Shoaib, *Donald Trump Third Term Proposed as GOP Rep Pushes to Repeal 22nd Amendment*, NEWSWEEK (Oct. 10, 2025), <https://www.newsweek.com/donald-trump-third-term-proposed-randy-fine-proposes-22nd-amendment-repeal-gaza-ceasefire-10859585> [<https://perma.cc/8288-E3CJ>]; Neil Vigdor, *No, Trump Cannot Run for Re-election Again in 2028*, N.Y. TIMES (Oct. 1, 2025), <https://www.nytimes.com/article/trump-third-term-2028-constitution.html>.
  2. See Kaia Hubbard, *What Has Trump Said About Seeking a Third Term? Here Are 6 Remarks He Has Made About Running Again*, CBS NEWS (Aug. 5, 2025), <https://www.cbsnews.com/news/what-trump-has-said-about-pursuing-a-third-term> [<https://perma.cc/98YM-WZLJ>] (quoting President Trump joking, “It will be the greatest honor of my life to serve, not once but twice—or three times or four times . . . No, it will be to serve twice.”).
  3. See, e.g., *Real Time with Bill Maher: Steve Bannon vs. The Constitution* (HBO television broadcast Apr. 15, 2025), available at <https://www.youtube.com/watch?v=hsGaj6WFrX0> [<https://perma.cc/B4WJ-7D9E>] (featuring former Senior Counselor to President Trump Steve Bannon, explaining that “President Trump is going to run for a third term and President Trump is going to be elected again—on the afternoon of January 20, 2029, he’s going to be President of the United States”); Khaleda Rahman, *‘Trump 2028’ Talk Is Ramping Up Among Republicans*, NEWSWEEK (Oct. 13, 2025), <https://www.newsweek.com/trump-2028-talk-ramping-up-republicans-10869797> [<https://perma.cc/VS5S-Q3JU>] (“Steve Bannon, a Trump ally who was a senior adviser to him during his first administration, repeated his claim that there are ‘many different alternatives’ that would allow the president to serve again.”); Erica L. Green, *Trump Says He’s ‘Not Joking’ About Seeking a Third Term in Defiance of Constitution*, N.Y. TIMES (Mar. 30, 2025), <https://www.nytimes.com/2025/03/30/us/trump-third-term.html>.

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(“FDR”) each sought a third term in office to varying degrees of success.<sup>4</sup> Those aspirations ended, or should have ended, with the 1951 ratification of the Twenty-Second Amendment prohibiting election after two terms.<sup>5</sup> But they did not. From the Eisenhower to the Clinton presidencies, some outside the White House hinted at potential Twenty-Second Amendment end runs.<sup>6</sup> Today, hints come from inside.

Constitutional debates over a three-term president have largely centered on the text and ratification history of the Twenty-Second Amendment itself.<sup>7</sup> Some argue that the Twenty-Second Amendment, in its plain language, merely precludes a two-term president from being “elected” to another term, but not from occupying the Office of the President altogether.<sup>8</sup> This reading has prompted careful examination of the relationships among amendments and the constitutional moments that shaped them: the Twelfth Amendment, adopted after the contentious Election of 1800; and the Twenty-Second, passed in the wake of FDR’s four-term presidency.<sup>9</sup>

Yet much of this modern conversation overlooks an earlier, and more foundational, constitutional moment—the Federal Convention of 1787. It

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4. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 433-38 (2005).
  5. U.S. CONST. amend. XXII (“No person shall be elected to the office of the President more than twice . . .”).
  6. *See, e.g.*, Stephen W. Stathis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?*, 7 CONST. COMMENT. 61, 76-77 (1990) (describing discussion over President Eisenhower’s eligibility to run for vice president); Michael C. Dorf, *The Case for a Gore-Clinton Ticket*, FIND LAW (July 31, 2000), <https://supreme.findlaw.com/legal-commentary/the-case-for-a-gore-clinton-ticket.html> [<https://perma.cc/5FDP-2PUG>]. *See generally* BRIAN C. KALT, *CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES* 228 n.7 (2012).
  7. *See* AMAR, *supra* note 4, at 622 n.8; Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 85 MINN. L. REV. 565 (1999).
  8. *See, e.g.*, Peabody & Gant, *supra* note 7; Phillip Bobbitt, *The Constitutional State* 7-9 (2025) (unpublished manuscript) (on file with author) (arguing, purposively, that despite the text of the Twenty-Second Amendment, the unconstitutionality of “[a] president, having served two terms in office, [who] may nevertheless hold a third term if he is subsequently elected vice-president and the elected president resigns” is “too obvious [and] too definitive”).
  9. AMAR, *supra* note 4, at 433-38.

was there that the word “eligible” first entered the Constitution. Its only uses within the unamended text are in reference to executive eligibility. Records, drafting notes, and committee reports from the Convention reveal that “eligible” and “electable” were used interchangeably during constitutional debates in Philadelphia. Although the Executive Eligibility Clause, as printed in our Constitution, contains only the word “eligible,” the final voted-on language of the Clause used the word “eligible” in its first half and “elected” in the second. That was the language ennobled by the Convention-goers. This semantic history, unexamined in modern Twenty-Second Amendment scholarship, provides further support for the view that a two-term president is not only barred from third-term *election*, but is *ineligible* for a third term altogether.

## I. MODERN DEBATE

### A. Potential Third-Term Loopholes

The Twenty-Second Amendment says only that “[n]o person shall be elected” to a third term, and not that “no person shall be eligible” for a third term. Read strictly, the Amendment might allow for at least three “gambits” that a two-term president could use to skirt its prohibition. Each of these relies on the simple premise that a third-term hopeful could ascend to the presidency without being “elected” to it. To alleviate confusion, allow me to analogize these gambits to the current Trump administration—with familiar faces in their familiar offices. First, Trump could run as J.D. Vance’s vice president then assume the Executive Office following Vance’s abdication.<sup>10</sup> Alternatively, Trump could forego a presidential ticket altogether and become vice president *ex post*. Imagine a winning J.D. Vance–Kristi Noem ticket followed by Noem’s resignation from the vice presidency. President Vance could then appoint Trump to be his vice (with bicameral approval),<sup>11</sup> only to immediately resign, leaving us with effectively the same result as our first scenario. Lastly, Trump could be placed elsewhere down the chain of presidential succession, say as

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10. Hansi Lo Wang, *Presidents Can be Elected Twice. Trump Could Try End Runs Around That, Experts Say*, NPR, Mar. 31, 2025, <https://www.npr.org/2025/03/31/nx-s1-5191889/is-trump-running-for-a-third-term> [<https://perma.cc/9UBS-V5SW>]. See generally Peabody & Gant, *supra* note 7.

11. U.S. CONST. art. 1, § 2, cl. 5.

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speaker of the House (*or* president *pro tempore* *or* secretary of state),<sup>12</sup> and ascend to the presidency in accordance with the Succession Act.<sup>13</sup>

Bruce G. Peabody and Scott E. Gant posit essentially these three circumventions—along with some less-applicable variants like if the president were to die or if there were an Electoral College tie—and find them to be constitutionally permissible based on the text, legislative history, and spirit of the Twenty-Second Amendment.<sup>14</sup> Their arguments are nuanced and deserve treatment beyond what this Comment can provide. But at bottom, Peabody and Gant hang their hats on the semantic difference between being “elected” to an office and serving in it.<sup>15</sup>

Akhil Reed Amar and Eugene Volokh rely on the Twelfth Amendment to rebut this view on intratextual and originalist grounds. The Twelfth Amendment, passed in 1804 to overhaul vice presidential selection, states that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”<sup>16</sup> Amar notes that both the words “eligible” and “elected” share a Latin root and that standard dictionaries—even *today*—list “electable” as one of the

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12. The Speaker of the House, arguably, need not be a member of the House of Representatives. *Id.*; see also Scott Bomboy, *The Speaker of the House’s Constitutional Role*, NAT’L CONST. CTR.: BLOG (Oct. 4, 2023), <https://constitutioncenter.org/blog/the-speaker-of-the-houses-constitutional-role> [<https://perma.cc/SQ5R-5XFT>].

13. There are other proposed gambits that differ semantically but largely fall under these umbrellas. A third-term seeker could serve only as “acting president,” which could apply under the first- and second-described gambits. See Peabody & Gant, *supra* note 7, at 568-69. Alternatively, one could ascend to the presidency subsequent the death of the president, but this is not too distinguishable from the gambits above and not particularly salient in the present Trump Administration conversation. The House could also appoint a third-term seeker to the presidency when no candidate reaches the sufficient Electoral College threshold, but this again turns on the conversation had herein and would be difficult to employ (requiring that the electorate split in such a coordinated way to achieve an intentional tie). See *id.* One could also see the Presidential Succession Act amended to allow unelectable presidents to remain eligible through succession. See AMAR, *supra* note 4, at 436, 622 n.10. Such a possibility is discussed *infra* notes 25-27 and accompanying text.

14. See Peabody & Gant, *supra* note 7, at 569-70.

15. *Id.* at 565-66.

16. U.S. CONST. amend. XII; see also AMAR, *supra* note 4, at 622 n.8.

definitions of “eligible.”<sup>17</sup> And, as Volokh explains, nineteenth-century legal dictionaries from the Twelfth Amendment’s ratification define “eligible” as a “capacity to be elected.”<sup>18</sup> If the Twelfth Amendment’s “ineligible” subsumes “electable” in its original meaning, then a two-term incumbent would be barred from being elected to or serving as vice president in the first place. Thus, a two-term president could neither be elected nor appointed vice president.<sup>19</sup>

Peabody, of course, rejects this view methodologically, citing the conspicuous omission of “eligible” in the Twenty-Second Amendment but inclusion in the Twelfth.<sup>20</sup> This Comment does not purport to be an analysis of competing strains of interpretive method—nor need it be. Even accepting Amar and Volokh’s arguments as true, they remain limited to our first and second gambits, those where a third-term hopeful passes through the vice presidency. As Peabody explains, “[S]uch readings of the Twelfth Amendment, even if sound, only prohibit *some* scenarios through which a twice-elected President might again serve as President.”<sup>21</sup> One could still “succeed to the presidency through a statute,” that is, through the Presidential Succession Act.<sup>22</sup> The current Act stipulates that those “[not] eligible to the Office of President under the Constitution” are excluded from the line of succession.<sup>23</sup> Peabody and Gant would say this permits third-term succession and Amar would say it does not.<sup>24</sup>

What if the Succession Act were amended?<sup>25</sup> Congress could jettison the eligibility provision, leaving only the Twenty-Second Amendment’s

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17. AMAR, *supra* note 4, at 622 n.8.

18. Eugene Volokh, *Bill Clinton for Vice President?*, REASON: VOLOKH CONSPIRACY (Sep. 18, 2015), <https://reason.com/volokh/2015/09/18/bill-clinton-for-vice-presiden> [<https://perma.cc/6BJS-MAG9>].

19. AMAR, *supra* note 4, at 622 n.8.

20. Bruce G. Peabody, *The Twice and Future President Revisited: Of Three-Term Presidents and Constitutional End Runs*, 122 MINN. L. REV. HEADNOTES 121, 127-130 (2016).

21. *Id.* at 129 (emphasis added).

22. *Id.*

23. 3 U.S.C. § 19(e) (2024); AMAR, *supra* note 4, at 622 n.10.

24. AMERICA’S CONSTITUTION: *Third Time, No Charm*, at 1:01:00 (PodBean, Apr. 1, 2025), <https://amaricasconstitution.podbean.com/e/third-time-no-charm> [<https://perma.cc/3B46-DKV4>]; *cf.* Peabody & Gant, *supra* note 7, at 634 n.283.

25. *Cf.* Peabody & Gant, *supra* note 7, at 634 n.283.

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“elected” language. Such legislation would be far easier to accomplish politically than a constitutional amendment aimed at shoring up a third-term ban.<sup>26</sup> Even Amar admits that a new act, passed by a narrow majority in Congress, could permit presidential third terms through succession with both a presidential and vice presidential vacancy.<sup>27</sup>

#### B. Where is Article II?

By and large, contemporary historical analyses of the words “eligible” and “elected” have ignored Article II’s Eligibility Clause.<sup>28</sup> The Eligibility Clause lays out a basic roadmap of certain constitutional criteria to hold the Office of the President and reads:

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be *eligible* to the Office of President; neither shall any Person be *eligible* to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.<sup>29</sup>

In other areas, this Clause has been, and indeed continues to be, hotly debated.<sup>30</sup> But relevant to a hypothetical third-term president, this Clause uses the word “eligible” twice. In fact, these are the only two uses of the word “eligible” in the unamended text of the Constitution.

The Eligibility Clause is every bit as important in assessing the constitutionality of presidential third terms as the Twelfth. If the words

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26. Cf. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 9-13 (1993).

27. *AMERICA’S CONSTITUTION*, *supra* note 24, at 1:02:49. Amar’s argument is arguably complicated by his own view that the Presidential Succession Act is unconstitutional. *See generally* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 *STAN. L. REV.* 113 (1995). But for the purposes of this argument, it suffices to accept the Act as the law of the land.

28. Volokh mentions this Clause in his introduction but does not connect it to Twenty-Second Amendment loopholes. Volokh, *supra* note 18. Peabody & Gant mention Article II only to argue that the Twelfth Amendment’s eligibility provision applied only to the Article II eligibility criteria, without looking to Convention records. Peabody & Gant, *supra* note 7, at 619.

29. U.S. CONST. art. 2, § 1, cl. 5 (emphasis added).

30. *See, e.g.*, Paul Clement & Neal Katyal, *On the Meaning of “Natural Born Citizen,”* 128 *HARV. L. REV. F.* 161 (2014).

“eligible” and “elected” were substitutable with respect to whether one could hold office, then perhaps all three constitutional provisions—the Eligibility Clause and the Twelfth and Twenty-Second Amendments—could be read together. The Twenty-Second Amendment, therefore, could be read so as not to disturb background eligibility principles in the Constitution. If being unelectable to an office makes one ineligible for it, no amendment would be necessary to shore up executive term limits. In effect, this Comment seeks to discern the original meaning of “eligible” as it is used in Article II. Amar and Volokh have shown that “eligible” subsumed “electable” in 1804. The Eligibility Clause is but another source—of text, history, and structure—which suggests that “eligible” and “electable” were fungible in 1787. Perhaps this Clause has gone largely unexplored in third-term debates because, facially, it applies only to age, citizenship, and residency requirements.<sup>31</sup> Term limits lay beyond its reach. But the Constitution is one document, intricately woven and profoundly interconnected. It demands to be read as one whole.<sup>32</sup>

## II. EVIDENCE FROM THE CONSTITUTIONAL CONVENTION

### A. Executive Eligibility in the Convention

The word “eligible” as it appears in the Executive Eligibility Clause is unusual. The Constitution contains two additional eligibility provisions (the House and Senate Qualifications Clauses) for members of Congress.<sup>33</sup> Neither uses the word “eligible.” The Framers said only that “[n]o person shall be a Representative” or “[n]o person shall be a Senator,” “who shall not” meet the respective age, citizenship, and residency requirements.<sup>34</sup> The Executive Eligibility Clause could have been phrased similarly, without using “eligible” at all. The story of how the word “eligible” made its way into Article II, but not Article I, is as powerful in uncovering the meaning of “eligible” as any dictionary. And it has everything to do with executive term limits.

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31. *Cf.* Peabody & Gant, *supra* note 7, at 619.

32. *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); ACKERMAN, *supra* note 26, at 6-7, 19-20 (outlining his dualist thesis and theory of constitutional moments).

33. U.S. CONST. art. I, §§ 2, cl. 2, 3, cl. 3.

34. *Id.*

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The word “ineligible” emerged through the Virginia Plan. On May 29, 1787, mere days into the Convention, Mr. Randolph proposed a sketch of government aimed at “preventing the fulfilment of the prophecies of the American downfall[.]” and ameliorating “the defects of the confederation.”<sup>35</sup> In many respects, the Virginia Plan was a radical departure from the model of governance set forth in the Articles of Confederation. But the Plan tracked closely the Articles’ means of electing a national executive: The president was to be chosen by the legislature and limited to a single, seven-year term.<sup>36</sup> Once the president’s single term had ended, he was said “to be *ineligible* a second time.”<sup>37</sup>

The manner of presidential election became a matter of persistent debate during the Convention. The Framers worried both about the risk of majoritarian tyranny and the role of small states in a federalist system.<sup>38</sup> And, of course, slaveholding states feared underrepresentation in a strictly popular electoral system by virtue of having larger populations, but not larger electorates.<sup>39</sup> Nearly all delegates voiced concern over this balance.<sup>40</sup> For most of the Convention, the delegates disagreed over whether to have the president chosen by Congress (as in the Virginia Plan) or by popular vote of qualified individuals.<sup>41</sup>

Debates over the means of presidential election necessarily implicated proposed term limits. Some feared that an executive chosen by the legislature would be beholden to the legislature. An ineligibility provision

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35. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND].

36. 1 FARRAND, *supra* note 35, at 20-22 (the Virginia Plan); *id.* at 228-32 (the Virginia Plan “as altered, amended, and agreed to in a Committee of the whole House”). Many so-called drafts of the Constitution, beginning with the Virginia Plan, called for the president to be chosen by Congress. *See, e.g., id.* at 20-22 (the Virginia Plan); 3 FARRAND, *supra* note 35, at 595-601 (the Pinckney Plan); 2 FARRAND, *supra* note 35, at 134, 145 (Committee of Detail Drafts II, III); *id.* at 171 (Committee of Detail Draft IX).

37. 1 FARRAND, *supra* note 35, at 21 (emphasis added).

38. *See* THE FEDERALIST NO. 10 (James Madison), No. 68 (Alexander Hamilton).

39. AMAR, *supra* note 4, at 156-59.

40. John Feerick, *The Electoral College: Why It Was Created*, 54 A.B.A. J. 249, 250-52 (1968).

41. *See* Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Electoral College, the Right to Vote, and Our Federalism: A Comment on a Lasting Institution*, 29 FLA. ST. U. L. REV. 884-85, 884-885 nn. 21-28 (2002) (citing 1 & 2 FARRAND, *supra* note 35).

would act as a safeguard. Since “he [the president] will not be eligible a 2d. time, there will not be such a dependence on the Legislature as has been imagined.”<sup>42</sup> After this term limit was voted down in June, the executive was often referred to as “re-eligible” during debates over how long to make his term.<sup>43</sup> This tension resurfaced in July, by which point James Wilson described the state of affairs as a “unanimous sense that the Executive should not be appointed by the Legislature, unless he be rendered in-eligible a 2d. time.”<sup>44</sup>

Throughout that summer in Philadelphia, when the delegates debated whether the executive should be limited to a single term, they used one word over and over—one that they plucked from the Virginia Plan itself. *Eligible*.<sup>45</sup>

The Framers alternated between using “eligible” and “elected” to the same effect. Even when they discussed an executive chosen by the legislature, delegates called a single-term limit both a limit on election and a limit on eligibility.<sup>46</sup> Near July’s end, the Committee of Detail put together the first draft of the Constitution.<sup>47</sup> That draft explained that the president

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42. 2 FARRAND, *supra* note 35, at 32.

43. *See, e.g., id.* at 33 (“By striking out the words, declaring him not re-eligible, he was put into a situation that would keep him dependent for ever on the Legislature . . . .”); *id.* at 53 (“Let [the president] be of short duration, that he may with propriety be re-eligible.”).

44. *Id.* at 56.

45. 2 FARRAND, *supra* note 35 *passim*. There are dozens of such examples, many of which can be found by simple query for the words “eligible” and “be elected” in FARRAND. I provide just some here: Mr. Williamson “conceived” that “he [the Executive] will not be *eligible* a 2d. time, there will not be such a dependence on the Legislature as has been imagined.” *Id.* at 32. Mr. Broom was in favor of a shorter presidential term if the president was “now to be *re-eligible*. Had he remained *ineligible* a 2d. time, he should have preferred a longer term.” *Id.* at 33. Often records describe votes “[t]o reconsider the clause which makes the Executive *reeligible*.” *Id.* at 37. Later, “Mr Pinkney moved that the *election* by Legislature be qualified with a proviso that no person be *eligible* for more than 6 years in any twelve years.” *Id.* at 111-12 (emphasis added in all).

46. *See, e.g., id.* at 23 (“to be ineligible a second time”); *id.* at 32 (“he will not be eligible a 2d. time”); *id.* at 102 (“be ineligible afterwards”); *id.* at 171 (“shall not be elected a second Time”); *id.* at 185 (same); *id.* at 401 (same).

47. *See* William Ewald & Lorianne Updike Toler, *Early Drafts of the U.S. Constitution*, 135 PA. MAG. HIST. & BIOGRAPHY 227, 228-29 (2011) (arguing for

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“shall hold his Office during the term of seven Years; but shall not be elected a second Time” by the legislature.<sup>48</sup> The Committee borrowed directly from the Virginia Plan but replaced “to be ineligible” with “shall not be elected.”<sup>49</sup> The Committee’s draft does not stand alone. There are countless such examples.<sup>50</sup> For instance, James Madison’s Notes from July 19 tell us that Mr. Elbridge Gerry of Massachusetts argued, “If the Executive is to be elected by the Legislature he certainly ought not to be re-eligible.”<sup>51</sup>

Come August, the Convention-goers thought it necessary to add presidential eligibility criteria to the Constitution, perhaps to mirror the House and Senate Qualifications Clauses that had already been adopted.<sup>52</sup> The first criteria proposed were that the president should be thirty-five, a citizen, and an inhabitant for twenty-one years.<sup>53</sup> But the delegates voted to postpone taking up that eligibility provision.<sup>54</sup> Some days later, the

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a more skeptical view of the Committee of Detail as reported in FARRAND while acknowledging the primacy of the August 6 draft).

48. 2 FARRAND, *supra* note 35, at 171 (Committee of Detail Draft); *id.* at 185 (Madison’s Notes Recorded Version) (emphasis added).
49. *Cf.* William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 226, 233-35 (2012).
50. *See, e.g.*, 2 FARRAND, *supra* note 35, at 406-07 (“It was moved that the president be elected by the people [This proposal then fails.] . . . On what respects his ineligibility Gov. Morris observed [t]hat in the strength of the Executive would be found the strength of America. Ineligibility operates to weaken or destroy the constitution. The president will have no interest beyond his period of service.” (emphasis added)). *Compare id.* at 53 (reporting that Gouverneur Morris said, “If he is to be the Guardian of the people let him be appointed by the people? If he is to be a check on the legislature let him not be impeachable. Let him be of short duration, that he may with propriety be re-eligible.” (emphasis added)), *with id.* at 55 (reporting from the same debate that “[Mr. Randolph] thought an election by the Legislature with an incapacity to be elected a second time would be more acceptable to the people than the plan suggested by . . . Morris” (emphasis added)).
51. *Id.* at 57 (emphasis added).
52. 2 FARRAND, *supra* note 35, at 239-40 (Senate Qualifications Clause vote); *id.* at 272 (House Qualifications Clause vote); *id.* at 367 (Executive Eligibility Clause proposal).
53. *Id.* at 367.
54. *Id.* at 368.

Committee of Eleven (known also as the Brearley Committee) was tasked with settling “such parts of the Constitution as ha[d] been postponed.”<sup>55</sup> It was there that the Eligibility Clause was born.

When the Brearley Committee returned before the Convention on September 4, it proposed a radical compromise: the Electoral College. The Committee recommended scrapping the legislatively elected president in favor of an executive chosen by representative electors for a renewable, four-year term.<sup>56</sup> Alexander Hamilton, in expressing his favor for this new method, argued that “the new modification, on the whole, [was] better,” since, in the unmodified plan “the President was a Monster *elect*ed for seven years, and *ineligible* afterwards . . . It seemed peculiarly desirable therefore that Some other mode of *election* should be devised.”<sup>57</sup> Hamilton echoed this language during ratification debates in *The Federalist*.<sup>58</sup> The word “eligible” as a descriptor for the president emerged from the delegates’ discussion of executive term limits and was used interchangeably with “elected.”

#### B. The Final Voted-On Eligibility Clause

The Brearley Committee report also included the immediate predecessor to the Eligibility Clause. That clause used both the words “elected” and “eligible” and was the last form of the Eligibility Clause explicitly voted on by the Convention-goers:

No person except a natural born citizen or a Citizen of the U[nited] S[tates] at the time of the adoption of this Constitution shall be *eligible* to the office of the President; nor shall any Person be *elect*ed to that office, who shall be under the age of thirty five years, and who has not been in the whole, at least fourteen years a resident within the U[nited] S[tates].<sup>59</sup>

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55. *Id.* at 481.

56. *See id.* at 493-94.

57. *Id.* at 524 (emphasis added). Hamilton’s response is also discussed in McHenry’s Notes to a similar effect. *Id.* at 530.

58. THE FEDERALIST NO. 69 (Alexander Hamilton) (“That magistrate is to be elected for FOUR years; and is to be re-eligible as often as the people of the United States shall think him worthy of their confidence.”).

59. 2 FARRAND, *supra* note 35, at 494, 498 (emphasis added); *see id.* at 565, 574 (confirming this language as “Referred to the Committee of Style and Arrangement”).

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The first and second halves of the Brearley Committee’s version of the Eligibility Clause treated all the qualifications symmetrically, such that a qualified candidate must be “a natural born citizen,” *and* “thirty five years [of age],” *and* “at least fourteen years a resident.” But these two sets of qualifications relied on different words—the citizenship requirement affected eligibility, whereas the age and residency requirements affected electability. There can be little doubt that these two words carried similar meaning. Had this near-final language of the Clause remained, a reading of “eligible” and “elected” as distinct would mean that Arnold Schwarzenegger could never ascend to the presidency, but a twenty-two-year-old Barron Trump—through some succession scheme—could.

The words “eligible” and “elected,” as used in this clause, are vestiges of an older, legislatively elected presidential model. The House and Senate Qualifications Clauses, written earlier, made no reference to eligibility precisely because there was little debate over whether congressmen should be limited to a single term and ineligible thereafter.<sup>60</sup> It would be more than a century and a half before Congress would adopt term limits for the president once again. But almost quixotically, the word “eligible,” as it appears in the unamended body of the Constitution, is a remnant of early debates about executive term limits, and it has now found its way into our modern debate over similar limits.

Three images from Madison’s Notes show how the last voted-on language of the Eligibility Clause was received by the Convention: Figure 1 shows the language of the Brearley Report’s Eligibility Clause, as voted on in the Convention;<sup>61</sup> Figure 2 is Madison’s description of the Brearley Report, and includes a footnote explaining that the text is an exact reproduction of the Committee’s proposal,<sup>62</sup> and Figure 3 is Madison’s

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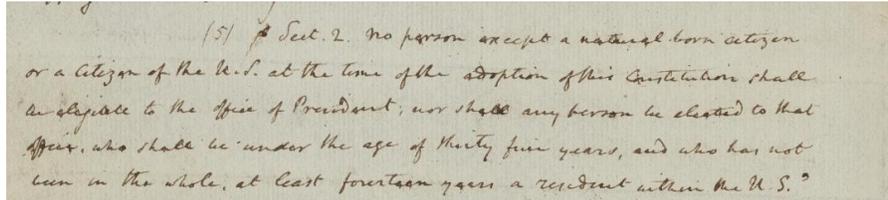
60. *See supra* note 52 and accompanying text; *cf.* Scott Bomboy, *Why Term Limits Face a Challenging Constitutional Path*, NAT’L CONST. CTR: BLOG. (Mar. 18, 2024), <https://constitutioncenter.org/blog/why-term-limits-for-congress-face-a-challenging-constitutional-path> [<https://perma.cc/DEC5-3L9P>].

61. Tuesday Sep. 4, 1787 In Congress, James Madison’s Original Notes on Debates at the Federal Constitutional Convention, 1787 (on file with Library of Congress, Subseries 5E, at 125b); *see supra* note 59 and accompanying text.

62. *Id.* at 125a (“\*This is an exact copy. The variations in that in the printed Journal are occasioned by its incorporation of subsequent amendments. This remark is applicable to other cases.”).

record of the vote on said Clause, including a parenthetical noting that the language was taken from the Brearley Report.<sup>63</sup>

**Figure 1: Brearley Report Eligibility Clause**



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63. *Id.* at 130c (showing that the unanimous vote was made in reference to the Brearley Report as a parenthetical above the vote in Madison's hand "see Sep<sup>r</sup>. 4").

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Figure 2: Madison's Description of the Brearley Report

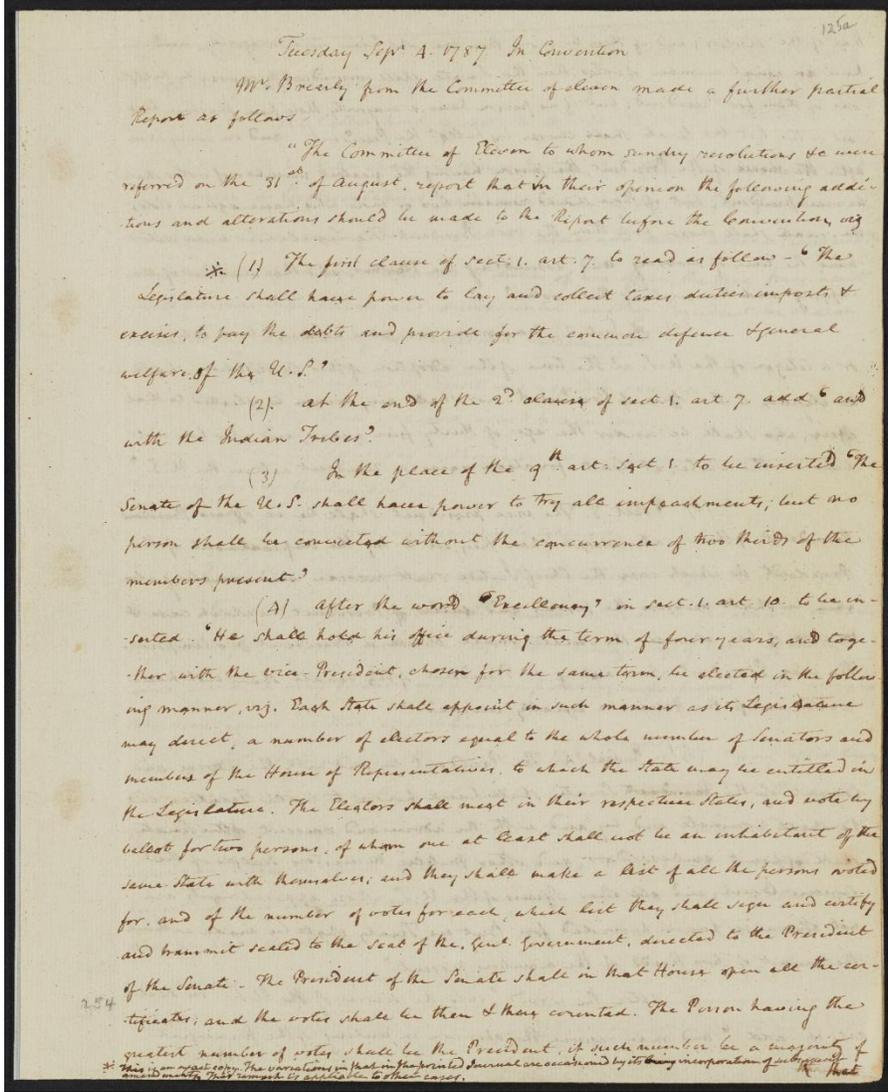
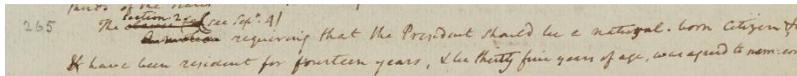


Figure 3: Madison's Record of the Eligibility Clause Vote



### C. From Final Voted-On to Final Printed Clause

One might wonder how the second half of the Clause came to read “eligible” instead of “elected.” The proposed language including the word “elected” was voted on and passed unanimously within the Convention on September 7.<sup>64</sup> Madison’s recitation of this vote described the Clause as “[t]he section *requiring* that the President should be a natural-born citizen, &c & have been resident for fourteen years, & be thirty five years of age.”<sup>65</sup> The Framers understood the age, residency, and citizenship criteria to all be equivalent categorical “requir[ements]” despite using both the words “elected” and “eligible.” After the Convention’s vote, the Clause was sent off, together with all other provisions of the Constitution, to be assembled into one whole by the Committee of Style. When that committee presented the final draft of the Constitution on September 12, the word “elected” was replaced by “eligible.”<sup>66</sup> There was no further debate.

In changing the language from “elected” to “eligible,” the Framers did not modify the meaning of the Eligibility Clause from an election-only hurdle to a categorical bar. As the Committee of Style’s name implies, its task was stylistic, not substantive.<sup>67</sup> Along with the change from “elected” to “eligible,” the Eligibility Clause was modified only in other nonsubstantive ways. The Committee changed “neither” to “nor” and “under the age of” to “not have attained the age of.” It also dropped the

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64. 2 FARRAND, *supra* note 35, at 536.

65. *Id.* (emphasis added).

66. *Id.* at 598.

67. See Lorianne Updike Toler, *Un-Fathering the Constitution*, 57 CONN. L. REV. 363, 400-01 (2025). There are some who argue that Gouverneur Morris exceeded his authority and did indeed change the Constitution substantively. Even so, this argument contends that substantive changes by Morris’s hand were made to embolden his position as “a committed nationalist who favored a strong executive.” William Michael Treanor, *The Case of the Dishonest Scrivener*, 120 MICH. L. REV. 1, 118 (2021). That view would not support a change like the one at bar. If “eligible” were a stronger hurdle to the Office than “elected,” this revision would have weakened, rather than strengthened, an executive. We find further evidence in Morris’s own words on executive eligibility during the Convention. Morris derided limits on eligibility. In debates surrounding a legislatively chosen executive (discussed *supra* Section II.A), Morris remarked that “in the strength of the Executive would be found the strength of America. Ineligibility operates to weaken or destroy the constitution. The president will have no interest beyond his period of service.” 2 FARRAND, *supra* note 35, at 407.

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word “who,” and added or subtracted the occasional comma, article, and capital letter.

Gouverneur Morris and the other members of the Committee penned the revision for prosodic reasons with intended rhetorical effect, and not to effectuate a substantive change. Madison would later describe the Committee’s role as shoring up “the symmetry and phraseology of the Instrument” without “impair[ing] the merit of the composition.”<sup>68</sup> There is no evidence of substantive change either in the Framers’ own recognition of “eligible,” nor in the word’s public meaning. Had such a stark difference in meaning been contemplated, we would expect some discussion of the change, or at least, a recognition that the previous version erroneously protected the citizenship requirement more strongly than it did age and residency requirements. There is none. Moreover, at that time, “ineligible” did encompass “unelectable” in general dictionaries.<sup>69</sup> A substantive change would not have been perceived by the ratifiers of the Constitution. As far as drafts of the Eligibility Clause go, the Framers alternated between “eligible” and “elected” without second thought.

### III. ON THE MEANING OF ‘INELIGIBLE’ TODAY

Why should we care that the Framers haphazardly alternated between the words “eligible” and “elected” throughout the Constitutional Convention? The drafting history of the Eligibility Clause reveals a deeper point. It leads us to what “eligible” and “elected” meant at the Framing and, by extension, what they mean in our Constitution. Our historical record is imperfect. But after surveying all the evidence, the task before us is to ask which explanation is best supported. Is it more likely that the Twenty-Second Amendment—when read together with the text and history of the Twelfth Amendment, earlier drafts of the Eligibility Clause, and Convention debates over presidential term limits—precludes a third-term president by any means, or simply by means of election?

On the one hand, as Peabody explains, “[T]he constitutional text references ‘elections’ and ‘eligibility’ as distinct words, and in ways that

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68. Letter from James Madison to Jared Sparks (Apr. 8, 1831), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/99-02-02-2323> [<https://perma.cc/PLS8-GQEM>].

69. The most common general dictionaries of the period, like *Johnson’s Dictionary*, give the first definition of “eligible” as “[f]it to be chosen.” *Eligible*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th folio ed. 1773); see also discussion *supra* Section I.A.

are not obviously fungible.”<sup>70</sup> The legislative history of the Twenty-Second Amendment, too, is at best unclear. Earlier versions of the Amendment used more explicit prohibitory language.<sup>71</sup> By the same token, it was an earlier version of the Eligibility Clause which said “elected,” *not the final one*. Does this not make our Constitution’s history similarly ambiguous? I say no.

The Constitution may reference “elections” and “eligibility” in ways that are not always substitutable, but this is not so with respect to presidential eligibility, specifically. The word “eligible” emerged uniquely in Article II, and not in symmetric provisions for Congress, because it was born from debates over a term-limited congressionally chosen president. In that context, the text’s use of “eligible” and “elected” is consistent. Every single invocation of electability or eligibility in debates over the executive is consistent. This history—from the Virginia Plan to the Committee of Detail’s draft, to the Brearley Committee’s report, to the Committee of Style, and to the Constitution in its final form—signals to an understood kinship between “eligibility” and “electability.”

This Comment by no means suggests that the language used in 1947 (or 1951) is the same in its ordinary meaning as that of 1787 (or 1789). Nor does this piece turn on the ordinary meaning of the Twenty-Second Amendment’s “[n]o person shall be elected” language at its ratification. Instead, it is concerned with the original meaning of the words “eligible” and “elect[able]” at the Framing and uses it to inform a background understanding of what it means to be electable in our constitutional order. This historical undertaking has aimed to show that in 1787, “eligible” and “electable” were lexically interchangeable. This suggests that Article II’s Eligibility Clause renders an unelectable president an ineligible one. This rationale persists *even if* the Twenty-Second Amendment were directed only at election, for it did not upend Article II. While this point would be better served by a more precise Twenty-Second Amendment, one that explicitly bars third-term eligibility, the Amendment’s letter—when read together with the history of the Eligibility Clause—renders a two-term president not just unelectable to, but ineligible for another term.

#### CONCLUSION

The Twenty-Second Amendment says only that one shall not be “elected” for a third term as president, not that one shall not be “eligible”

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70. Peabody, *supra* note 20, at 131.

71. *Id.* at 128.

### **Unelectable Is Ineligible**

for it. This difference has spurred a great deal of opportunistic debate and has most recently been taken up by some close to President Trump to hint at a possible third term. But there is another constitutional provision, that of Article II, that speaks to presidential eligibility. While its text squarely uses the word “eligible,” its history is more telling. Article II’s Eligibility Clause, as voted on by the Constitutional Convention, used both the words “eligible” and “elected” in the same way. Throughout the Convention, the Framers used the words “eligible” and “elected” to refer to presidential eligibility—and to presidential term limits—interchangeably. At the time of the Constitution’s ratification, and of the ratification of the Twelfth Amendment establishing vice presidential eligibility, the terms “eligible” and “elected” shared in meaning. One could not be eligible to hold the Executive Office without being electable to it. Reading the Twenty-Second Amendment together with this history, we see that third-term loopholes through elaborate succession schemes are constitutionally foreclosed.