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Lame Duck Logic

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This article analyzes the arguments regarding the propriety of a lame-duck Congress. It does so by comparing the concerns that animated the enactment of the twentieth amendment with the claims advanced during the lame-duck session of the 111th Congress. It begins by describing why lame-duck Congresses were as troublesome to the Republican members of the 111th Congress as they were to the overwhelming bipartisan majority of Congress that approved the twentieth amendment. Their objections differed in a crucial respect. While the framers of the twentieth amendment sought to prevent Congress from doing anything during a lame-duck session, most Republicans in 2010 objected only to the priorities that the Democratic leadership pursued during the lame-duck session. The article next analyzes the arguments offered by Democratic representatives and their supporters during the lame-duck session in 2010,

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comparing those arguments to the ones articulated by the few defenders of lame ducks in the 1920s and early 1930s. Finally, the article examines the ways in which the Republican opponents of the lame-duck session in 2010 sought to prevent Congress from enacting any laws that they found objectionable. In each instance, the arguments echo a constitutional debate that was thought to be settled in 1933, and they offer insight into the ways in which the uniquely American struggle with lame ducks could be settled once and for all.

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INTRODUCTION

The lame-duck 111th Congress was a great success for champions of bipartisan economic policy, gay rights, and nuclear disarmament. On November 2, 2010, the American voters elected a Republican majority for the House of Representatives and narrowed the Democratic Senate majority for the 112th Congress. But on November 15, the 111th Congress returned to Washington intent on enacting a host of new laws. This lame-duck 111th Congress included fifty-one members who had been defeated in their reelection bids two weeks before, six who had lost earlier in that year in the primary elections, and forty-eight who had decided to retire.¹

The lame-duck 111th Congress started slowly, enacting a food safety law and little else in November. In early December, Congress approved a compromise bill negotiated by President Obama and Senate Republicans that preserved the income tax cuts adopted during the Bush Administration and further extended unemployment benefits. Then the lame-duck Congress really got busy. It repealed the military's "don't ask, don't tell" ("DADT") policy, approved extensive health benefits for emergency workers injured during their response to the September 11 terrorist attacks, and enacted numerous other statutes.² The Senate confirmed the appointment of nineteen federal judges,³ and its approval of the START treaty with Russia was the first time a lame-duck Senate had ratified a treaty since the Twentieth Amendment.⁴

These congressional actions may be desirable, undesirable, or some of both, but they all resulted from a congressional abuse of power. The existence of any lame-duck legislation would surprise the supporters of the Twentieth Amendment, who believe that they corrected a constitutional error seventy-seven years ago. The Twentieth

¹ See *Departing Members of the 111th Congress*, CONG. Q. WEEKLY, Nov. 8, 2010, at 2628-29; *infra* note 20 (discussing various meanings of "lame duck").

² See generally *Weekly Report*, CONG. Q. WEEKLY, Dec. 27, 2010, at 2907 (describing the congressional actions during the final weeks of the lame-duck session of the 111th Congress).

³ See 156 CONG. REC. S 11068 (daily ed. Dec. 22, 2010) (statement of Sen. McConnell).

⁴ Treaties were difficult to ratify during lame-duck sessions even before the adoption of the Twentieth Amendment. Most famously, when the Senate refused to ratify a treaty annexing Texas in 1844, President Tyler simply persuaded the lame-duck Congress to approve the annexation by joint resolution on his last day in office in March 1845. See 3 W.H. BARTLETT & B.B. WOODWARD, THE HISTORY OF THE UNITED STATES OF NORTH AMERICA FROM THE DISCOVERY OF THE WESTERN WORLD TO THE PRESENT DAY 604 (1856).

Amendment was the culmination of a decade-long effort to eliminate lame-duck sessions of Congress.⁵ Laws enacted after Election Day but before the newly elected representatives take office have plagued Congress since 1800, when the defeated Federalist congressional majority passed dozens of new laws, including the statute authorizing that judgeship to which President Adams tried to appoint William Marbury.⁶ In 1840, Congressman Millard Fillmore proposed to amend the Constitution to provide that the terms of newly elected members of Congress “shall commence on the first day of December, instead of the fourth day of March.”⁷ The proposal was never heard of again. Several members of Congress sought to remedy the lame-duck problem at the end of the nineteenth century and the beginning of the twentieth century, again to no avail.⁸ The American Bar Association began to speak out against lame-duck sessions in the second decade of the twentieth century.⁹ Finally, in 1922 President Harding pushed a

⁵ The first two sections of the Twentieth Amendment provide:

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

U.S. CONST. amend. XX, §§ 1-2. The other sections of the Twentieth Amendment are similarly direct. Sections 3 and 4 govern various presidential succession questions; section 5 gives the effective date for sections 1 and 2. See U.S. CONST. amend. XX, §§ 3-5. See generally Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 216-21 (1995) (discussing ambiguities in sections 3 and 4). Section 5 set the effective date as March 15 after ratification, and section 6 gave the states seven years to ratify the Twentieth Amendment once Congress approved it in 1932. See U.S. CONST. amend. XX, §§ 5-6.

⁶ See *Marbury v. Madison*, 5 U.S. 137, 155 (1803). See generally John Copeland Nagle, *The Lame Ducks of Marbury*, 20 CONST. COMMENT. 317 (2004) (describing the actions of the lame-duck Congress and lame-duck President John Adams after the election but before the inauguration of President Thomas Jefferson).

⁷ H.R.J. Res. 26th Cong., 2d Sess. 87 (1840). Fillmore did not explain his proposal, but it appears that he was motivated by the exclusion of several of his Whig colleagues after an extended contested congressional election in 1838.

⁸ See Jeffrey A. Jenkins & Timothy P. Nokken, *Partisanship, the Electoral Connection, and Lame-Duck Sessions of Congress, 1877-2006*, 70 J. POL. 450, 452 (2008) (citing the efforts of Rep. William Crain, Rep. Robert Lee Henry, Sen. George Frisbie Hoar, and Rep. Richard Parker).

⁹ See REPORT OF THE COMM. ON CHANGE OF DATE OF PRESIDENTIAL INAUGURATION (1923), reprinted in *Proposed Amendment to the Constitution of the United States Fixing*

lame-duck Congress to enact a bill to subsidize the government's sale of surplus ships, even though that idea had been emphatically rejected in the 1922 election.¹⁰ Public reaction against the seeming ignorance of the election prompted renewed calls for a constitutional amendment led by Nebraska Republican Senator George Norris, ultimately yielding the Twentieth Amendment in 1933.¹¹ The requisite thirty-six states ratified the amendment in near record time, often unanimously, and never with more than a few dissenting voices.¹² It is the only constitutional amendment to have been ratified by every state.

The many supporters and few opponents of the Twentieth Amendment expected it to abolish lame-duck sessions of Congress.¹³

the Commencement of the Terms of President and Vice President and Members of Congress, and Fixing the Time of the Assembling of Congress: Hearings Before the House Comm. on Election of President, Vice President, and Representatives in Congress, 68th Cong. 6 (1924).

¹⁰ See PAUL MAXWELL ZEIS, AMERICAN SHIPPING POLICY 95-114, 125-141 (1938) (describing “the emergency shipbuilding program of the Wilson shipping board” and “taking the government out of the shipping business”). See generally Craig Goodman & Timothy P. Nokken, *Lame-Duck Legislators and Consideration of the Ship Subsidy Bill of 1922*, 32 AM. POL. RES. 465 (2004) (describing the ship subsidy bill controversy).

¹¹ As I have observed before, there is no definitive history of the Twentieth Amendment. See John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. Rev. 470, 470 & n.2 (1997) [hereinafter *Parable*]. Helpful sources to consult include GEORGE W. NORRIS, FIGHTING LIBERAL 328-43 (1945) (“The Lame Duck Amendment”); and B.M. CROWE, THE HISTORY OF THE TWENTIETH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (May 1969) (unpublished master's thesis, University of Houston) (on file with author) (providing the only comprehensive account of the history of the Twentieth Amendment).

¹² Congress submitted the proposed amendment to the states in early March 1932. Only nine state legislatures were in session at that time. See Editorial, *The Twentieth Amendment*, COURIER-J. (Louisville, Ky.), Mar. 5, 1932, at 6. On January 23, 1932, “Missouri won a spectacular ‘race’ with Massachusetts and Nevada . . . for the distinction of being the thirty-sixth state to ratify the ‘lame-duck’ amendment.” *“Lame Ducks” Go: Missouri’s Ratification Makes Effective a New Constitutional Amendment*, KAN. CITY STAR, Jan. 23, 1933, at 1 (noting how “[s]ergeants at arms scurried about the capital, arousing members from their sleep or interrupting their breakfast hours” in order to vote before any other states).

¹³ See, e.g., 75 CONG. REC. 3836 (1932) (statement of Rep. Cartwright) (“This amendment will free Congress of the dead hand of the so-called ‘lame duck.’ ”); *id.* at 3833 (statement of Rep. Dickinson) (“This will put an end to the ‘lame-duck’ Congress . . . ”); *id.* at 3823 (statement of Rep. Stafford) (describing purpose of Amendment as “to discontinue, to put a stop for all time to these lame-duck sessions of Congress”); see also *id.* at 3868 (statement of Rep. Dickinson); *id.* at 3824 (statement of Rep. Greenwood); *id.* at 3870 (statement of Rep. Howard); *id.* at 3832 (statement of Rep. Lozier); *id.* at 3841 (statement of Rep. Norton); GEORGE WHITE,

Such claims now seem strange given that the text of the Twentieth Amendment only moves the beginning date of the newly elected Congress from March 4 to January 3 — shortening the lame-duck period rather than eliminating it. But the universal understanding of those involved with the Amendment could not imagine that Congress would meet after Election Day and before January 3, citing the difficulties of winter travel and the distractions of the holidays. Thus, numerous members of Congress proclaimed that the amendment would eliminate lame-duck congressional sessions.¹⁴ Only a few observers recognized that the text of the Twentieth Amendment did not actually ban lame-duck sessions. Not to fear, insisted the *New York Times*, because the likelihood of such a session occurring after the Twentieth Amendment was “[o]ne chance in a thousand.”¹⁵ Most newspapers celebrated the ratification of the amendment with headlines announcing that there would not be any more lame-duck sessions.¹⁶

They were wrong. Congress has held lame-duck sessions eighteen times since the Twentieth Amendment took effect in 1933, including

MESSAGE RE: PROPOSED AMENDMENT TO U.S. CONSTITUTION (Jan. 2, 1932), *reprinted in* GEORGE WHITE, OFFICIAL PAPERS OF GOVERNOR GEORGE WHITE: JANUARY, 1931 TO JANUARY, 1935, at 114 (1935) (message of the Ohio governor submitting the proposed amendment to the state legislature with the explanation that newly elected members of Congress “shall assume their seats immediately after election”).

¹⁴ See, e.g., 75 CONG. REC. 3836 (1932) (statement of Rep. Cartwright) (“This amendment will free Congress of the dead hand of the so-called ‘lame duck.’ ”); *id.* at 3833 (statement of Rep. Dickinson) (“This will put an end to the ‘lame-duck’ Congress . . .”); *id.* at 3823 (statement of Rep. Stafford) (describing purpose of Amendment as “to discontinue, to put a stop for all time to these lame-duck sessions of Congress”); *see also id.* at 3868 (statement of Rep. Dickinson); *id.* at 3824 (statement of Rep. Greenwood); *id.* at 3870 (statement of Rep. Howard); *id.* at 3832 (statement of Rep. Lozier); *id.* at 3841 (statement of Rep. Norton); 74 CONG. REC. 5892 (1931) (statement of Rep. Johnson of Texas) (stating that Amendment “would abolish what is popularly known as the lame-duck session of Congress, so that all sessions of Congress convening after congressional elections would not have in its membership those who were not elected at the last preceding election”); *id.* at 5891 (statement of Rep. Johnson of Oklahoma) (asserting that purpose of Amendment “is to eliminate what is commonly called the lame-duck session of Congress”); *id.* at 5908 (statement of Rep. Selvig) (“The principal change involved is the abolition of the so-called ‘lame-duck’ session of Congress.”).

¹⁵ 39 *States Ratify Amendment Ending Lame Duck Terms*, N.Y. TIMES, Jan. 24, 1933, at 6.

¹⁶ See, e.g., “Lame Duck” Sessions To Be No More, HARTFORD DAILY COURANT, Jan. 24, 1933, at 2; *Present Lame Duck Session Will Be Last*, WASH. POST, Jan. 24, 1933, at 1; *20th Amendment Ratified, Ending “Lame Duck” Rule*, SEATTLE POST-INTELLIGENCER, Jan. 24, 1933, at 1 (noting that the Congress sitting when the Twentieth Amendment was ratified “marks the last ‘lame duck’ session”).

every lame-duck year since 1998. What was supposed to be a 0.001 percent likelihood has actually happened forty-six percent of the time. By 2010, many observers wondered why lame-duck sessions should be any different than congressional sessions held before Election Day. Norman Ornstein, a prominent congressional scholar, described the likely lame-duck session of the 111th Congress as “[n]ot revolutionary, not conspiratorial, not anti-democratic — just more of the same, like its predecessors.”¹⁷ When the lame-duck session of the 111th Congress proved to be different from the ordinary congressional session, however, the *New York Times* complained of “the other-worldly logic of a lame-duck session.”¹⁸

This Article analyzes the arguments regarding the propriety of a lame-duck Congress. It does so by comparing the concerns that animated the enactment of the Twentieth Amendment with the claims advanced during the lame-duck session of the 111th Congress. Part I describes why lame-duck Congresses were as troublesome to the Republican members of the 111th Congress as they were to the overwhelming bipartisan majority of Congress that approved the Twentieth Amendment. Both their objections differed in a crucial respect: while the framers of the Twentieth Amendment sought to prevent Congress from doing *anything* during a lame-duck session, most Republicans in 2010 objected only to the *priorities* that the Democratic leadership pursued during the lame-duck session.¹⁹ Part II analyzes the arguments offered by Democratic representatives and their supporters during the lame-duck session in 2010, comparing those arguments to the ones articulated by the few defenders of lame-duck sessions in the 1920s and early 1930s. Finally, Part III examines the ways in which the Republican opponents of the lame-duck session in 2010 sought to prevent Congress from enacting any laws that they found objectionable. In each instance, the arguments echo a constitutional debate that was thought to be settled in 1933, and they offer insight into the ways in which the uniquely American struggle with lame-ducks could be settled once and for all.

¹⁷ Norman Ornstein, *The Lame-Duck Session: Myth and Reality*, N. REPUBLIC (Nov. 5, 2010), <http://www.tnr.com/article/politics/77769/the-lame-duck-session>.

¹⁸ Editorial, *The Senate Stands for Injustice*, N.Y. TIMES, Dec. 10, 2010, at 34. The *New York Times*, almost alone among major American newspapers, was never a big fan of ending lame-duck sessions of Congress. See Crowe, *supra* note 11, at 41-62 (observing that “[e]ditorially, the Times opposed [what became the Twentieth Amendment] in its early years, finally came around to lukewarm approval, and only supported passage when it was evident that success was imminent in 1932”).

¹⁹ See *infra* text accompanying notes 33-37.

I. THE PROBLEMS WITH LAME DUCKS

Government officials whose terms are about to expire and whose successors have already been chosen have been labeled “lame ducks” since the early twentieth century.²⁰ The term is not a compliment. The primary concern about lame ducks is that it is undemocratic for them to enact new laws or take any other legally binding actions because the People have already voted for someone else to represent them. Three secondary concerns target: (1) the fear that lame-duck legislators are susceptible to executive patronage opportunities or other inducements; (2) the laws enacted by lame-duck legislators are especially likely to be flawed because they are hastily enacted; and (3) the actions of lame-duck congressional sessions contradict the purpose of the Twentieth Amendment.²¹ I consider each argument in turn.

²⁰ According to a Congressional Research Service (“CRS”) report, “[t]he expression ‘lame duck’ was originally applied in 18th century Britain to bankrupt businessmen, who were considered as “lame” in the sense that their situation had left them with diminished powers. By the 1830s, the usage had been extended to officeholders whose service already had a known termination date.” RICHARD S. BETH & MOMOKO SOLTIS, *LAME DUCK SESSIONS, 74TH-110TH CONGRESS (1935-2008)*, at 1 (2009). There are at least four understandings of lame ducks: (1) representatives who are not running for reelection; (2) representatives who have been defeated in their bid for reelection; (3) representatives whose successors have already been chosen; and (4) anyone who has previously lost an election. I favor the third understanding, and it characterizes the lame-duck 111th Congress.

²¹ Many of the same concerns apply to the actions of lame-duck Presidents. See, e.g., HAROLD HOLZER, *LINCOLN PRESIDENT-ELECT: ABRAHAM LINCOLN AND THE GREAT SECESSION WINTER 1860-1861*, at 171 (2008) (quoting Lincoln’s late 1860 remark that “I would willingly take out of my life a period in years equal to the two months which intervene between now and my inauguration to take the oath of office now”); Letter from Thomas Jefferson to Abigail Adams, June 13, 1804, in 1 *THE ADAMS-JEFFERSON LETTERS* 270 (Lester Cappon ed. 1959) (complaining that it “seemed but common justice to leave a successor free to act by instruments of his own choice”). State and local officials face similar concerns. See Nagle, *supra* note 6, at 335-37 (criticizing lame-duck Illinois Governor George Ryan’s commutation of all death sentences during his last days in office). I regard executive and legislative lame-duck actions as equally troublesome, but executive actions are harder to address (given the statutory deadlines for certain regulations) while legislative actions were already subject to a (failed) constitutional fix. See generally Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 2006, 84 N.C. L. REV. 1253 (2006) (discussing uncertainty and contradiction in presidential transition periods); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003) (examining “midnight” rulemaking of the executive branch). In any event, this Article concentrates on the issues presented by lame-duck Congresses.

A. Lame-Duck Lawmaking Is Undemocratic

The Twentieth Amendment was based on the belief that lame-duck Congresses were undemocratic. They were objectionable because they perverted the interests of the People, the outgoing members of the Congress, and the newly elected members. For the People, the supporters of the Twentieth Amendment proclaimed that the voice of the People in an election was supreme.²² That proposition demanded that the electoral mandate of the People should be put into effect immediately.²³ For the outgoing members of Congress, they were characterized as no longer representative of the People and no longer entitled to participate in legislative actions. Representative Barton thus argued that “the defeat of a candidate is often the rejection by the electorate of the laws he advocates.”²⁴ For the newly elected

²² See, e.g., 75 CONG. REC. 3864 (1932) (statement of Rep. Stafford) (“The voice of the people in the election of their representatives is the supreme law of the land.”); 74 CONG. REC. 5880 (1931) (statement of Rep. Glover) (“We are a Nation that says the people ought to rule”); *id.* at 5898 (statement of Rep. McCormack of Massachusetts) (“The making of a legislative body responsive to the will of the people is the object of self-government and of representative government.”).

²³ As Representative McCormack declared, “In a representative government it is essential that the will of the voters immediately go into effect and operation.” 74 CONG. REC. 5898 (1931) (statement of Rep. McCormack of Massachusetts); see 75 CONG. REC. 3842 (1932) (statement of Rep. Black) (arguing government should act on people’s will as soon as possible after election); *id.* at 3831 (statement of Rep. Cable) (same); *id.* at 3828 (statement of Rep. Celler) (same); *id.* at 3834 (statement of Rep. Dickinson) (same); *id.* at 3839 (statement of Rep. Glover) (same); *id.* at 3824 (statement of Rep. Greenwood) (same); *id.* at 3829 (statement of Rep. LaGuardia) (same); 74 CONG. REC. 5890 (1931) (statement of Rep. Leavitt) (same); *id.* at 5887-88 (statement of Rep. Maas) (same); *id.* at 5888 (statement of Rep. Nolan) (same); *id.* at 5899 (statement of Rep. Quin) (same); *id.* at 5893 (statement of Rep. Stobbs) (same).

²⁴ 75 CONG. REC. 3874 (1932) (statement of Rep. Barton); see *id.* at 3842 (statement of Rep. Black) (“Their very presence, after repudiation, is a denial of representation.”); 74 CONG. REC. 5886 (1931) (statement of Rep. Lozier) (arguing that “it is un-American, undemocratic, un-republican to allow him to remain in office two or three months after the repudiation of his policies by his constituents”). Others voiced similar sentiments. See, e.g., 75 CONG. REC. 3831 (1932) (statement of Rep. Jeffers) (calling lame-duck government contrary to people’s wishes); *id.* at 3832 (statement of Rep. Lozier) (same); *id.* at 3842 (statement of Rep. Norton) (same); *id.* at 3824 (statement of Rep. Greenwood) (criticizing lame ducks as contrary to principles of representative government); 74 CONG. REC. 5898 (1931) (statement of Rep. McCormack of Massachusetts) (same); *id.* at 5881 (statement of Rep. Celler) (calling it travesty to allow lame ducks to continue legislating); *id.* at 5891 (statement of Rep. Johnson of Oklahoma) (same); *id.* at 5897 (statement of Rep. Luce) (same); NORRIS, *supra* note 10, at 332 (observing that permitting men to mold legislation after their repudiation by people is contrary to reason and precedent); *The Norris Bill*, TIME, Mar. 3, 1923 (objecting to “the ubiquitous ‘lame duck’ Congressman, who, defeated and repudiated by his constituency, continues long afterward to wreak his will upon

representatives, it was essential that they take their seats soon after the election.²⁵

These arguments resurfaced in 2010. As Bruce Ackerman put it, “It is utterly undemocratic for repudiated representatives to legislate in the name of the American people.”²⁶ A proposed House resolution to prevent a lame-duck session of the 111th Congress cited the Declaration of Independence’s assertion that governments derive “their just powers from the consent of the governed.”²⁷ Representative King railed against “this lame duck Congress” because it was “repudiated,” “rejected,” and “no longer the valid representatives of the people.”²⁸ Representative McClintock insisted that “the American people said very clearly they don’t want this Congress legislating for them any longer.”²⁹ Senator DeMint complained that this “is a very

legislation”).

²⁵ See 75 CONG. REC. 3842 (1932) (statement of Rep. Black) (arguing government should act on people’s will as soon as possible after election); *id.* at 3831 (statement of Rep. Cable) (same); *id.* at 3828 (statement of Rep. Celler) (same); *id.* at 3834 (statement of Rep. Dickinson) (same); *id.* at 3839 (statement of Rep. Glover) (same); *id.* at 3824 (statement of Rep. Greenwood) (same); *id.* at 3829 (statement of Rep. LaGuardia) (same); 74 CONG. REC. 5890 (1931) (statement of Rep. Leavitt) (same); *id.* at 5887-88 (statement of Rep. Maas) (same); *id.* at 5888 (statement of Rep. Nolan) (same); *id.* at 5899 (statement of Rep. Quin) (same); *id.* at 5893 (statement of Rep. Stobbs) (same).

²⁶ Bruce Ackerman, *Lame Ducks vs. the Constitution*, WASH. POST, Nov. 12, 2010, at A17.

²⁷ See 156 CONG. REC. H6355 (daily ed. Jul. 29, 2010) (resolution to prohibit a lame-duck session that “reaffirms the principle expressed in the Declaration of Independence that governments [derive] their just powers from the consent of the governed”). The role of popular consent has become a debated issue among legal theorists. Compare Randy Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 112-15 (2003) (acknowledging the claim “that legitimacy flows from the fact that “We the People” have consented to this Constitution” is “the most commonly-held explanation for constitutional legitimacy,” but attacking “the fiction of ‘We the People’” and arguing that it is impossible to obtain such “consent of the governed”), with Ilya Somin, *Revitalizing Consent*, 23 HARV. J.L. & PUB. POL’Y 753 (2000) (defending the traditional view of popular consent).

²⁸ 156 CONG. REC. H7845 (daily ed. Dec. 1, 2010) (statement of Rep. King). King added, “That’s why it’s called a lame duck. We should have shot this lame duck a long time ago. It still limps along and it still flares up, and it still steps in and goes against the will of the American people.” *Id.*; see also *id.* at H7849 (statement of Rep. King) (asserting that “this is a repudiated Congress. This is the lame duck Congress. This is the Congress that the American people have said enough already, shut it off”).

²⁹ 156 CONG. REC. H8945 (daily ed. Dec. 22, 2010) (statement of Rep. McClintock). Representative McClintock offered an historical analogy as well: “Perhaps the most bitter indictment of a malingering legislative body was delivered by Cromwell to the Rump Parliament. His words seem appropriate now to this rump Congress: ‘You have sat here too long for any good you have been doing. It is not fit

unaccountable Congress.”³⁰ These critics also sought to defer consideration of any new legislation until the newly elected representatives took office.³¹ Senator Alexander favored a musical analogy, saying that the Democrats “keep insisting on an encore for a concert that drew a lot of boos.”³²

The claim that lame-duck lawmaking is undemocratic rests on a particular theory of representation. It does not contend that the democratic legitimacy of a law depends on its support in contemporary polls. Popular opposition to a law enacted by a lame-duck Congress does not render that law illegitimate; popular support for a law enacted by a lame-duck Congress does not legitimize that law. Nor does it presume that the voters have specifically disavowed all of the policies favored by a defeated or retiring representative. Instead, the objection to lame-duck lawmaking views the legitimacy of an elected representative as ending once their successor has been elected and when that representative is no longer electorally accountable to the People.

Such arguments against lame-duck Congresses generally were less common in 2010 than they had been at the time of the Twentieth Amendment. Most Republicans worried more about the legislative priorities of the defeated Democratic members of the 111th Congress

that you should sit here any longer. You shall now give way to better men. Now depart and go, I say, in the name of God, go.’ ” *Id.* See also Betsy McCaughey, Op-Ed., *This Lame Duck Session Should Be the Last*, WALL ST. J., Nov. 18, 2010, at A23. (asserting that “[m]embers who lose re-election have no moral authority to continue governing”); H.R. Rep. No. 50-841, at 1-2 (1888) (insisting that any new legislation should be considered by the new representatives because “the people in many instances are not represented by the men whom they have to represent them, but defeated candidates hold over”).

³⁰ 156 CONG. REC. S10951 (daily ed. Dec. 22, 2010) (statement of Sen. DeMint); see also 156 CONG. REC. S10484 (daily ed. Dec. 17, 2010) (statement of Sen. DeMint) (advising that many of those participating in lame-duck sessions “are no longer accountable to the voters”).

³¹ 156 CONG. REC. H8261 (daily ed. Dec. 8, 2010) (statement of Rep. King of Iowa) (“Who would have thought that in a lame duck session, when we had big things to do and big things to worry about, the Speaker would push an amnesty act out here in a lame duck session in a repudiated Congress and not give all of those freshmen an opportunity to weigh in on this ?”); see also H.R. REP. NO. 50-841 (1888) (asserting that “the theory of the founders of the Constitution, that the Representatives should come ‘fresh from the people,’ would be carried out” with a shorter lame-duck period).

³² 156 CONG. REC. S8340 (daily ed. Dec. 1, 2010) (statement of Sen. Alexander). Will Rogers, a frequent opponent of lame-duck congressional sessions during the 1920s and early 1930s, may have inspired Senator Alexander’s analogy. See Will Rogers, *Lame Ducks Like Actors, Says Will*, ROCK HILL HERALD, Jan. 13, 1933, at 1 (likening lame-duck sessions to “a troop of actors getting hissed off the stage, but insisting on staying on there because they have a two-weeks’ contract”).

than they did about the democratic legitimacy of lame-duck sessions in general. Rather than objecting to all lame-duck actions, most Republicans suggested that a lame-duck Congress should do some things but not others. Senator McConnell, the Republican leader in the Senate, accused Democrats of “resist[ing] the message of the election” and “clinging to the wrong priorities.”³³ Representative Boehner, the Republican leader in the House, expressed his “hope [that] the leaders that are still in charge would heed the advice of the American people that occurred on Election Day in terms of being prudent in their actions here before the end of the year.”³⁴ There was a particular fear that the Democrats planned to press the same ambitious agenda that the American people rejected in the election.³⁵ At the same time, most

³³ 156 CONG. REC. S 8258 (daily ed. Nov. 20, 2010) (statement of Sen. McConnell); see also Lisa Mascaro, *Deadlines and Discord on the Hill*, L.A. TIMES, Nov. 27, 2010, at A12 (“It’s like the election didn’t happen — if you look at what the priorities are. . . . The American people’s priorities are not the Dream Act, ‘don’t ask, don’t tell repeal’ and the START treaty. Their priorities are not getting a tax hike — and keeping spending under control.” (quoting a spokesperson for Sen. McConnell)).

³⁴ See Carl Hulse & Jennifer Steinhauer, *Looking to Next Year, Republicans Stymie Democrats’ Efforts on Top Measures*, N.Y. TIMES, Nov. 20, 2010, at A11 (quoting Rep. Boehner).

³⁵ According to Representative King:

The leaders and many of the Members of this lame duck 111th Congress, if they got the message, their message back to us is a spiteful message against the American people, which is, So you didn’t like debt and deficit and you’d like to have jobs and a better growing economy. Well, on our way out the door—you’ve thrown a lot of us out of office—on our way out the door, we’re going to give you a little more of what you didn’t like. . . . That’s what’s going on in this lame duck Congress.

156 CONG. REC. H7846 (daily ed. Dec. 1, 2010) (statement of Rep. King); see also 156 CONG. REC. H8845 (daily ed. Dec. 21, 2010) (statement of Rep. Broun) (complaining that “the Democrats are using this lame duck session to continue pursuing their rejected agenda”); 156 CONG. REC. H7761 (daily ed. Dec. 1, 2010) (statement of Rep. Fleming) (contending that “Democrats in Congress have hinted at other plans to continue their irresponsible spending spree by passing a massive omnibus spending bill. . . . [A]fter the bell-ringing on November 2, surely Democrats in their few remaining days of control are not intending to use this lame duck session to continue the failed policies that got us into this mess to begin with.”); 156 CONG. REC. H7656 (daily ed. Nov. 30, 2010) (statement of Rep. Foxx) (contending that “Americans made it very clear they want the Washington spending spree to end. Democrats, however, have turned a deaf ear, and still want to pass a disastrous \$1.1 trillion spending bill in the lame duck session of Congress.”); 156 CONG. REC. H7420 (daily ed. Nov. 15, 2010) (statement of Rep. Gohmert) (“we were hearing in the last week the cry of people across America too about this lame duck session. . . . They thought they made it clear, but they were not listened to.”); 156 CONG. REC. H8398 (daily ed. Dec. 15, 2010) (statement of Rep. Wilson) (expressing concern “that this outgoing majority

Republicans wanted a lame-duck session to address pressing economic issues such as the imminent rise in tax rates.³⁶

These statements contain a modified, diluted form of the undemocratic argument against lame-duck legislation. They still look to the results of the election, but they look for a referendum of specific issues instead of on specific candidates. This approach looks at what the electorate wants done, not who the electorate wants to do it. Following that view, a lame-duck Congress may legislate concerning issues for which there is a popular consensus or which were implicitly approved by the electorate, but a lame-duck Congress should not enact contested legislation or legislation that the voters implicitly rejected.³⁷

Eventually, the 111th Congress accepted an even more diluted form of the democratic impulse that animated the Twentieth Amendment. Republican members of Congress were ambiguous, or even contradictory, regarding the status of the economic issues that they prioritized. Some Republicans wanted to address those issues and then adjourn.³⁸ Other Republicans were open to considering other issues once the economic issues were resolved.³⁹ The ambiguity appears in

has placed a higher priority on repealing Don't Ask, Don't Tell than actually passing the National Defense Authorization Act for fiscal year 2011").

³⁶ 156 CONG. REC. H 7761 (daily ed. Dec. 1, 2010) (statement of Rep. Fleming) (acknowledging that "the lame duck Congress has unfinished business to complete, such as permanently extending the current income tax rates"); *id.* at S83209 (daily ed. Dec. 1, 2010) (statement of Sen. Alexander) ("What the American people were saying to us is, fund the government, keep the tax rates where they are, freeze spending, and go home."). Many Democrats favored that approach as well. *See, e.g.,* Jessica Brady & Emily Pierce, *Weekend Votes Unlikely for Senate; Tax Cuts Still Up in the Air*, ROLL CALL, Nov. 18, 2010 ("Given many are still licking their wounds from the midterm elections, Members instructed their leader to stay focused on economic policy.").

³⁷ *See, e.g.,* 156 CONG. REC. H 8356 (daily ed. Dec. 1, 2010) (statement of Rep. Pence) ("Despite the fact that last November the American people did not vote for more deficits, more stimulus or more uncertainty in the Tax Code, that is just what this lame duck Congress is about to give them"); 156 CONG. REC. H6140 (daily ed. July 27, 2010) (statement of Rep. King, Iowa) (asserting that "[a] lame duck session that brings transformative pieces of legislation breaks with the trust of the American people"); 156 CONG. REC. H5298 (daily ed. June 30, 2010) (statement of Rep. King, Iowa) (asserting that "[i]f people get voted out of office because they were thinking about doing something, talking about doing something, they should not come in here and do it after they've been voted out").

³⁸ *See* 156 CONG. REC. S8339 (daily ed. Dec. 1, 2010) (statement of Sen. Alexander) (advising that "we should keep the tax rates where they are, fund the government, consider the debt commission's report . . . and go home and bring the new Congress back").

³⁹ *See* 156 CONG. REC. S8330-31 (daily ed. Dec. 1, 2010) (statement of Sen. Alexander) (acknowledging that it is the majority leader's prerogative "to go to a

the letter that all forty-two Republican Senators sent to Democratic Majority Leader Senator Harry Reid on November 29 vowing to oppose “any legislative item until the Senate has acted to fund the government and we have prevented the tax increase that is currently awaiting all American taxpayers.”⁴⁰ The letter insisted that the lame-duck Congress address economic issues first; it did not, however, argue that the lame-duck Congress should address only such issues. Rather, it left the door open for further legislative action once the economic issues were settled.⁴¹ And that is precisely what happened. The House approved the tax and unemployment benefit compromise on December 17, which then opened the floodgates for the ratification of the START treaty, the repeal of DADT, and numerous other actions to be taken during the last week of the lame-duck session.

B. *The Fear of Presidential Patronage*

The proponents of the Twentieth Amendment were greatly concerned about the incentives presented to lame-duck legislators. Freed from electoral accountability, lame-duck members of Congress were portrayed as willing to do the President’s bidding in the hope of securing an executive appointment. George Norris, for example, complained that “many of these lame-duck members of Congress were willing to follow the command of the executive and to adopt legislation which he desired. For their subservience, they were given fat executive appointments.”⁴² Similarly, Representative Cellar made

whole laundry list of other issues” once taxes are resolved); 156 CONG. REC. H7457 (daily ed. Nov. 16, 2010) (statement of Rep. Wilson) (arguing that “the top priority of Congress for this lame duck session should be extending the tax cuts for all Americans in order to create jobs and get people back to work. Once this important matter is completed, I strongly encourage Congress to consider ways to protect the privacy of airline passengers while keeping air travel safe and secure”). Representative Wilson earned notoriety by shouting “you lie” during President Obama’s 2009 health care speech. See Haya El Nasser, *Officials Ask Input on Cuts in Effort to Foster Civility*, USA TODAY, Feb. 14, 2011, at 2A.

⁴⁰ Letter from Mitch McConnell et al. to Harry Reid (Nov. 29, 2010), *reprinted in* 156 CONG. REC. S8310 (daily ed. Dec. 1, 2010). Reid responded by accusing his Republican colleagues of taking their ball and going home, just as Lucy used to do to Charlie Brown. See 156 CONG. REC. S8513 (daily ed. Dec. 4, 2010) (statement of Sen. Reid); see also 156 CONG. REC. S8542 (daily ed. Dec. 6, 2010) (statement of Sen. Boxer) (accusing Republicans of “stopping everything”). It turns out that the Republican Senators only wanted to have their turn to kick the ball first.

⁴¹ See Letter from Mitch McConnell et al. to Harry Reid (Nov. 29, 2010), *supra* note 40 (indicating that “there are other items that might ultimately be worthy of the Senate’s attention” once the tax and government funding issues were addressed).

⁴² NORRIS, *supra* note 11, at 332.

the most of the image by describing lame-ducks as “hit with the shot of defeat by their constituents, and they have become very lame, docile, and tractable, and when they have jobs dangled before them they do the bidding of the Executive or those who may be in power.”⁴³ Those who faced such criticism included Wyoming Representative Franklin Mondell, who used his position as majority leader to prevent the Twentieth Amendment from being approved in 1923, thereby delaying the Amendment for ten years. Mondell was a lame duck when he blocked the Amendment, and soon after his departure from the House he accepted an appointment as a director of the War Finance Corporation.⁴⁴ Likewise, Ruth Bryan Owen — the daughter of William Jennings Bryan who had been elected to the House from Florida — objected to lame-duck congressional sessions, but during her own lame-duck period she actively worked to secure a presidential appointment as ambassador to the Netherlands.⁴⁵ Of course, these and other presidential appointees objected to the accusation of unfair patronage extended to those whom the voters had rejected. But the fear that presidential patronage could seduce lame-duck members of Congress echoed the emoluments clause’s related prohibition on congressional self-dealing.⁴⁶

The opponents of the lame-duck session of the 111th Congress were much less concerned about the possibility of presidential patronage. The concern was voiced a few times, but far less frequently than it was during the debate leading to the Twentieth Amendment.⁴⁷ Perhaps

⁴³ 75 CONG. REC. 3828 (1932) (statement of Rep. Celler); *see also id.* at 3843 (statement of Rep. Black) (reasoning that lame duck’s anxieties for future make him amenable to Executive’s suggestions); *id.* at 3836 (statement of Rep. Cartwright) (noting influence of favors from White House on lame ducks); *id.* at 3833-34 (statement of Rep. Dickinson) (warning of special interest groups’ special influence over lame ducks); *id.* at 3842 (statement of Rep. Norton) (stating that promise of later appointment may sway lame duck); 63 CONG. REC. 26 (1922) (statement of Sen. Caraway) (same).

⁴⁴ *See* Crowe, *supra* note 11, at 47-48.

⁴⁵ *See* Sarah P. Vickers, *Ruth Bryan Owen: Florida’s First Congresswoman and Lifetime Activist*, 77 FLA. HIST. Q. 445, 470 (1999) (reporting that “[d]espite her poetic repudiation of the patronage system, the remainder of Ruth Bryan Owen’s political career hinged on that intrinsic element of American politics”).

⁴⁶ *See* U.S. CONST. art. 1, § 6, cl. 2 (providing that “[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time”).

⁴⁷ *See* 156 CONG. REC. H248 (daily ed. Jan. 20, 2010) (statement of Rep. Wolf) (contending that “[d]uring the lame duck session, some outgoing Members may already be looking for new jobs, which could well be lobbying special interest groups and other stakeholders that have a vested interest in the outcome of the vote on the

that is because the political science literature that has developed since the 1930s suggests that there is no empirical support for the patronage argument against lame ducks.⁴⁸ Nor, surprisingly, did anyone in the 111th Congress worry that lame-duck members could be swayed by the prospect of future employment in the private sector as a lobbyist. The role of corporate influence on Congress played a significant role in the 2010 congressional elections, thanks to the debate regarding the Supreme Court's *Citizen United* campaign finance decision.⁴⁹ Yet campaign reform organizations failed to worry about the incentives faced by lame-duck members of Congress. To the contrary, even those organizations pressed Congress to enact their preferred legislation during the lame-duck session.⁵⁰

C. Flawed Legislation

The opponents of legislating during the lame-duck 111th Congress advanced another argument that appeared much less frequently during the Twentieth Amendment debates. They worried that the time pressure and competing demands associated with a lame-duck session would result in flawed legislation.⁵¹ Courts and scholars have long

commission's recommendations"); Sheryl Gay Stolberg, *The Teary, Busy, Ugly Lame-Duck Congress*, N.Y. TIMES, Dec. 19, 2010, at WK1 (observing that "[n]early one fifth of those doing the voting [in the lame-duck session] were packing boxes or sending out resumes").

⁴⁸ See Jenkins & Nokken, *supra* note 8, at 124 (concluding that there is no evidence that lame-duck members of the President's party were more inclined to support the President and that they "were not systematically rewarded with executive appointments"). Norman Ornstein contended that President Obama couldn't bribe legislators with executive appointments because they require Senate confirmation. See Ornstein, *supra* note 17. That point overlooked the many other enticements that the President can offer short of an appointment requiring Senate confirmation.

⁴⁹ See *Citizens United v. F.E.C.*, 130 S. Ct. 876, 913 (2010).

⁵⁰ See Kenneth P. Doyle, *Campaign Reformers Want Congress to Pass Disclosure Legislation in Lame-Duck Session*, BNA MONEY & POL. REP., Nov. 19, 2010.

⁵¹ See 156 CONG. REC. S10951 (daily ed. Dec. 22, 2010) (statement of Sen. DeMint) ("To put a bill on the floor, in an unaccountable lameduck Congress, that has not been through hearings, when we do not know how the millions of dollars have been used that we have already given to the same cause certainly is worth a few weeks of committee hearings and understanding exactly how to spend taxpayer money effectively . . ."); 156 CONG. REC. H8464 (daily ed. Dec. 15, 2010) (statement of Rep. Buyer) (supporting reluctantly a bill to require reports on the management of Arlington National Cemetery and describing it as "very unfortunate that we're proceeding with this bill in a lame duck session when we have not even held hearings ourselves on this issue"); *id.* ("All these inequities, all these poor drafting errors, the challenge that the administration even had with regard to the implementation of the legislation. Oh, once again we'll just do something quickly, with expediency, bypass the House process,

been concerned about hastily enacted legislation.⁵² The many drafting errors in the Superfund law, enacted by a lame-duck Congress in 1980, support the claim that lame-duck sessions are especially likely to produce such flawed legislation.⁵³

There are two responses to such concerns. First, laws may be hastily enacted whenever Congress confronts a deadline, whether that is during a lame-duck session or during a regular session. Second, the proponents of the legislation considered during the lame-duck session of the 111th emphasized that many of the bills had already been subjected to extensive scrutiny before the lame-duck session occurred. In such circumstances, the concern about lame ducks is understandable but avoidable.

D. *Lame-Duck Sessions as Historical Accidents and Historical Mistakes*

The Framers of the original Constitution did not purposefully create a lame-duck period between Election Day and the date on which elected representatives took office.⁵⁴ Rather, it resulted from the happenstance of when the requisite number of states ratified the Constitution. On September 13, 1788, Congress announced that a sufficient number of states had ratified the Constitution, so Congress specified that the new Congress would meet on the first Wednesday of March 1789.⁵⁵ Congress duly met on that date, or at least some

ignore regular order, dump it on the administration, and then force them to fix it. And then, if they don't do things according to the timeline for which we foresee, then we'll just beat 'em up. This is like the worst way to legislate.”); 156 CONG. REC. H8311 (daily ed. Dec. 14, 2010) (statement of Rep. McHenry) (“We have had no legislative hearing, no markup, no substantive discussions about the content of this legislation. And here we are at the last hour of a lame duck Congress and they are trying to pass a piece of legislation that hasn't had an honest-to-goodness legislative hearing or a markup.”); see also David A. Fahrenthold, *Lame-Duck Sessions Supposed to be a Thing of the Past, Historians Say*, WASH. POST, Dec. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/17/AR2010121703572.html> (noting that during the lame-duck session “lawmakers are tackling one enormous issue after another, with very un-congressional efficiency”).

⁵² See John Copeland Nagle, *Direct Democracy and Other Hastily Enacted Statutes*, 1996 ANN. SURV. AM. L. 535, 545 (1996).

⁵³ See John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1405-08 (1997).

⁵⁴ No other nation has a similar gap. That point was made repeatedly during the debate over the Twentieth Amendment. See, e.g., Basil M. Manly, *Pro and Con Discussion of the “Norris Amendment”*: Pro, 5 CONG. DIG. 238, 238 (1926).

⁵⁵ See PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788* at 429-30 (2010). Another explanation for the March date cites the Congress meeting under the auspices of the Articles of Confederation, which enacted a law in

members did, for it took nearly a month to achieve a quorum as the new members endured the rigors of eighteenth century travel. In 1792, Congress codified March 4 as the date on which the new President and Congress began their terms.⁵⁶ Once those terms began, the constitutional specification of two-year terms for House members and six-year terms for Senators meant that Congress could not move the date on which those terms began.

Meanwhile, the only relevant text in the original Constitution provided that Congress must meet at least once every year beginning on the first Monday in December.⁵⁷ Those dates yielded a schedule by which Congress would meet in a long session one year (from December until early the next summer) and in a short session in its second year (from December until March 4).⁵⁸ For example, Abraham Lincoln was elected on August 3, 1846, to represent Illinois's Seventh Congressional District in the Thirtieth Congress. After he was elected, the Twenty-Ninth Congress returned to Washington in December 1846, where it sat until it expired on March 4, 1847. Congress did not sit between March and December 1847. Lincoln and the other members of the Thirtieth Congress took office in December 1847 — sixteen months after Lincoln was elected. That first session of the Thirtieth Congress continued until August 1848. Lincoln returned for the second session of the Thirtieth Congress from December 1848 to March 1849, after abiding by his pledge not to seek reelection in August 1848, thus making his second session a lame-duck session.⁵⁹

Each session presented difficulties. The timing of the long session meant that the newly elected Congress did not actually meet until thirteen months after its election.⁶⁰ The short session became the infamous lame-duck session that was targeted by the Twentieth Amendment. Even though the schedule was unintentional, the most

1788 providing that it would meet beginning on March 4 each year. *Id.*

⁵⁶ See An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President, ch. 8, § 12, 1 Stat. 239, 241 (1792). An alternative, though uncorroborated, tradition suggests that Benjamin Franklin chose March 4 because that date “would fall less on a Sunday than any other date in a suitable season.” *How March Fourth Came to be Chosen*, 5 CONG. DIG. 221, 221(1926).

⁵⁷ U.S. CONST. art. I, § 4, cl. 2.

⁵⁸ See Jenkins & Nokken, *supra* note 8, at 451. An additional session occurred about one-third of the time when the President convened Congress in December before the long session. See *id.* at 451 n.5.

⁵⁹ See Nagle, *Parable*, *supra* note 11, at 484 (detailing the timing of Lincoln's congressional service).

⁶⁰ See *id.* at 485 (explaining the delay and the criticisms of it).

fervent opponents of eliminating the lame-duck period characterized the Twentieth Amendment as an attack on the Congress and the framers of the Constitution, though they could not agree who was responsible for such a plot.⁶¹

The historical accident of a lame-duck session was compounded by the historical failure of the Twentieth Amendment to eliminate it. As discussed above, the purpose of the Twentieth Amendment was to abolish lame-duck sessions, but it failed to accomplish that goal. The supporters of the Twentieth Amendment could not imagine that Congress would meet between Election Day and January 3, but subsequent events have confirmed that those supporters lacked the necessary imagination. The Twentieth Amendment thus ranks as one of only two constitutional amendments that failed to achieve its essential purpose, joining the Eighteenth Amendment (which was soon repealed by the Twenty-First Amendment). The two amendments failed in opposite ways; while the prohibition goal of the Eighteenth Amendment was clearly stated but soon rejected, the goal of eliminating lame-duck Congresses was unstated in the Twentieth Amendment but never rejected. Even though the Twentieth Amendment's purpose does not appear in the constitutional text, it

⁶¹ Compare 75 CONG. REC. 3836 (1932) (statement of Rep. Montague) ("I think 'lame-duck Members' is a capitalistic terminology to destroy the usefulness of the legislative branch of our Government, which is the desire of some people."), with *id.* at 3878 (statement of Rep. Griffin) (complaining that "the hue and cry about 'lame-duck' sessions is simply furnishing fodder to bolshevists"). While many opponents of the Amendment claimed that there was no need to disrupt the work of the framers, Representative Underhill pressed that point with special vigor. See *id.* at 5879 (statement of Rep. Underhill) (asking "which amendment has brought to this country greater peace or prosperity?" and arguing that if Senator Norris's "gospel of government is sound, . . . then George Washington was a piker, Jefferson was a bum, Madison and Patrick Henry were morons, Jefferson and John Marshall were socialists, Ben Franklin was senile, and John Rutledge and Charles Pinckney were ward heelers"). One of the few state legislators who opposed the ratification of the Twentieth Amendment blamed George Norris. According to Utah state Senator W.D. Candland, "The Constitution of the United States. . . is regarded by the people of Utah as an inspired instrument" that should not be changed, while Norris's "whole career has been an effort to nullify the institutions founded by the fathers, to break down established government to conform to his distorted ideas." See "Lame Duck" Amendment Ratified: Utah 38th State to Put Okeh on Law, SALT LAKE CITY TRIB., Jan. 24, 1933, at 1 (quoting Senator Candland). One editorial attributed the House's delay in approving the Twentieth Amendment to Norris's personal unpopularity among his colleagues. See *Texas Ratifies the Lame Duck Amendment*, HOUSTON CHRONICLE, Sept. 9, 1932, at 4 (explaining that the lame-duck amendment "met continued defeats, not because the measure itself was deemed vicious, but because the veteran Nebraska solon's personal unpopularity with some of the powers that be, in his own party, acted as a deterrent to the progress of the amendment he sponsored").

remains true that congressional decisions to hold lame-duck sessions contradict the purpose of the amendment. That constitutional purpose offers an independent reason to avoid such lame-duck sessions, but only a few members of Congress mentioned that in 2010.⁶²

II. THE JUSTIFICATIONS FOR LAME DUCKS

The Framers of the Constitution did not purposely create the lame-duck period between congressional elections and the seating of the newly elected members. Consequently, all of the arguments for lame-duck lawmaking are *post hoc* rationalizations for an accidental opportunity. George Norris contended during the debate over the Twentieth Amendment that there were no valid arguments for allowing lame-ducks to legislate.⁶³ His view is supported by the fact that the Twentieth Amendment passed by overwhelming majorities in Congress and was quickly ratified by the states with similar overwhelming majorities.

Fewer than four decades later, lame-duck congressional sessions have again become commonplace. So commonplace, in fact, that no justification for them is seen as necessary. The extraordinary consensus supporting the Twentieth Amendment demands reasons for departing from its teaching. Yet the most common justification for the lame-duck session of the 111th Congress was silence. Rather, the session was seen as an ordinary event that did not merit any discussion.⁶⁴

When confronted, the supporters of the lame-duck 111th Congress echoed some of the few arguments articulated by the few opponents of the Twentieth Amendment, and they developed some new ones of their own. Those arguments may be categorized into six claims: (1)

⁶² See 156 CONG. REC. H8845 (daily ed. Dec. 21, 2010) (statement of Rep. Broun) (observing that the purpose of the Twentieth Amendment was “to stop exactly what we’re doing here today, passing important legislation in a lame duck session”); see also McCaughey, *supra* note 29, at A23 (noting that the purpose of the Twentieth Amendment was “to eliminate lame-duck sessions,” for “no one imagined that the old Congress would return to the [Capitol]” between Election Day and January 3). One reporter concluded that “Republicans have mostly objected to the session because it threatened to infringe on their Christmas holiday, not the Constitution.” Fahrenthold, *supra* note 51. There was relatively little press coverage of the Twentieth Amendment’s impact on lame-duck Congresses, too.

⁶³ See NORMAN L. ZUCKER, GEORGE W. NORRIS: GENTLE KNIGHT OF AMERICAN DEMOCRACY 37-38 (1966).

⁶⁴ See Ornstein, *supra* note 17 (describing the likely lame-duck session of the 111th Congress as “[n]ot revolutionary, not conspiratorial, not anti-democratic — just more of the same, like its many predecessors”).

lame ducks exercise desirable independence; (2) Congress needs more time to act; (3) the outgoing Congress remains in power until January 3; (4) the legislation to be considered by a lame-duck Congress is really important; (5) lame-duck sessions are acceptable because both parties utilize them; and (6) the lame-duck 111th Congress was very productive, and those results justify the process. As I explain below, none of those arguments overcomes the force of the democratic principles that produced the Twentieth Amendment.

A. *The Independence of Lame Ducks*

On the first day of the lame-duck session of the 111th Congress, Senator Arlen Specter gave a speech extolling the virtues of acting during the upcoming weeks. Specter had represented Pennsylvania as a Republican in the Senate for thirty years, only to switch parties and lose in the Democratic primary in May 2010. He told his colleagues that:

Our session does not necessarily have to be a lameduck. We have the capacity to respond to the many pressing problems of the country as we choose. We can spread our wings and we can fly. One could say at many points during the course of the 111th Congress, the session could be called a turkey. It has not been very active in many respects. This body, not atypical, has been expert at avoiding tough votes. Well, if there is any time where it is easiest to avoid tough votes, it is a long distance from the next election, and we can't get any further from the next election than today, since the last election was only 13 days ago. It is my suggestion that this would be a good time to undertake some significant action.⁶⁵

Specter thus embraced the claim that legislators will act more wisely if they are independent.⁶⁶ His colleagues often made the same argument. For example, one senator explained that a lame-duck session may be ideal for legislation to establish a cap-and-trade regulation of carbon emissions because “[i]f it is after the election, it may well be that some members feel free and liberated.”⁶⁷

⁶⁵ 156 CONG. REC. S7873 (daily ed. Nov. 15, 2010) (statement of Sen. Specter).

⁶⁶ He made the same point in his valedictory speech in the Senate. See 156 CONG. REC. S10856 (daily ed. Dec. 21, 2010) (statement of Sen. Specter) (emphasizing “an elected official’s independence in a representative democracy”).

⁶⁷ Lisa Lerer & Viola Gienger, *Kerry Says Democrats May Take Up Broad Climate Legislation After Election*, BLOOMBERG, July 23, 2010, <http://www.bloomberg.com/news/2010-07-23/kerry-says-democrats-may-take-up-broad-climate-legislation-after->

The opponents of the Twentieth Amendment offered similar arguments on behalf of the independence of lame-duck legislators. They championed lame-duck members of Congress as worthy legislators even if the people had decided to replace them. Lame-duck members were also praised as independent from partisan and popular demands. As Representative John Tilson, the majority leader of the House, was fighting a losing battle against the Twentieth Amendment, he urged that a lame-duck session “is one time in the life of a Member of Congress when he can vote his real convictions without the hope of reward or the fear of punishment.”⁶⁸ Other comments betrayed highly elitist tendencies by depicting defeated members as the victims of an ignorant and ungrateful populace. They were seen as deserving of the opportunity to finish their legislative agenda, to counsel their replacements, and to make the transition back to private life. Lame ducks “act, if differently at all, more independently than though they had been reelected.”⁶⁹

election.html. See also 156 CONG. REC. S10480 (daily ed. Dec. 17, 2010) (statement of Sen. Dodd) (recounting that Senator John Kerry, the chair of the Senate Foreign Relations Committee, advised during the summer of 2010 that consideration of the START treaty should be deferred until after the election in order to avoid politicizing the debate); 156 CONG. REC. S8542 (daily ed. Dec. 9, 2010) (statement of Sen. Boxer) (asserting that “we are in a postelection session called a lameduck, but this is no reason for us to be lame, and there is no reason for us to be limping out of this session. We can do some good things”); Abner J. Mikva & Timothy Lewis, *Let's Fix Judicial Nominee Process*, POLITICO, Nov. 18, 2010, reprinted in 156 CONG. REC. S8322 (daily ed. Dec. 1, 2010) (writing that “[w]ith the Senate now back for the lame-duck session, political pressure on nominations may not be so intense. This is the time for the Senate to return to an effective process for confirming judges—one that can eliminate the appearance of excessive partisanship and apply to both Democratic and Republican administrations.”). Studies of presidential actions during lame-duck periods make the same point. See Beermann, *supra* note 21, at 952 (suggesting that “[a] lame-duck President and administration may be freed from interest group pressure and thus be able to advance social welfare without concern for the political consequences”).

⁶⁸ 75 CONG. REC. 3853 (1932) (statement of Rep. Tilson); see also C.P. Carpenter, Letter to the Editor, *Lame Ducks Make Good Legislators, Because They Can Vote According to Their Convictions*, WASH. POST, Nov. 24, 1932, at 6 (writing that “the failure to be reelected actually makes him better qualified for that duty [of legislating] than before. The fact of his failure to be reelected takes out of his consideration any thought of reelection and all thought of popularity concerning any measure under consideration. It leaves the so-called lame duck actually free for the first time to vote strictly according to his judgment and his sincere belief as to the real merits of each proposal”).

⁶⁹ *Proposed Constitutional Amendments Relating to the Fixing of the Time for the Commencement of the Terms of President, Vice President, and Members of Congress, and Fixing the Time of the Assembling of Congress; and to the Presidential Succession; and to the Electoral System: Hearing on H.J. Res. 65, H.J. Res. 9, H.J. Res 216 and H.J. Res.*

But independent of whom? The implicit, and sometimes explicit, claim is that legislators do better when they are independent of the electorate. That, of course, is deeply problematic. As Senator Johanns responded, “The plan to do cap and trade in a lame-duck is premised on Senators and House Members being free and liberated from the tethers of the American people. This is extraordinary, and it is deeply troubling.”⁷⁰ The independence argument echoes some of the justifications for China’s lawmaking process, which is said to yield desirable results precisely because the lawmakers are not constrained by the votes of the people.⁷¹

B. Congress Needs More Time

A second argument for the lame-duck session of the 111th Congress is that it lacked enough time to finish its work before the election. Before the passage of the Twentieth Amendment, there were occasional efforts to *extend* the lame-duck period, though the voices calling for a shorter period were more numerous.⁷² Likewise, the need for a longer lame-duck period to facilitate travel to Washington was already outdated by the time of the Twentieth Amendment. Instead, the modern calls for more time center on three claims: the desirability of a cooling-off period, the newly elected Congress’s need for time to prepare to govern, and the outgoing Congress’s need for time to complete its work.

1. A Cooling-Off Period

The opponents of the Twentieth Amendment glamorized the lame-duck session as a cooling-off period during which electoral passions could subside. According to Representative Knutson:

In the heat of campaigns candidates are apt to make rash promises that are incapable of fulfillment, and I may say to you it would be dangerous to convene a new Congress within 60 days after an election unless we took the newly elected Members and placed them on ice, thereby giving them an

²⁹²Before the Comm. on Election of President, Vice President and Rep. in Cong., 71st Cong. 4 (1930) (testimony of William Tyler Page, Clerk H.R.).

⁷⁰ 156 CONG. REC. S6270 (daily ed. July 27, 2010) (statement of Sen. Johanns).

⁷¹ See generally STEFAN HALPER, THE BEIJING CONSENSUS: HOW CHINA’S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY (2010) (explaining and endorsing the contemporary Chinese approach to government).

⁷² See Jenkins & Nokken, *supra* note 48, at 114 n.12 (citing proposals made by, among others, Aaron Burr).

opportunity to reflect and cool off before taking their seats in this body.⁷³

Senator Reid adopted this view after the 2010 election, explaining that “[w]hen the heat of the campaign season cools, our constituents are more interested in us getting things done.”⁷⁴ Members of the 111th Congress and other observers hoped that Congress would act more constructively once the electoral passions cooled.⁷⁵

The idea of a cooling-off period borrows from other areas of the law where individuals are protected from making rash decisions.⁷⁶ But the cooling-off argument is strange in the context of legislating after an election. The argument may justify a delay in allowing the new Congress to legislate, but it does not lend any support for allowing the defeated Congress to continue legislating. The partisanship produced by legislating during a lame-duck session — when one party is eager to complete its agenda before it loses power, and the other party is frustrated by the inability to exercise the power the voters have just given it — is the antithesis of a cooling-off period. If anyone needs to cool off after the passions of an election campaign, it is the losers of

⁷³ 74 CONG. REC. 5886 (1931) (statement of Rep. Knutson); *see also* 75 CONG. REC. 3837 (1932) (statement of Rep. Montague) (advocating a “cooling time” to “give them some time to get free of the atmosphere of partisanship”); Will P. Kennedy, *Pro and Con Discussion of the “Norris Amendment”*: *Con*, 5 CONG. DIG. 237, 239 (1926) (asserting the need for “an intervening or transition period between election day, after the heat and passion of a campaign, before the meeting of a new Congress, in which calmly to reflect and prepare”); James A. Reed, *Pro and Con Discussion of the “Norris Amendment”*: *Con*, 5 CONG. DIG. 227, 228 (1926) (arguing that “there should be a period of reflection, of discussion, of debate, of thoughtfulness, to intervene between the day of the election, with all of its excitement and its turmoil, and the period when those elected shall assume the duties of government”). *But see* 75 CONG. REC. 3841-42 (1932) (statement of Rep. Norton) (arguing against “cooling-off period”); 74 CONG. REC. 5888-89 (1931) (statement of Rep. LaGuardia) (same); *id.* at 5888 (statement of Rep. Maas) (same); *id.* at 5888 (statement of Rep. Nolan) (same).

⁷⁴ 156 CONG. REC. S7872 (daily ed. Nov. 15, 2010) (statement of Sen. Reid).

⁷⁵ 156 CONG. REC. S10298 (daily ed. Dec. 15, 2010) (statement of Sen. Leahy) (quoting an uncited article that claimed “[t]he final days of the lame-duck session are a chance to significantly improve on this dismal record and to lift the judicial confirmation process out of the partisan muck”).

⁷⁶ *See, e.g.*, Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 786 (1983) (explaining contract law’s use of a cooling-off period that “insures that the promisor has an opportunity to reflect on his commitment and to withdraw from the contract if he wishes”); Brishen Rogers, “Acting Like a Union”: *Protecting Workers’ Free Choice By Promoting Workers’ Collective Action*, 123 HARV. L. REV. F. 38, 52 (2010) (explaining that “[c]ooling off periods are a common legislative tactic to protect individuals from the negative consequences of decisions made while in “transient emotionally or biologically ‘hot’ states”).

the election, not the winners. The 111th Congress demonstrated that a lame-duck session is the opposite of the cooling-off period because it continues the passions of the election. Republicans and Democrats alike voiced that complaint, depending on who objected to the legislation being enacted by the lame-duck Congress.⁷⁷

2. Preparing for the New Congress

During the debates regarding the Twentieth Amendment, the defenders of the lame-duck period insisted that the new members of Congress needed sufficient time before they could take office. Part of their concern relied on the difficulty in traveling to Washington from remote parts of the United States. New modes of transportation had already made it easier to reach Washington than it had been when the original Constitution was ratified, and air travel has entirely eliminated travel concerns as a basis for the lame-duck period today. Defenders of such a period also cited the time that it takes for those who have just been elected to prepare to govern.⁷⁸ The concern is exaggerated. The experience of other democracies with little or no lame-duck period demonstrates that incoming legislatures can take office without a mandatory delay. Nor does a longer lame-duck period alleviate concerns about contested congressional elections.⁷⁹ Historically, such contests have dragged out for entire sessions of

⁷⁷ See 156 CONG. REC. S10852 (daily ed. Dec. 21, 2010) (statement of Sen. Alexander) (complaining that “[t]he majority’s decision to jam through other matters during this lame-duck session has poisoned the well”); 156 CONG. REC. H8582 (daily ed. Dec. 16, 2010) (statement of Rep. Dingell) (worrying that “we will feel the repercussions of this for years” because President Obama and Senate Republicans negotiate the income tax and unemployment benefit bill in a lame-duck session on a take-it-or-leave-it basis).

⁷⁸ See *Proposed Amendment to the Constitution of the United States Fixing the Commencement of the Terms of President and Vice President and Members of Congress, and Fixing the Time of the Assembling of Congress: Hearings on H.J. Res. 93 Before the H. Comm. on Election of President, Vice President, & Rep. in Cong.*, 68th Cong., 23 (1924) [hereinafter *1924 House Hearing*] (testimony of Rep. Tydings) (citing the need for the newly-elected President to formulate policies, develop a budget, address the Congress, appoint officials, “and to do scores of other things that no human being except a President can contemplate”); John Q. Tilson, Op-Ed., *The “Lame Duck” Session*, WASH. POST, Sept. 7, 1929, at 6 (written by the House Majority Leader describing the possible difficulties in organizing the House and appointing committees).

⁷⁹ See A.L. Bulwinkle, *Pro and Con Discussion of the “Norris Amendment”*: Con, 5 CONG. DIG. 233, 233 (1926) (observing that “[m]any of the State election boards do not meet for nearly 30 days after the election, and, in the case of the recount of the entire vote of a State, clearly there would not be sufficient time”); Reed, *supra* note 73, at 227 (claiming that “[i]t is entirely conceivable that when this body gets together there will be an enormous number of members whose seats are contested”).

Congress, far beyond any conceivable lame-duck period. It is also desirable to have such contests resolved by the new Congress, not the outgoing Congress. Or perhaps a short recess of the length that Congress regularly takes during the summer or during the Christmas holidays would suffice. Most importantly, at best this argument for delay says that the new Congress should wait to take office, but it does not justify continued work by the old Congress.

3. Concluding the Old Congress

The opponents of the Twentieth Amendment insisted that lame-ducks deserved the opportunity to finish their legislative agenda.⁸⁰ The 111th Congress embraced that idea with unprecedented zeal. In 2010, Senator Reid argued that “we have a lameduck session with such a long to-do list” because “everything we have tried to do legislatively this year has been stymied, stopped with filibusters.”⁸¹ The role of the filibuster was especially controversial during the 111th Congress, and the tactic deserves the attention that it is now receiving. That would come as a surprise to Senator Norris, who wrongly expected that his effort to abolish lame-duck sessions would also eliminate filibusters.⁸² But the claim that the use of the filibuster justifies lame-duck sessions is historically backwards. The filibuster was seen as an essential device to block proposed legislation during lame-duck sessions, as I explain below.⁸³ Moreover, the claim that filibusters during the 111th

⁸⁰ See 74 CONG. REC. 5878 (1931) (statement of Rep. Underhill) (contending that lame-duck members of Congress should an opportunity “to put across many of the measures which have been proposed from year to year”).

⁸¹ 156 CONG. REC. S8445 (daily ed. Dec. 3, 2010) (statement of Sen. Reid); see also 156 CONG. REC. S8539 (daily ed. Dec. 6, 2010) (statement of Sen. Reid) (explaining that “as far as lameduck sessions of the Senate go, our agenda is rather ambitious” because “the minority has tried to shut down the Senate” whenever Congress tried “to tackle each of the priorities on our agenda”); Fahrenthold, *supra* note 51 (quoting Senator Reid’s spokeswoman’s claim that “[w]e wouldn’t need to be doing all this in the lame duck if the Republicans had not obstructed and delayed everything that we had been trying to do”).

⁸² See NORRIS, *supra* note 11, at 328-43; Jenkins & Nokken, *supra* note 8, at 135-36 (explaining how Norris failed to anticipate the use of filibusters at the end of any congressional session, regardless of the ending date); see also *20th Amendment Ratified, Ending “Lame Duck” Rule*, SEATTLE POST-INTELLIGENCER, Jan. 24, 1933, at 1 (asserting that filibusters “are struck a death blow” by the ratification of the Twentieth Amendment); *Lame Duck Bill Will Abolish Filibustering*, DENVER POST, Jan. 22, 1933, at 10; *Ratification Assured with Single Vote: Twentieth Amendment to End Short Session of Congress Already Approved by 35 States*, NASHVILLE BANNER, Jan. 22, 1933, at 1 (explaining that “Senate filibustering performers are having their last fling”).

⁸³ See *infra* Part III.E.

Congress made a lame-duck session necessary overlooks historical uses of the filibuster,⁸⁴ the contested motivation for the filibusters in the 111th Congress,⁸⁵ other reasons for delay,⁸⁶ and the fact that the 111th Congress was already productive before it held a lame-duck session.

The argument that the 111th Congress needed more time to act *after* the election also suffers from the time that the Congress took off *before* the election. During 2010, Congress left Washington for ten of the forty-three weeks before Election Day.⁸⁷ The House took off a week earlier than usual for its summer recess.⁸⁸ When the House voted 210–209 to adjourn on September 29, thirty-nine Democrats agreed with Majority Leader John Boehner’s argument that adjournment meant “putting [their] election above the needs of your constituents.”⁸⁹ The

⁸⁴ See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 187 (1997) (noting that “[t]he strategic use of delay in debate is as old as the Senate itself. The first recorded episode of dilatory debate occurred in 1790, when senators from Virginia and South Carolina filibustered to prevent the location of the first Congress in Philadelphia.”). On the constitutionality of filibusters, see, for example, Josh Chafetz & Michael Gerhardt, Debate, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. (PENNUMBRA) 245 (2010), available at <http://www.pennumbra.com/debates/pdfs/Filibuster.pdf>.

⁸⁵ See *Examining the Filibuster: Hearings Before the Sen. Comm. on Rules & Admin.*, 111th Cong., 2d Sess. at 171 (2010) (testimony of Sen. Schumer) (“We say, the majority Democrats at this moment say, you are filibustering to delay. The minority Republicans say, we are filibustering because you won’t let us offer amendments.”); *id.* at 477 (testimony of Sen. Roberts) (complaining that “there has been an incessant attempt on the part of some of the majority to paint the minority obstructionist and that this is a broken institution. It is not — what is broken is not the Senate rules, but the attitude and approach to legislating by members of the majority that is fundamentally at odds with the atmosphere of comity and compromise that our rules are intended to foster.”).

⁸⁶ See Kerry Young et. al., *Democrats’ Play: “CR and See You,”* CONG. Q. WKLY., Sept. 27, 2010, at 2228 (explaining that “[t]he minimalist pre-election endgame” resulted from “the bitter partisanship, combined with political nervousness and legislative lethargy brought on by campaign pressures”).

⁸⁷ The House was not in session for one week in February, two weeks in March and April, one week in May and June, one week in July, and five weeks in August and September. See *Days in Session Calendars*, LIBR. CONG., <http://thomas.loc.gov/home/ds/> (last visited April 11, 2012).

⁸⁸ See John Fund, *The Obama-Pelosi Lame Duck Strategy*, WALL ST. J., July 9, 2010, at A15.

⁸⁹ 156 CONG. REC. H7227 (daily ed. Sept. 29, 2010) (statement of Rep. Boehner); see also *id.* at H7361 (daily ed. Sept. 29, 2010) (statement of Rep. Hastings, Wash.) (objecting to Congress adjourning without addressing the expiring tax cuts); *id.* at H7217 (statement of Rep. Foxx) (same).

Senate adjourned at the same time, the earliest that it adjourned before an election since 1960.⁹⁰

C. *Lame Ducks Remain in Power After an Election*

A third defense for the lame-duck lawmaking of the 111th Congress simply cited the fact that the Twentieth Amendment provides that the newly elected representatives do not take office until January 3. The Constitution empowers members of the House and Senate to serve for two years and six years respectively, not one year and ten months or five years and ten months. The 111th Congress thus insisted that its contract with the American people did not run out until January 3. That claim of raw power is correct as a descriptive matter. It is not also true, though, that the electorate and members of Congress should have expected that Congress should be able to act during the lame-duck period, for the purpose of the Twentieth Amendment and the democratic impulses supporting the amendment counsel against such lame-duck lawmaking. As Nina Mendelson has observed in the context of lame-duck Presidents, “The purpose of the Twentieth Amendment was not to give the lame-duck President an entitlement to some specified time in office.”⁹¹ Standing alone, the raw power of Congress to act during a lame-duck session makes no case for the normative desirability of exercising legislative power during a lame-duck session, nor for how it complies with democratic principles to do so. If the democratic impulse animating the Twentieth Amendment is accepted, then legislating during a lame-duck session is an abuse of a power that the framers of the Amendment expected to employ only in extraordinary circumstances. Nor did lame-duck members of Congress serving before the ratification of the Twentieth Amendment ever claim that their actions were justified in this way.

D. *Lame-Duck Actions Are Really Important*

The most frequent defense of the legislation considered by the lame-duck 111th Congress was that it was really important. The need for Congress to act quickly on extremely important legislation apparently persuaded the framers of the Twentieth Amendment to avoid a flat ban on lame-duck sessions in the constitutional text. Imagine that the

⁹⁰ See Janet Hook, *Election 2010: Lawmakers Head for Exits — After Prolific Session, Democrats Ready Final Push to Explain Record to Voters*, WALL ST. J., Sept. 30, 2010, at A5 (citing the Senate historian).

⁹¹ Nina A. Mendelson, *Quick Off the Mark? In Favor of Empowering the President-Elect*, 103 NW. L. REV. (COLLOQUY) 464, 473 (2009).

Japanese attack on Pearl Harbor had occurred one year earlier, during the lame-duck period after the 1940 elections.⁹² It was the possibility of such events occurring after Election Day and demanding an immediate response by Congress that persuaded the drafters of the Twentieth Amendment not to include an express prohibition on lame-duck sessions.

None of the legislation or other actions taken by the 111th Congress fits that description. The kind of emergency legislation that was contemplated during the debate over the Twentieth Amendment is qualitatively different from the claims advanced during the lame-duck 111th Congress. The proponents of acting during the lame-duck session of the 111th Congress articulated two different kinds of urgency.

First, they cited a looming deadline that would change the legal status quo during the lame-duck period. The income tax cuts adopted during the Bush Administration, the expiration of unemployment benefits, the reimbursement of doctors for Medicare payments, scheduled increases in capital gains and estate taxes, and the funding of the federal government were all set to change during November or December of 2010.⁹³ Calls for other actions by the lame-duck Congress cited the possibility of adverse court rulings and the

⁹² See Garrett Epps, *It's Not Dead, It's Only Lame: John Boehner and the 20th Amendment*, ATLANTIC, July 2010, <http://www.theatlantic.com/national/archive/2010/07/its-not-dead-its-only-lame-john-boehner-and-the-20th-amendment/60404/#> (raising the Pearl Harbor hypothetical); see also Ackerman, *supra* note 26, at A17 (asserting that “[i]f terrorists attack after Election Day, it’s appropriate for a lame-duck session to consider the need for emergency legislation”). Note, however, that there is some tension between the emergency rationale and the desire to avoid hasty legislation. See *supra* text accompanying notes 51-53. The opponents of the Patriot Act, passed in the aftermath of the September 11 attacks, have denounced the rush to judgment that produced that law. See, e.g., Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387, 1407 (2005) (asserting that “no more than a handful of members of Congress had even read the legislation before it was rushed into law”).

⁹³ See, e.g., 156 CONG. REC. S8380 (daily ed. Dec. 2, 2010) (statement of Sen. Collins) (noting that “unless Congress acts, this new year will begin with the imposition of an onerous new tax burden for American families”); 156 CONG. REC. H7764 (daily ed. Dec. 1, 2010) (statement of Rep. Polis). (worrying that “the Federal Government will effectively shut down” on December 3); 156 CONG. REC. H7586 (daily ed. Nov. 18, 2010) (statement of Rep. King of Iowa) (noting that “we have the 2001 and the 2003 tax brackets that need to be extended or we will be seeing a huge tax increase, perhaps the largest tax increase of our lifetimes poised to hit us at midnight December 31 if this lame-duck Congress doesn’t act”); 156 CONG. REC. H7458 (daily ed. Nov. 16, 2010) (statement Rep. Pence) (asserting that “[i]t is absolutely imperative, if Congress accomplishes nothing else in this lame duck, that we take immediate action to make permanent all of the current tax rates”).

expiration of presidential nominations at the end of the session.⁹⁴ The problem with these deadlines is that they were all known before the election. At best, if Congress believed that it was essential to act before the deadlines, then it mismanaged its schedule.⁹⁵ A far more problematic explanation applies when Congress deferred its action until after the election precisely to avoid having to consider it before then. The first accusation of that strategy occurred in January 2010, when Representative Frank Wolf objected to the establishment of a deficit reduction commission whose report would trigger congressional action during the lame-duck period in December. According to Wolf:

The American people will be cut out of the process. It is a backroom deal; and under this deal, the recommendations will be voted on by a lame-duck Congress, filled with retiring and defeated Members. This is wrong. Any action should be taken by a newly elected Congress, not one on the way out the door.⁹⁶

By the summer of 2010, news organizations were reporting that the Democratic leadership planned to consider several controversial issues after Election Day because it would jeopardize their election prospects

⁹⁴ See Elisabeth Bumiller, *Pentagon Sees Little Risk in Allowing Gay Men and Women to Serve Openly*, N.Y. TIMES, Dec. 1, 2010, at 21 (quoting Secretary of Defense Robert Gates' claim that it was a "matter of urgency" for the lame-duck Congress to repeal the rule lest a change be "imposed immediately by judicial fiat"); see also 156 CONG. REC. S 8321 (statement of Sen. Leahy) (daily ed. Dec. 1, 2010) (quoting an editorial from the Charlotte Observer, Nov. 21, 2010) ("Time is running out on the Senate to do the right thing. If it does not confirm Diaz in the current lame duck session, his nomination expires."); see also Barack Obama, *The President's News Conference*, Nov. 3, 2010, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=88668&st=&st1=#ixzz1sKAUZl00> (asserting that it "would be very disruptive to good order and discipline and unit cohesion . . . if we've got this issue bouncing around the courts, as it already has over the last several weeks, where the Pentagon and the chain of command doesn't know at any given time what rules they're working under").

⁹⁵ See 156 CONG. REC. H7880 (daily ed. Dec. 2, 2010) (statement of Rep. Roskam) (observing that the Democratic majority "has had the calendar well in place and been able to control this process for years and now we find ourselves 30 days out from the largest tax increase in American history").

⁹⁶ 156 CONG. REC. H197 (daily ed. Jan. 20, 2010) (statement of Rep. Wolf); see also 156 CONG. REC. H7199 (daily ed. Sept. 28, 2010) (statement of Rep. Gohmert) (asserting that "[p]erhaps the most glaring sleight of hand, one I believe the American people will recognize and refute, is that the Democratic leadership intends to bring the commission recommendations up for a vote in Congress, but only after the mid-term elections and before the new Congress begins in 2011. It would be a lame duck vote").

to vote on these issues before then.⁹⁷ House Republicans responded by introducing a resolution which contended that “delaying controversial, unpopular votes until after the election gives false impressions to voters and deliberately hides the true intentions of the majority, while denying voters the ability to make fully informed choices on Election Day.”⁹⁸ Once the lame-duck session arrived, Democratic Senator Michael Bennet, who won a narrow election victory on November 2, was inadvertently recorded telling another Senator that “the fact that we don’t get to a discussion before the break about what we’re going to do in lame duck — is just rigged.”⁹⁹

The second claim of urgency justifying action during the lame-duck session of the 111th Congress emphasized the importance of the issue. The START treaty, DADT, and the Dream Act fall within that category. But the desirability of such legislation does not explain why it could not wait until the next Congress convened in less than two months. The START treaty had been negotiated in March 2010. The Dream Act was first introduced in 2001. The DADT rule had been in effect for seventeen years. The desire to take such legislative actions existed

⁹⁷ Jackie Calmes, *September Senate Debate Expected on Extending Tax Cuts for Rich*, N.Y. TIMES, Aug. 5, 2010, at A15 (observing that “[n]ervousness among politically vulnerable Democrats had led some in the party to predict that Congress would not take up the issue [of the expiring income tax cuts] until after the elections, in a lame-duck session”); John Harwood, *The Caucus: As Congress Returns, Series of Tests Awaits*, N.Y. TIMES, July 12, 2010, <http://thecaucus.blogs.nytimes.com/2010/07/11/as-congress-returns-series-of-tests-awaits/> (reporting that “House leaders, fearing political fallout, want to wait for a lame-duck session after the midterm elections”); Young et. al., *supra* note 86, at 2228 (“many Senate Democrats have made it clear that with Republicans construing the White House plan as a historic tax hike, they would just as soon leave the issue until after the election”). Senator Feinstein “opposed taking a vote before the election because ‘the message can be manipulated,’” and Senator Carper was “comfortable with waiting out of concern that those colleagues who are on the ballot . . . ‘would just as soon have the opportunity to vote after the elections are over rather than do that now’ ”). *Id.*

⁹⁸ 156 CONG. REC. H6355 (daily ed. Jul. 29, 2010); *see also* Ackerman, *supra* note 26, at A17 (noting that “the prospect of a lame-duck session encourages sitting politicians to defer big issues till after Election Day and thereby avoid scrutiny by the voters”); Jenkins & Nokken, *supra* note 8, at 453 (suggesting that returning members are insulated from constituency pressures in lame-duck sessions); Brian Friel, *A Consequential Lame Duck*, CONG. Q. WKLY., Nov. 15, 2010, at 2652 (quoting University of Virginia political scientist John Jenkins, “Usually, they are occurring today because of overly risk-averse political leaders. . . . It might just mean that leaders aren’t willing to take the chance on holding tough votes in the pre-election period. Why put members on the spot if they don’t have to do it?”).

⁹⁹ *See* Jennifer Epstein, *Michael Bennet: Lame Duck is “Rigged,”* POLITICO, Nov. 30, 2010, <http://www.politico.com/news/stories/1110/45745.html> (quoting Sen. Bennet).

long before Election Day in 2010, so that alone does not explain the urgency for acting during a lame-duck session.¹⁰⁰

The real urgency that existed during the lame-duck session of the 111th Congress was the fear that the 112th Congress would have different priorities. The supporters of the legislation considered by the lame-duck 111th Congress argued that the lame-duck session was necessary because the incoming Congress would not support such legislation. The fear that the new Congress would not enact certain laws was implicit in much of the debate during the lame-duck session. Sometimes it was offered with surprising candor.¹⁰¹ The opponents of such legislation recognized this strategy, too.¹⁰²

This argument, of course, is anathema to the reason that we ratified the Twentieth Amendment. The fact that the newly elected Congress won't prioritize a proposal is an argument against the proposal, not an argument for it. The outgoing Congress should not be able to judge what is important once the electorate has chosen new representatives precisely for that purpose. No one dared voice the contrary argument during the decade of debate over the Twentieth Amendment. The closest anyone came to it was the suggestion that the members of Congress defeated in the election were actually wise and deserving, and that the electorate erred by ousting them.¹⁰³ But that argument

¹⁰⁰ 156 CONG. REC. S10348 (daily ed. Dec. 16, 2010) (statement of Sen. Inhofe) (asserting that “most of the stuff we are trying to cram in right now is what we should have been talking about all year long and have not been”); 156 CONG. REC. H8231 (daily ed. Dec. 8, 2010) (statement of Rep. Kingston) (arguing against the Dream Act because “[t]his is a lame duck session. The Democrats have been in charge of the House and the Senate and the White House now for nearly 2 years”).

¹⁰¹ See Richard L. Hasen, *Kirk Offers Hope Vs. Secret Donors*, POLITICO (Nov. 5, 2010), <http://www.politico.com/news/stories/1110/44718.html> (exhorting the lame-duck Congress to enact a campaign disclosure bill because “[p]rospects could be far worse in the next Congress”); Diana Marcum, *Students Want the Dream Act to Become Reality*, L.A. TIMES, Nov. 28, 2010, <http://articles.latimes.com/2010/nov/28/local/la-me-dream-act-20101128> (quoting a UCLA student's remark that “[t]here's a feeling that it's now or never. With all this anti-immigrant sentiment growing, if it doesn't pass in the lame duck session of Congress, it might be years and years”).

¹⁰² See 156 CONG. REC. S10779-80 (daily ed. Dec. 20, 2010) (statement of Sen. Inhofe) (objecting that “a lot of the things that have come up in this lameduck session have come up because the chances of getting these things through is greater than they would be after eight or nine new Senators come in”); Devlin Barrett, *Mayor Seeking 9/11 Health Aid*, WALL ST. J., Nov. 15, 2000, at A19 (noting that if the outgoing Congress failed to enact the 9/11 health bill during the lame-duck session the new Congress “is unlikely to revive it”).

¹⁰³ See 74 CONG. REC. 5879 (1931) (statement of Rep. Underhill) (describing lame duck as “a victim of mob psychology”); *id.* at 5878 (defining lame duck as “a defeated statesman,” particularly recently, for those who have been defeated for office

against the Twentieth Amendment failed then, and there is no reason why it is more persuasive today.

The final problem with entrusting the lame-duck Congress with taking especially important actions is that the purpose of the Twentieth Amendment was just the opposite. Many supporters of the Twentieth Amendment believed that electing a President is the most important action that Congress can take. The Twelfth Amendment charges the House with choosing the President in the event that no candidate receives a majority of the electoral college votes.¹⁰⁴ Three Presidents — Thomas Jefferson, John Quincy Adams, and Rutherford B. Hayes — have been elected by the vote of the House.¹⁰⁵ They were chosen by the lame-duck House, not the incoming House elected at the same time that they ran for President. The supporters of the Twentieth Amendment wanted to ensure that any future selections of the President would be made by the new members of the House who would take office on January 3. Representative McKeown, for example, insisted that “[t]he vital thing that underlies this legislation is, in the event an election of the President of the United States is thrown into the House of Representatives that that election will be conducted by new Congressmen coming directly from the people, who have the interest of the people at heart when they come to cast their votes in that election.”¹⁰⁶ The more important the question, the more important it is for the newly elected Congress to answer it.

E. Everybody Does It

The supporters of the Twentieth Amendment were not assuaged by the fact that both political parties had suffered from previous lame-duck Congresses.¹⁰⁷ They wanted to eliminate future lame-duck

in recent years were more entitled to the designation of ‘statesmen,’ as a rule, than those who succeeded them”).

¹⁰⁴ See U.S. CONST. amend. XII.

¹⁰⁵ See 74 CONG. REC. 5881 (1931) (statement of Rep. Celler) (noting that lame-duck members participated in House’s election of those three Presidents). The House elected Thomas Jefferson pursuant to its power under Article II, section 1, clause 3, which was superseded by the Twelfth Amendment in 1804.

¹⁰⁶ 75 CONG. REC. 3857 (1932) (statement of Rep. McKeown); see S. Rep. No. 72-26, at 5 (1932) (noting that proposed amendment would mean House of Representatives with fresh popular mandate would select President if duty to elect devolved to House); 75 CONG. REC. 3824 (1932) (statement of Rep. Greenwood) (criticizing ability of lame-duck members to vote for next President); *id.* at 3842 (statement of Rep. Norton) (same); 74 CONG. REC. 5897 (1931) (statement of Rep. Luce) (same).

¹⁰⁷ For a rare exception, see 1924 House Hearing, *supra* note 78, at 3 (statement of

sessions regardless of what those sessions might do. By 2010, though, lame-duck sessions had again become so common that one scholar described the upcoming lame-duck session as “[n]ot revolutionary, not conspiratorial, not anti-democratic — just more of the same, like its many predecessors.”¹⁰⁸

Not all of the predecessors were like that. The first lame-duck session held after the Twentieth Amendment occurred in 1940, when Congress stayed in session after the election because of the war in Europe, though it really did not do anything. Lame-duck sessions were also held in 1942, 1944, 1948, 1950, and 1954, though again they did little of any consequence. The fact that the Twentieth Amendment had failed in its effort to eliminate lame-duck sessions was realized as early as 1942.¹⁰⁹ There were no lame-duck sessions for sixteen years between 1954 and 1970. By 1970, a senator could explain that “the derogatory connotations of ‘lame duck’ have largely disappeared” while the Twentieth Amendment simply “reduced the ‘lame duck’ period for Members of Congress from 13 months to the present 2 months.”¹¹⁰ That historical amnesia probably explains why the 1970 lame-duck Congress had the busiest legislative agenda since the Twentieth Amendment was ratified, passing the Clean Air Act, a major housing bill, two appropriations bills, and other legislation.¹¹¹ The original purpose of the Twentieth Amendment of completely eliminating lame-duck sessions of Congress as undemocratic was forgotten.

Rep. White) (stating that “the rule works both ways . . . It operates the same for both political parties. It is as good sauce for the goose as it is for the gander.”).

¹⁰⁸ Ornstein, *supra* note 17.

¹⁰⁹ See 88 CONG. REC. 9349 (1942) (statement of Sen. Reed) (“We changed the Constitution to eliminate what was called the ‘lame duck’ session of Congress. If anyone can tell me the difference between a ‘lame duck’ session meeting, as it used to meet on the first Monday of December and continuing until March 4, when it expired by limitation, and the present ‘lame duck’ session, which began after the last election in November and will expire by limitation on January 3, I should be pleased to have the distinction made.”); *id.* at 8907 (statement of Rep. McKellar) (observing that Senator Norris “worked long and faithfully to bring about an end to so-called ‘lame duck’ sessions. After many years he succeeded; but he does not seem to have cut the cloth close enough. . . . The only regret I have is that the length of the so-called ‘lame-duck session was not reduced a little more, so as to end about November 15 instead of January 3”).

¹¹⁰ 116 CONG. REC. 37273 (1970) (statement of Sen. Griffin). It is unclear which three months Senator Griffin had in mind; the 13 months are explained in the text accompanying notes 54-61.

¹¹¹ See BETH & SOLTIS, *supra* note 20, at 21 (describing the 1970 lame-duck session).

Not surprisingly, lame-duck sessions became much more common after 1970. The first lame-duck session following an Election Day shift in party control of Congress occurred in 1980, when Congress enacted the Superfund cleanup law, passed extensive Alaska lands legislation, and approved Stephen Breyer's nomination to the First Circuit.¹¹² Lame-duck sessions took place again in 1984 and 1994, and they have convened after every congressional election since 1998 (when a lame-duck House impeached President Clinton).¹¹³ Some of those lame-duck sessions were *pro forma*, some addressed only a single issue, and many achieved little.¹¹⁴

The 2010 lame-duck session was different. It was the first time since the Twentieth Amendment that the party that was in control of Congress began planning a lame-duck session because it expected to lose control after the election in November.¹¹⁵ It pursued the most ambitious legislative agenda that was simply a continuation of what happened before, and was partly designed to enact legislation that the new members of Congress opposed. The devolution was cumulative as lame-duck sessions became more common and more ambitious in the years since 1933, but 2010 marks the total failure of the Twentieth Amendment to prevent lame-duck Congresses from legislating.

¹¹² See Nagle, *Parable*, *supra* note 11, at 491-93.

¹¹³ See generally BRUCE ACKERMAN, *THE CASE AGAINST LAME DUCK IMPEACHMENT* (1999) (arguing that voting on the bill of impeachment against President Clinton should have been reserved for the incoming members of the House); Epps, *supra* note 92 (announcing "the Boehner Rule" — your lame ducks are evil; mine are noble" — based on Representative John Boehner's vote to impeach President Clinton during the 1998 lame-duck session).

¹¹⁴ See Jim Abrams, *Hobbled Dems, Eager GOP Back for Lame-Duck Session*, HERALD-SUN (Durham, N.C.) Nov. 14, 2010, at 8 (contending that "[l]ame-duck sessions are usually unpopular and unproductive"); Friel, *supra* note 98, at 2652 (observing that "[l]ame-Duck sessions . . . are so short and fraught with post-election fissures that Congress usually musters the will to complete only a single piece of business, if that").

¹¹⁵ As early as July 9, it was reported that Democrats expected to lose control of the House, so they were "planning an ambitious, lame-duck session to muscle through bills in December they don't want to defend before November." Fund, *supra* note 88, at A15; see also 156 CONG. REC. S6561 (daily ed. Aug. 2, 2010) (statement of Sen. Dorgan) (describing debate on energy legislation as "a process that I hope will last through September, and perhaps through the lame duck session as well"); Alexander Bolton, *Democrats to Stuff 20 Bills Into Post-Election Session*, HILL, Sept. 28, 2010 (reporting that "[t]he array of bills competing for floor time shows the sense of urgency among Democratic lawmakers to act before the start of the 112th Congress, when Republicans are expected to control more seats in the Senate and House").

F. *Lame-Duck Congresses Enact Desirable Legislation*

Once the lame-duck session of the 111th Congress concluded, numerous participants and observers praised it for its accomplishments. President Obama said that “this has been the most productive post-election period we’ve had in decades.”¹¹⁶ By contrast, Republican Senator Lindsey Graham lamented that “[t]his has been a capitulation in two weeks of dramatic proportions that wouldn’t have passed in the new Congress.”¹¹⁷ Others lamented what Congress failed to accomplish, including the passage of climate change legislation, an omnibus public lands bill, campaign finance disclosure requirements, the Dream Act, and additional federal spending authority.

It may be tempting for those who are especially pleased with the actions of the lame-duck session of the 111th Congress to credit lame-duck Congresses more generally. Or maybe that session was anomaly that is unlikely to be repeated. Further research or further experience may be needed to determine whether the dynamics of the lame-duck session lend themselves toward certain kinds of actions, rather than simply the priorities of the party that is about to lose power. Even so, the productivity claim is inevitably entangled with one’s judgment of the merits of the legislation at issue. And the democratic principles underlying the Twentieth Amendment affirm that the judgment should be made by the new Congress, as Senator Graham contended.

III. THE OPPOSITION TO LAME DUCKS

The debate preceding the Twentieth Amendment resulted in a constitutional amendment designed to eliminate lame-duck sessions of Congress. The debate in the lame-duck 111th Congress resulted in the enactment of sweeping new legislation. The shifting success in the debate about the propriety of lame-duck congressional sessions thus requires a further inquiry into the efforts to resist such sessions. The lame-duck 111th Congress also illustrates the scenario of greatest concern of a defeated majority party that seeks to act before the new

¹¹⁶ Barack Obama, *The President’s News Conference*, Dec. 22, 2010, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=88852#axzz1sK7eY9D3>; see also 156 CONG. REC. S11061 (daily ed. Dec. 22, 2010) (statement of Sen. Reid) (boasting that “the lameduck session we are finishing was the most productive of its kind”); *id.* at H8946 (daily ed. Dec. 22, 2010) (statement of Rep. Pallone) (asserting that “this has been a very productive lame duck Congress”).

¹¹⁷ See Michael O’Brien, *Graham: GOP to Blame for “Capitulation . . . of Dramatic Proportions” in Lame-Duck*, THE HILL, Dec. 21, 2010, <http://thehill.com/blogs/blog-briefing-room/news/134719-graham-gop-to-blame-for-capitulationof-dramatic-proportions-in-lame-duck> (quoting Senator Graham’s interview on FOX News radio).

majority takes office. The opponents of lame-duck sessions in the 1920s and again in 2010 employed five tactics to oppose lame-duck Congresses: using the Twentieth Amendment, eliminating the gap between Election Day and Inauguration Day, enacting a statute prohibiting or limiting lame-duck sessions, individual action by affected lawmakers, and filibusters.

A. *Interpret the Twentieth Amendment*

The text of the Twentieth Amendment does not prohibit lame-duck sessions of Congress, but other constitutional provisions have been interpreted according to their purpose rather than their text. As I have noted before, the Supreme Court has read the Eleventh Amendment to include a broad command of state sovereign immunity that is not actually contained in that Amendment's text.¹¹⁸ That approach justifies the argument suggested by one member of Congress during the 111th Congress that "it could be argued that it's unconstitutional" to legislate during a lame-duck session.¹¹⁹ Or perhaps the courts could adopt an interpretive canon that narrowly construes legislation enacted during a lame-duck session, just as there are substantive canons to effectuate other underenforced constitutional norms, though those canons are controversial, too.

The meaning of the Twentieth Amendment may thus depend on the choice between constitutional theories. A broad, purposive approach to constitutional interpretation could support a jurisprudence that invokes the Twentieth Amendment to invalidate or narrow statutes enacted by lame-duck Congresses. So far, the courts have avoided that approach. The better course is to admit that the framers of the Twentieth Amendment failed to achieve their desire to eliminate lame-ducks.

B. *Eliminate the Gap Between Election Day and Inauguration Day*

There are two ways to eliminate or shorten the lame-duck period between Election Day and Inauguration Day: move Inauguration Day earlier or move Election Day later. Another constitutional amendment would be needed to move the beginning date of the congressional session from January 3 to, say, the middle of November. There is some support for that idea,¹²⁰ but there is a visceral opposition to most

¹¹⁸ See Nagle, *Parable*, supra note 11, at 472-77.

¹¹⁹ See 156 CONG. REC. H8845 (daily ed. Dec. 21, 2010) (statement of Rep. Broun).

¹²⁰ *Lame Duck on Steroids: Democrats Abuse the System on Their Way Out*, WASH.

proposals to amend the Constitution at the beginning of the twenty-first century, including structural reform proposals related to congressional elections. The constitutionalization of the January 3 date by the Twentieth Amendment thus proved Representative Millard Tydings right when he warned in 1924 against “put[ting] into the organic law of our country dates which afterwards may be found to be inadvisable, and in order to cure the defect we will have again to amend the Constitution.”¹²¹

The alternative to moving up Inauguration Day is to move Election Day closer to the January 3 inauguration mandated by the Twentieth Amendment. Sandy Levinson has observed that lame-duck Congresses could be avoided “if we simply changed Election Day to mid-December.”¹²² That’s hardly simple, though, and one could expect significant resistance to the idea of moving Election Day into the already busy Christmas and holiday season.

Though both strategies are improbable, they are also the most effective solutions. Most other democracies avoid the lame-duck problem by installing new representatives immediately after they are elected. That is the most direct way of addressing the concerns that animated the Twentieth Amendment and that resurfaced during the 111th Congress. It may not be easy, but it is a result worth pursuing.

C. Legislation Prohibiting Lame-Duck Sessions

Congress could enact a statute prohibiting all lame-duck sessions, or prohibiting them except in specified extraordinary circumstances. This is Bruce Ackerman’s solution.¹²³ It was also attempted during the summer of 2010 as the prospect of a lame-duck session became apparent. In August 2010, Representative Tom Price introduced a resolution for the House to “pledge[] not to assemble on or between the dates of November 2, 2010 and January 3, 2011, except in the case

TIMES, Dec. 15, 2010, at 2 (editorializing that “[o]ne of the first orders of business in the new Congress should be to introduce an amendment to further compress the time between holding elections and implementing their results”) [hereinafter *Duck on Steroids*].

¹²¹ 1924 House Hearing, *supra* note 78, at 22 (testimony of Rep. Tydings).

¹²² Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 61, 66 n.4 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

¹²³ See Ackerman, *supra* note 26, at A17 (arguing that Congress “should enact legislation prohibiting lame-duck sessions except in national security emergencies”). Betsy McCaughey, the former lieutenant governor of New York, has also called for legislation “providing that Congress will not meet between the November 2012 election and Jan. 3, 2013.” McCaughey, *supra* note 29, at A23.

of an unforeseen, sudden emergency requiring immediate action from Congress.”¹²⁴ The resolution was motivated by reports indicating that the Democratic leadership had already planned to address a number of contested issues after the November election.¹²⁵ But the resolution framed the issue as a partisan abuse by the Democratic majority, and it suffered a predictable defeat along party lines.¹²⁶ A similar proposal offered by Senator Johanns in July 2010 to prohibit a lame-duck Congress from enacting cap-and-trade climate legislation did not even get a vote in the Senate.¹²⁷ Such legislation may be more viable when an election is not imminent and when the apparent beneficiaries and losers from a lame-duck session are unknown.

D. Individual Action by Affected Lawmakers

Absent an institutional fix, lame-duck sessions could be blocked by the actions of individuals who would participate in them. For example, members of Congress who become lame-ducks after Election Day could decline to participate in any further legislative activities. That was the first solution proposed in response to the controversial 1922 lame-duck session that ultimately inspired the Twentieth Amendment.¹²⁸ Or a lame-duck lawmaker could resign. Ruth Bryan Owen, the daughter of William Jennings Bryan and a member of the House from Florida, took that approach after her 1932 reelection defeat, but she soon backtracked under pressure from her party's leadership.¹²⁹ Nonetheless, she voted for the repeal of the Eighteenth Amendment, honoring the desires of the constituents who had just

¹²⁴ 156 CONG. REC. H 6355 (daily ed. Jul. 29, 2010).

¹²⁵ See 156 CONG. REC. H 6354 (citing eight press reports about the plans to consider various bills during a lame-duck session); see also 156 CONG. REC. H6583 (daily ed. Aug. 10, 2010) (statement of Rep. Wilson of S.C.) (worrying that “after the election in November, Washington liberals will try to ram through a national energy tax, remove the right to a secret workers’ ballot, and continue to skyrocket America’s deficits with reckless spending”); *id.* at E1563 (suggesting that a lame-duck Congress may pass “unpopular legislation like a national energy tax, additional deficit spending bills, ‘Card Check’ legislation for union formation, or any type of amnesty for undocumented aliens”).

¹²⁶ See 156 CONG. REC. H6599 (daily ed. Aug. 10, 2010) (reporting the 236–163 vote to table the resolution).

¹²⁷ See 156 CONG. REC. S6269-70 (daily ed. July 27, 2010) (statement of Sen. Johanns).

¹²⁸ See 1924 *House Hearing*, *supra* note 78, at 18 (testimony of A.D. Fairbairn) (observing that Senator Caraway had proposed “a bill declaring it to be the sense of Congress that ‘lame ducks’ would disqualify themselves voluntarily from voting upon any important or vital legislation”).

¹²⁹ See *Mrs. Owen Decides to Be “Lame Duck,”* WASH. POST, July 10, 1932, at M12.

voted her out of office rather than insisting upon legislating her own convictions.¹³⁰ The recusal and resignation scenarios only address half of the problem: they disqualify the defeated member, but they do not empower the incoming member to vote instead.¹³¹

Decisions not to engage in lame-duck legislating become more effective if they are joined by sufficient numbers of senators or representatives, or their leadership. In 2010, one House Republican recalled his party had adopted that approach when it lost control of the House four years before.¹³² Lame-duck sessions would not occur if the party in power refused to convene them.

The President could address the lame-duck problem, too, by vetoing any legislation enacted by a lame-duck Congress. Ari Fleischer, who served as the press secretary for President George W. Bush, suggested during the summer of 2010 that President Obama should take that approach.¹³³ So did one Republican member of Congress.¹³⁴ But President Obama did the opposite, imploring the lame-duck Congress to act.¹³⁵ Obama's view of lame ducks mimics President Carter, who explained soon after his defeat in the 1980 election (when the Republicans took control of the Senate as well) that he "was determined not to let anything interfere with my efforts to complete

¹³⁰ See Vickers, *supra* note 45, at 469 (1999).

¹³¹ Even that half measure was desirable to the supporters of the Twentieth Amendment. See *1924 House Hearing*, *supra* note 78, at 31 (testimony of Rep. Tydings) (observing that what the amendment's supporters "are really after is not so much the new men taking office, but to get rid of the men who have not been reelected").

¹³² See 156 CONG. REC. H8464 (daily ed. Dec. 15, 2010) (statement of Rep. Buyer) (stating that "[t]hen-Speaker Dennis Hastert, in 2006, when Democrats took over the House, what did Dennis Hastert do? He held a conference and he told Republicans: Respect the will of the American people. We will not legislate our agenda in a lame duck"). I have yet, however, to find any independent verification that Hastert held such a conference and made such a directive.

¹³³ See *How Can Obama Rebound?*, N.Y. TIMES, July 18, 2010, at 8 (statement of Ari Fleischer that President Obama "should start by declaring his opposition to a lame-duck session of Congress after November in which Democrats, ignoring the voice of the people, ram through major legislation"). Fleischer was one of 15 political experts who answered the question of how President Obama could "shore up his base, woo back independent voters and win a second term." *Id.*

¹³⁴ See 156 CONG. REC. H6143-44 (daily ed. July 27, 2010) (statement of Rep. King of Iowa) (calling on President Obama "to say no transformative legislation should be brought before this Congress in a lame duck session").

¹³⁵ See Barack Obama, *Remarks by the President After a Cabinet Meeting*, Nov. 4, 2010, available at <http://www.whitehouse.gov/the-press-office/2010/11/04/remarks-president-after-a-cabinet-meeting> (listing "what we need to get done during the lame-duck session").

my legislative agenda.”¹³⁶ Both Presidents thus failed to defend the judgment encompassed within the movement to take the extraordinary step of amending the Constitution to eliminate lame-duck Congresses as contrary to fundamental democratic principles. Of course, no other President has opposed lame ducks either, and members of Congress have tended to rail against lame-ducks only when it is politically convenient to do so.

E. Filibusters

George Norris opposed filibusters as well as lame-duck Congresses,¹³⁷ but he viewed the latter as worse than the former. He thus employed filibusters to block the actions of lame-duck Congresses. In order to prevent legislation from being enacted by members of Congress who have been repudiated by the people, Norris explained, “[T]here is only one remedy, and that is the filibuster; and when such a condition exists, the filibuster is justified, desperate and illogical though it may be.”¹³⁸

Filibusters have been used to prevent lame-duck Congresses from legislating before and after the ratification of the Twentieth Amendment. As lame-duck sessions became especially controversial during the first decades of the twentieth century, “filibusters ended all four lame-duck sessions during President Woodrow Wilson’s Administration.”¹³⁹ A Senate filibuster stopped the ship subsidy bill that President Harding pursued in a lame-duck session after the 1922 election, even as that episode sparked the movement to abolish lame-duck sessions through the Twentieth Amendment.¹⁴⁰ After the 1970 election, Senator William Proxmire conducted a two-week filibuster to block the funding of the SST during the first lame-duck session in sixteen years.¹⁴¹ By contrast, the effort to filibuster Stephen Breyer’s appointment to the First Circuit in 1980 failed by a 68–28 vote.¹⁴²

¹³⁶ JIMMY CARTER, WHITE HOUSE DIARY 481 (2010); see also *id.* at 493 (boasting in December 1980 about “how productive this so-called lame-duck congressional session had been”).

¹³⁷ See NORRIS, *supra* note 11, at 173-75, 328-29.

¹³⁸ George William Norris, *Mr. Dawes and the Senate Rules*, FORUM, Oct. 1925, at 584.

¹³⁹ Jenkins & Nokken, *supra* note 8, at 452.

¹⁴⁰ See Goodman & Nokken, *supra* note 10, at 478. The filibuster was led by Texas Senator Morris Shepherd, two of whose grandsons served on the Eighth Circuit.

¹⁴¹ See *Lame Duck on Steroids*, *supra* note 120, at 2 (calling on Republicans to emulate Proxmire).

¹⁴² See Nagle, *supra* note 11, at 493.

The primary criticism of filibusters is that they deny the majority the opportunity to enact legislation.¹⁴³ They have the opposite effect in lame-duck sessions. Filibusters actually preserve the will of the majority of the people during lame-duck sessions because they prevent Congress from acting after the People have elected new representatives. The concern is not whether a sufficient number of representatives support a proposed bill, but whether the people voting on the bill are representative at all. Even then, filibusters are an inadequate defense against lame-duck lawmaking because they are only available in the Senate and they can be overcome by sixty votes even if those voting have been defeated. Despite these shortcomings, filibusters will remain the most effective deterrent to lame-duck congressional action until one of the remedies outlined above is adopted.

CONCLUSION

Missouri Representative Ralph Lozier was an eager supporter of the Twentieth Amendment. Of course, he could not have known that he would lose his seat in the first election after the amendment was ratified and thus would become one of the first lame ducks who never had a farewell opportunity to legislate. Subsequent events proved that Lozier's analysis of the amendment was faulty, too. The Twentieth Amendment was not, despite Lozier's assurance, "practically a perfect form, that is, embodying the last and best word that could be said upon the subject involved."¹⁴⁴

The arguments for lame-duck lawmaking were weak during the debate over the Twentieth Amendment, and they are no stronger now — except, perhaps, for one. The actions of the lame-duck 111th Congress are very popular among some observers. Those results have encouraged some to judge all lame-duck sessions by the results they achieve rather than the process for achieving them. The legislative ends, in other words, justify the legislative means. That argument appears to be gaining traction throughout the lawmaking process:

¹⁴³ See, e.g., Josh Chafetz, Debate, *The Filibuster and the Supermajoritarian Difficulty*, 158 U. PA. L. REV. (PENNUMBRA) 245, 246 (2010) (arguing against the constitutionality of filibusters because "we understand the concept of an election of representatives to include within it a structural principle of majoritarianism"); Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803, 827 (questioning the constitutionality of filibusters of judicial nominations because "America's founders believed that majority rule is central to the very definition of democracy").

¹⁴⁴ 75 CONG. REC. 3832 (1932) (statement of Rep. Lozier).

“The history of modern Washington is a history of the social norms that once restrained political parties from no-holds-barred warfare falling by the wayside, one by one.”¹⁴⁵ The framers of the Twentieth Amendment thought that they were enacting a constitutional prohibition, not a social norm. Their failure means that we need to have the debate over the problems with lame ducks, the justifications for them, and the means of opposing them all over again.

¹⁴⁵ Jonathan Chait, *Scandal TBD: The Coming Impeachment of Barack Hussein Obama*, NEW REPUBLIC, Oct. 28, 2010, at 2.