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William Howard Taft Lecture

***375 PRESIDENTS WITHOUT MANDATES (WITH SPECIAL EMPHASIS ON OHIO)**

Akhil Reed Amar [\[FN1\]](#)

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Advocate, judge, scholar, diplomat, and President-William Howard Taft packed at least five grand careers in the law into one life. A single lecture in honor of so large a man could travel a long way in any number of directions, and yet stay close and true to him. This day, I shall take my cue not just from the man, but from the place. Ohio is, or at least for much of our history has been, the home of Presidents. This place invites us to ask not simply about what one does as President, but also about how one becomes President. The specific story of Taft's ascension might make for a fine tale, but it has been well told elsewhere. [\[FN1\]](#) Today, I shall try to offer a different, more general, story focusing on those who (unlike Taft) came to the Presidency without a direct and personal mandate from the American electorate.

Before I plunge into my tale, let me note some of the roads I shall not travel. William Howard Taft became a state judge at the age of twenty-nine, the Solicitor General of the United States at thirty-two, a federal Circuit Judge a couple of years later, and eventually, of course, Chief Justice of the United States. [\[FN2\]](#) A lecture commemorating this part of his extraordinary life might reflect on his greatest judicial opinion, *Myers v. United States* [\[FN3\]](#) -the subject of Justice Scalia's Taft Lecture; [\[FN4\]](#) or on Taft's overall legacy as Chief Justice-the subject of Judge McGowan's Inaugural Taft Lecture; [\[FN5\]](#) or on the more general topic of judicial review-the subject of Senator Hatch's Taft Lecture; [\[FN6\]](#) or on the role of *376 lower federal court judges-the subject of Judge Wald's Taft Lecture; [\[FN7\]](#) or on Taft's role as a judicial administrator and law reformer-the subject of Justice O'Connor's and Solicitor General Starr's Taft Lectures. [\[FN8\]](#) William Howard Taft also served as professor and dean of this distinguished school, the University of Cincinnati College of Law, and as the Chancellor Kent Professor at my own home institution, Yale University. A lecture honoring this dimension of Taft's career might well consider the role of universities and other public institutions of culture-the subject of Dean Bollinger's Taft Lecture. [\[FN9\]](#) Also, let us not forget that William Howard Taft served as the first civil governor of

the Philippines, provisional governor of Cuba, and secretary of war, carrying out sensitive diplomatic missions in Panama and Japan. [\[FN10\]](#) A lecture weighing this slice of Taft's service might well ponder America's obligations to the world beyond our shores-the subject, perhaps, of some future Taft Lecture?

I propose to talk about none of the above, and instead, to speak of the Presidency. To bend a phrase, we might say that some men were born to be President (John Quincy Adams comes to mind); others achieved the Presidency- against the odds of their birth, and through sheer force of will; while still others had the Presidency thrust upon them. Taft himself was an interesting hybrid case: well born (and in the right state), winning the office in his own right, but without lusting after it and with considerable help from Theodore Roosevelt, who hand-picked Taft as his chosen successor. [\[FN11\]](#) Today, I mean to focus on those who, unlike Taft, simply had the Presidency thrust upon them-on men who became President without being voted President by the American people.

I. Vice Presidential Ascension and The Problem of Ticket Balancing

My story begins with William Henry Harrison, the ninth President of the United States, and the first President from Ohio. [\[FN12\]](#) Much of the *377 story of the first century and a half of our national existence can be distilled in the shift from the early Virginia Presidents to the later Ohio Presidents, reflecting westward expansion and northern ascendancy. Washington, Jefferson, Madison and Monroe-Virginians all-collectively held the Presidency for thirty-two of its first thirty-six years, but from the ascension of Grant in 1869 to Harding's death in 1923, Ohioans occupied the White House for more days than all non-Ohioans put together. [\[FN13\]](#) Harrison himself personifies this transition. Born in Virginia (under the British flag), and the son of a man who signed the Declaration of Independence, Harrison later moved to the Northwest Territory, eventually settling in North Bend, Ohio. [\[FN14\]](#) With his inauguration in 1841, Ohio had its first President. But not for long- Harrison was also the first President to die in office, and after only one month in the White House. [\[FN15\]](#) The reins of power fell into the hands of a man from (you guessed it) Virginia, Vice President John Tyler. [\[FN16\]](#)

At this point, a nice constitutional question arose. Was Tyler, strictly speaking, merely the Vice President acting as President, or did he instead actually become President upon the death of Harrison? Tyler, unsurprisingly, took the latter position. The words of the original Constitution on this question seem fiendishly ambiguous: "In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President." [\[FN17\]](#) Did the words "the Same" in this Devolution Clause mean the "said Office" itself, or merely "the Powers and Duties" of the office?

At first we might wonder what would turn on such a hairsplit. Surely not Tyler's formal authority to, say, veto laws-for even under a narrow reading, such authority seems obviously included as among the "Powers and Duties" of the Presidency. Nevertheless, Tyler's exuberant use of the veto provoked torrents of criticism and even serious calls for his impeachment. [\[FN18\]](#) Whereas his predecessors had used the veto pen rather sparingly-confining most of their vetoes to instances in which they deemed bills unconstitutional or invasions of executive turf-Tyler felt freer to veto bills that he thought were merely bad policy. Perhaps a President with a strong and personal mandate from the American *378 people

could have expanded the office this way with more plausibility, but John Tyler was no Andrew Jackson. No one had voted for Tyler as President and he was derisively referred to by his many critics as "His Accidency" (a pun on "His Excellency"). [FN19] Indeed, Tyler's policy views were in general sharply at odds with those of the man the people had chosen, namely, Harrison. Later in my lecture, I shall return to the global problem exemplified by the Tyler ascension, a problem created by tickets and ticket balancing.

If Tyler's formal powers did not turn on whether he was actually the President, or merely the Vice President acting as President, what else was at stake? Perhaps his tenure in office? Probably not. At the end of the above- quoted Devolution Clause, the Constitution contains language that the devolution (of the office, or of the powers thereof) would end when "the Disability shall be removed, or a President shall be elected." [FN20] These words clearly contemplated the possibility of a special election in the following situation. If both the President and the Vice President were to die, Congress could by law designate an officer to be a statutory successor, who would simply act as a caretaker until a special off-year presidential election was held, whose winner would serve out a residual term until the next regularly scheduled inauguration. [FN21] When Congress implemented this clause by adopting the Presidential Succession Act of 1792, [FN22] it provided for just such a special off-year election, to pick a new President who would have a clear mandate. But this Act applied only in the event of statutory succession triggered by double death-of both the President and Vice President. Only by an odd grammatical contortion of the Devolution Clause can we read its last clause as applicable to Vice President-successors as opposed to statutory (double death) successors.

Thus at the end of the day, it seems that Tyler was entitled to wield all presidential powers for three years and eleven months, regardless of whether, strictly speaking, he had become President. However, at least two things were at stake. First was the issue of salary. A presidential salary was not quite part of the "powers and duties" of the presidency, but it surely was part of the "office" itself, which Tyler claimed as his own. Calling himself President, Tyler thereby claimed the higher presidential salary (which of course under the Constitution was fixed for the entire term, and thus immune from any congressional carrot-and-stick *379 reprisals for his maddening vetoes). [FN23] Second was the issue of formal title itself. We are apt to miss the import of such a seemingly small formality in our highly informal world of "Jimmys" and "Bills" rather than "Mister Presidents," but the formal issue of title loomed larger in an earlier America surrounded by regimes bulging with dukes and earls and barons and counts and kings. [FN24] Two separate clauses of the federal Constitution condemned "titles of nobility" [FN25] and a third anti-title provision passed Congress as a proposed constitutional amendment in 1810, only to fail at the state ratification stage. [FN26] From a modern perspective, an unfathomable amount of wrangling occurred at the founding over the issue of the President's title. Washington let it be known that he would prefer to be formally addressed as "His High Mightiness, the President of the United States and Protector of their Liberties," [FN27] but the First Congress ultimately opted for the more republican-sounding "Mister President."

With Tyler having fixed in place a practical precedent resolving the open textual question, later Vice Presidents also proclaimed themselves Presidents upon the deaths of their running mates. After Harrison, the next presidential death occurred in 1850 when the Virginia-born President Zachary Taylor passed away in office, whereupon VicePresident Millard Fillmore became President Millard Fillmore.

Then came Lincoln's assassination in 1865, with the reins of presidential power falling into the hands of Andrew Johnson. [\[FN28\]](#) Like John Tyler before him, Andrew Johnson insisted on wielding the powers of the presidency-especially the veto pen-with exuberance, even though he had no personal mandate, and indeed came to stand for things quite at odds with what Lincoln would likely have stood for. [\[FN29\]](#)

Opponents were of course outraged. Who did this fellow think he was, this self-proclaimed President wielding such awesome power by ***380** dint of one man's bullet rather than all men's ballots? For the first time in history, Congress overrode a major presidential veto and eventually impeached the president, with a strong majority (but not the necessary two-thirds) voting to convict. [\[FN30\]](#) Here again we see the general problem raised by ticket balancing-with Americans voting for presidential policy X, and ending up with presidential policy Y.

But before we ponder that problem more generally, let us trace to its end the other thread of the Tyler precedent-the question of whether a Vice President actually becomes President. When the elected President actually dies, and dies quickly-as did Harrison, Taylor, and Lincoln-we have seen that very little turns on the question. Salary and title are more than trivial but less than momentous. But the next presidential assassination showed that a great deal more might be at stake. In 1880 the nation elected James Garfield-of Ohio, of course. [\[FN31\]](#) Four months after assuming office, Garfield was shot in a train station by a dissatisfied office-seeker. [\[FN32\]](#) Garfield did not die immediately, but lingered on for months, waxing and waning in bed. Meanwhile the nation listed, rudderless, without a leader at the helm. [\[FN33\]](#)

Why didn't Vice President Chester A. Arthur do something, and step in temporarily, given that the President was obviously disabled? In large part, because of the Tyler precedent. [\[FN34\]](#) Suppose Arthur did step forward and start acting as President. Under the Tyler precedent, wouldn't Arthur thereby become President? But then what would happen if Garfield later recovered (as for a time seemed quite likely)? If Arthur had already become President, would Garfield be out of luck (and out of a job)? If so, Arthur would have in effect staged a coup, and permanently ousted Garfield. And two further complicating factors were at work. First, it was far from clear exactly who should decide whether Garfield was indeed "disab[led]" within the meaning of the Constitution. Garfield alone? Arthur alone? The Cabinet? The Congress? The Supreme Court? Second, Garfield and Arthur came from opposite wings of the Republican party, representing different policies. [\[FN35\]](#) Garfield seemed to smile upon a professional civil service, while Arthur believed that government jobs should reward the party faithful. In effect, Republicans ticket-balanced a mugwump and a ***381** stalwart. Garfield paid dearly for his perceived views. Upon arrest, Garfield's assassin told police, "I did it and will go to jail for it. I am a stalwart, and Arthur will be President." [\[FN36\]](#) On his person, police found a letter addressed "To the White House" proclaiming Garfield's death a "sad . . . political necessity" to "unite the Republican party" and a letter addressed to Arthur making various recommendations for Cabinet reshuffling. [\[FN37\]](#) Arthur of course had had nothing to do with this madman, but for the Vice President to move in too soon would indeed look like a coup of sorts. Thus, Arthur did nothing, and months went by with the country effectively without a President. Garfield eventually died, and under the Tyler precedent, Arthur thereupon became President. [\[FN38\]](#)

A similar situation arose in 1919. In 1912, Woodrow Wilson became the first Virginia-born President

since Zachary Taylor, by defeating an incumbent Ohio President-one William Howard Taft-in a three way race that also included Teddy Roosevelt. [\[FN39\]](#) Late in Wilson's second term, he suffered a serious stroke that spelled the practical end of his presidency. [\[FN40\]](#) Once again, the Vice President did nothing, in part because of the uncertainty created by the Tyler precedent. Read narrowly, the precedent might mean that when a President died, his Vice President became President; but that in the event of disability, a Vice President could only act as President until the disability subsided. But read broadly, perhaps the precedent might mean that the moment a Vice President started wielding presidential powers, he irreversibly became President. With so much at stake, and little definitive legal guidance, Vice Presidents acted with extreme caution.

Today, of course, definitive guidance does exist, in the form of the Twenty- Fifth Amendment, proposed and ratified after the assassination of John Kennedy and the ascension of Lyndon Johnson. [\[FN41\]](#) The Amendment makes clear that when the President dies or resigns or is removed from office-and only then-does the Vice President in fact "become President." [\[FN42\]](#) Otherwise, if the President is merely disabled (perhaps only temporarily) from exercising the powers and duties of his office, then the Vice President may step in and "assume the powers and duties of the office as Acting President" [\[FN43\]](#) without prejudice to the President's ability to resume his post when he has recovered from his *382 disability. The Amendment also provides a clear framework for determining whether the President is in fact disabled, and for how long. Its biggest flaws are that it provides no satisfactory mechanism for determining vice presidential disability, and that in the event of a vacant or disabled vice presidency, its rules for determining presidential disability will not work. [\[FN44\]](#)

The Twenty-Fifth Amendment does one more noteworthy thing: in the event of a vice presidential vacancy (created either by vice presidential death, removal, or resignation on the one hand, or by vice presidential ascension to a vacant Presidency on the other) the President may nominate a candidate to fill the vacancy, who must then be voted on by the entire Congress before becoming Vice President. [\[FN45\]](#) This is of course the mechanism by which Gerald Ford became Vice President (and later President) in the mid 1970s, and by which President Ford in turn paved the way for Nelson Rockefeller to become Vice President. [\[FN46\]](#) Although the American people do not directly vote in this process, their representatives in Congress do vote, and thereby confer a direct and personal mandate upon the Vice President.

It is precisely this mandate that is generally lacking in ordinary elections of a Vice President. Generally, American voters are not allowed to vote for President and Vice President separately in a process that would give each one a direct and personal mandate to govern (though the mandate of the Vice President would obviously be a contingent one). Rather, voters are confronted with a single ticket, and must take the package as a whole. There is nothing in the Constitution that requires this way of voting; it is purely a matter of state law. And there is good reason to question the current and traditional way of voting for tickets. Here we return to the other thread of the Harrison-Tyler succession problem-the problem of ticket balancing.

The problem, simply put, is this: Americans vote for a President at the top of a ticket, without much attention to the Vice President at the bottom of the ticket. So long as nothing happens to the President, all this may be harmless enough, but what if something does happen to the President? Having voted for

A, the American people end up with B. B lacks a personal mandate to govern, yet has the legal right to wield all the awesome power of the office. The situation is even worse when parties balance tickets with candidates from opposite party wings, so that the electorate votes for one set of policies and ends up with a very different set.

***383** Elsewhere, Vik Amar and I have explored the theoretical problems of ascending Vice Presidents who come to the Presidency with neither a personal nor a political mandate from the people. [\[FN47\]](#) Today, in this place, let me try to illustrate this theoretical point anecdotally, with four examples in American history of ticket balancing gone bad. Each of the four examples, interestingly, has an Ohio connection. First, as we have seen, democracy and constitutional structure were not well served when the people voted for President Harrison and ended up with President Tyler, who nearly provoked a constitutional crisis. [\[FN48\]](#) Lest we simply personalize all this, and heap the blame on Tyler, let us note that virtually the same thing happened when the people voted for President Lincoln, and ended up with President Johnson, who did indeed provoke a severe constitutional crisis. [\[FN49\]](#) (In a few moments, I shall highlight the role of Ohio in this crisis, in the person of Ohio Senator Benjamin Wade, who would have become President had Johnson been convicted by the Senate in his impeachment trial.) The situation with Presidents Garfield and Arthur seems even worse—here the ticket balancing actually induced an assassination. [\[FN50\]](#) In such a situation, Arthur was in a poor position to lead the country, had strong leadership been necessary; his occupancy of the office was a genuine embarrassment. [\[FN51\]](#) In 1905, the country once again voted for one kind of Republican-Ohio's William McKinley—only to get a very different kind as President, Theodore Roosevelt. [\[FN52\]](#) Although Roosevelt turned out to be a man of great ability, this seems like blind luck more than structural genius. Precisely because Americans never vote directly for a Vice President, parties have weak incentives to fill this bottom slot with a truly worthy figure, and many talented politicians shun the assignment.

The solution, Vik Amar and I have suggested elsewhere, [\[FN53\]](#) is to let Americans vote directly for Vice President. In the event of the President's death or disability, the Vice President will be able to lead more effectively precisely because he will have already received a personal vote of confidence from the nation he must lead. Parties will be more likely to field one of their most worthy candidates for the job precisely because separate election will focus the voters more carefully on the ***384** bottom of the ticket. Talented and ambitious politicians will be more willing to accept the number two spot if it comes with a personal mandate from the entire nation—which no other politician in America (aside from the President) enjoys. Even if the President stays healthy in office, the Vice President will be in a stronger position to run for President on his own later on.

II. Statutory Succession

Having pondered some of the implications of our constitutional scheme of succession, let us now note some of the features of our statutory scheme of succession, which would swing into operation in the event of double death or disability—of both President and Vice President. Double death or disability has never yet happened—and after the Twenty-Fifth Amendment it is less likely to happen, because we now have a mechanism for filling a vacant Vice Presidency. But if it were to happen, the stakes would be even more serious, since by hypothesis, the nation would have lost (at least temporarily) its two highest

leaders.

Here are the words of the Constitution's Devolution Clause on the subject: "Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected." [FN54] There are two fundamental questions we must answer in the event of double death. First, who should take over? Second, for how long? Over the centuries, Congress has enacted three different succession statutes, each of which offered different answers to these two questions. None of these statutes has answered both questions correctly, and the current statute is a disaster—a true constitutional accident waiting to happen.

Under the Act of 1792, as we have seen, a statutory successor simply would act as a caretaker, holding the office until a special off-year presidential election could be arranged, whose winner would immediately take over the reins for the remainder of the deceased President's term. This Act, I suggest, got the "how long" question right. Precisely because a statutory successor will lack a strong mandate from the American people, the successor should simply hold down the fort for the minimum amount of time necessary to run a smooth election that will generate a leader who does have such a mandate to hold the nation's (and today, the world's) most powerful office. But the 1792 Act got the *385 "who" question wrong. It designated the Senate president pro tempore as the caretaker officer. As James Madison pointed out at the time, this designation is unconstitutional. [FN55] Members of the House and Senate are not, strictly speaking, "officers of the United States"—for example, legislators cannot be impeached. Only "officers" of the United States may be designated as statutory successors under a proper reading of the Devolution Clause; the clause plainly contemplates that a Cabinet officer picked by the President, and not a legislator, should hold down the fort.

Elsewhere, Vik Amar and I have offered a detailed analysis of why Madison was absolutely right [FN56]—and I do not propose to rehash all of our reasons today. But standing here in Ohio, I do want to highlight a few of the most vicious features of legislative (as opposed to Cabinet) succession, because these features directly involve this state, and these features helped lead to the repeal of the Act of 1792. When Andrew Johnson was impeached by the House, and tried by the Senate in 1868, the Vice Presidency was of course vacant. [FN57] (It had been vacated by Johnson himself, and prior to the Twenty-Fifth Amendment, no means existed to fill the vacancy.) Thus, if the Senators who sat in solemn judgment over Johnson, in a judicial proceeding under oath, were to find him guilty of high crimes and misdemeanors and remove him from office, the 1792 Act would swing into operation. And who would move into the White House? The Senate President pro tempore, and leader of the Senate opposition to Johnson—Senator Ben Wade of Ohio. Indeed, while sitting in solemn judgment over Johnson, Wade had already been picking his Cabinet. [FN58] Thus the Act of 1792 had the obvious potential for corrupting judicial judgment, effectively making Wade a judge in his own case, giving him an obvious conflict of interest. Such an arrangement is hardly calculated to inspire confidence and reduce cynicism among ordinary Americans. Had Wade actually succeeded in succeeding, what kind of mandate would he have had, coming into power in such a smelly way? Legislative succession also smacked of creeping Parliamentarianism; transforming the Founders' judicial model of impeachment into a political vote of no confidence, unraveling the fixed presidential term prescribed by the Constitution, and allowing the legislature to usurp the power that the Framers so *386 carefully sought

to deny them- the unilateral power to pick their own leader as President.

Repulsed by the sordidness of the Wade affair, and persuaded that Madison may well have been right on the constitutional question, Congress in 1886 repealed the 1792 Act and replaced it with a scheme providing for Cabinet officer succession. [\[FN59\]](#) This statute got the "who" question right-a fallen President's fort should be held down by the person that the President selected to carry his flag. But the 1886 question got the "how long" question wrong by failing to specify that a Cabinet officer should simply act as a caretaker until a proper national election could be held. Given that Cabinet officers are not directly elected, they lack a strong personal mandate, and should act as President for as short a time as possible. (Of course, such a caretaker officer could choose to run in the special election, and thereby win a mandate to stay in office until the end of the deceased President's term.)

In 1947, Congress changed the statute once again, giving us the worst of both worlds-truly a wrong-wrong result. [\[FN60\]](#) The 1947 Act restored legislative succession-but put the Speaker of the House ahead of the Senate President pro tempore. And it utterly abandoned the idea of a special election. The supporters of the 1947 Act denounced Cabinet succession because Cabinet officers are unelected, and thus have an insufficient democratic mandate. I concede that there is some truth here; this is precisely why a statutory successor simply should serve as a caretaker until a new election can be held that will give someone a democratic mandate. The alternative solution proposed by the 1947 law fails to solve the problem. A single Senator or House member may be elected, but not by the nation. A President must have not simply a democratic mandate but a national one. And that mandate cannot simply come from fellow legislators unless we are to revert to the very system of unilateral legislative selection of chief executive, a la Parliament, that our entire system of separation of powers was painstakingly crafted to repudiate.

Here is what all this means today. Under the current version of the 1947 succession statute, the foreman of the constitutional grand jury that is charged with overseeing the President and the Vice President has a blatant conflict of interest. If that grand jury (that is, the House of Representatives) indicts (i.e., impeaches), then the foreman (i.e., the Speaker of the House) moves one huge step closer to the Oval Office. One hears a lot of talk about impeachment these days. Would public ***387** confidence be enhanced, and public cynicism put to rest, if Newt Gingrich or Strom Thurmond-yes, he is the Senate President pro tempore-were to move into the Oval Office after an impeachment or two? Would such a statutory successor have the requisite legitimacy to govern when there are such strong arguments that the very statute that swept him into office is patently unconstitutional? If a bomb had gone off in February 1997, just months after Americans voted for Democrats Claccept that for the next four years they should be governed by Republican President Gingrich or Thurmond? Why do we bother holding national presidential elections if our law treats them with such evident disrespect?

III. Electoral College Glitches

Here is another little-known pocket of law that is a constitutional accident waiting to happen. Suppose our hypothetical bomb had gone off after Democrats Clinton and Gore had been overwhelmingly elected in November 1996, but hours before the scheduled meeting of the electoral college in December.

Suppose, in our hypothetical, that Clinton had been killed. Many states purport to legally bind electors to vote for the ticket to which they pledged themselves on Election Day. Even if those laws are unconstitutional or unenforceable, imagine that most electors-reeling from the news, and without much time to consult legal experts-simply cast their electoral votes for Clinton (as pledged) under the assumption that on Inauguration Day, Clinton's running mate, Gore, would take up the reins. In this event, who would become President in January? One possible answer-you should all be shocked to learn-is not Gore, and it is not Clinton. It is Bob Dole-yes, the man the country had just voted down.

How could this be? Once again, our story takes us back to Ohio. In November 1872, Ohioan Ulysses Grant defeated Horace Greeley in the race for the Presidency. [\[FN61\]](#) Shortly after the election but before the meeting of the electoral college, a brokenhearted Greeley died. [\[FN62\]](#) Some electors nevertheless cast their votes for Greeley, as pledged-but when Congress met to tally these votes, as provided for in the Constitution, Congress refused to count the votes for Greeley. [\[FN63\]](#) Little turned on the issue then-after all, Greeley lost no matter what-but the situation is very different in our hypothetical, where the decedent won. Were ***388** Congress to blindly follow the Greeley precedent in our hypothetical, they would refuse to count the votes for Clinton, and the only one with any eligible electoral college votes for President would be-yes-Bob Dole.

Elsewhere, I have suggested that the obviously sensible result in this situation is that Al Gore and not Bob Dole should be sworn in as President, [\[FN64\]](#) and there is a simple way to get to this result. It may sound counterintuitive at first, but we should simply count the votes of a dead man as if he were alive. The Greeley precedent was ill-considered and should not be followed. On this approach, Clinton's votes count; he wins when the electoral votes are tallied; and as he is unable to discharge the office on Inauguration Day, his Vice President, Al Gore, becomes President.

I cannot here go into all the details and permutations of my analysis; [\[FN65\]](#) but there is another accident waiting to happen that is even easier to fix. Suppose our hypothetical bomb had gone off one day before the popular election. What should we do? The obvious answer-and it can easily be accomplished by statute-is to postpone the election so that the national parties and the candidates and the people can absorb the situation. If substitute candidates must be fielded, let this be done before the people vote rather than after, so that the people will know which precise persons they are voting for, and will accept as fully legitimate whichever candidates ultimately win the election.

Thus far in this lecture, I have suggested that a big problem arises when the people vote for A and end up with B. This is a problem even when A and B are running mates-though I have suggested that the problem could be dramatically lessened if voters were allowed to vote for A and B individually rather than as a ticket. With a separate vote on the Vice Presidency, if the people get B upon A's death, then they are getting precisely what they voted for, and voted for unambiguously. But now suppose they vote for party A and get party B instead-they vote for Clinton and get Gingrich or Thurmond or Dole. I have suggested that these are scenarios to be avoided.

If you are with me so far, the next step is logically simple, but more constitutionally difficult: we must abolish the electoral college itself. The reason of course is that under the electoral college, more Americans may vote for A, but end up with B instead as their President. This has not yet happened in

this century, but if and when it does, will the *389 loser/winner have genuine legitimacy? If not, then shouldn't we abolish the electoral college before the damage is done?

If we consider the last two times a man with fewer popular votes than his rival ended up winning in the electoral college, we will find that in both instances, the winner lacked a certain democratic legd Benjamin Harrison, came from the state of-you guessed it-Ohio. I must confess that I may be slightly prejudiced against Hayes-he was after all a Harvard Law School graduate, and I am a Yale man. And there were considerable electoral college machinations that further clouded his election. But the simple fact that his rival evidently received more popular votes helped contribute to a widespread sense that his occupancy of the White House was less than fully legitimate-a sense reflected in cruel nicknames like "His Fraudulency," "the Usurper," and "Rutherfraud B. Hayes." [FN66] Benjamin Harrison-the grandson of old William Henry Harrison, and born on the family homestead in North Bend-displaced Grover Cleveland in 1888 even though Cleveland won more votes, and the very next time the people were consulted they promptly put Cleveland back in the White House, in the rematch election of 1892. [FN67]

The weakness of the Presidency between Lincoln and Wilson had often been noted, and we can now see that a considerable part of that weakness consisted in a series of Presidents without popular mandates, due to death and the quirks of the electoral college. [FN68] Today, America's role in the world is much more central than it was then, and the powers of the Presidency are far greater. Precisely because of this, the legitimacy lapses I have highlighted today seem more worrisome.

Unlike some of the other things I have been proposing today-separate election of Vice Presidents, repeal of the 1947 Succession Act, repudiation of the Greeley precedent, and postponement of presidential elections in the event of election-eve tragedies-fixing the electoral college cannot be done simply by statute. It will require a constitutional amendment.

But amendment is exactly what is called for here; the reasons that made the electoral college sensible in the eighteenth century no longer apply. [FN69] The Framers emphatically did not want a President dependent *390 on the legislature, so they rejected a parliamentary model in which the legislature would pick its own leader as prime minister and chief executive officer. How, then, should the President be picked? The visionary James Wilson proposed direct national popular election, but the scheme was deemed unworkable for three reasons. First, very few candidates would have truly continental reputations among ordinary citizens; ordinary folk across the vast continent would not have enough good information to choose intelligently among national figures. [FN70] Second, a populist Presidency was seen as dangerous-inviting demagoguery and possibly dictatorship as one man claimed to embody the Voice of the American People. [FN71] Third, national election would upset a careful balance of power among states. [FN72] Because the South did not let blacks vote, southern voices would count less in a direct national election. A state could increase its clout by recklessly extending its franchise-for example, if (heaven forbid!) a state let women vote, it could double its weight in a direct national election. Under the electoral college system, by contrast, a state would get a fixed number of electoral votes whether its franchise was broad or narrow-indeed, whether or not it let ordinary voters pick electors.

None of these arguments works today. Improvements in communications technology, and the rise of political parties, make possible direct election and a populist Presidency-de facto, that is our scheme today. Blacks and women are no longer selectively disenfranchised, and states no longer play key roles in defining the electorate or in deciding whether to give the voters a direct voice in choosing electors. Direct national election would encourage states to encourage voters to vote on Election Day; but today, this hardly seems a strong reason to oppose direct election. Ingenious, indirect, sophisticated arguments made on behalf of the electoral college by clever theorists these days are legion-but almost all are make-weight. If the scheme is so good, why doesn't any U.S. state, or any foreign nation, copy it? A low plurality winner in a three-or four-way race is possible even with the electoral college; and could be avoided in a direct national election by single transferable voting (with voters listing their second and third choices on the ballot, in effect combining the "first heat" and "run off" elections into a single transaction).

The only two real arguments against abolition of the electoral college sound in federalism and inertia. Only federalism can explain why we *391 should use an electoral college to pick Presidents but not governors. But it is hard to see what the federalism argument is today. The specter of the national government administering a national election, I confess, does not give me the cold sweats. A razor-thin popular vote margin might occasion a national recount, but states now manage recounts all the time, and new technology will make counting and recounting much easier in the future. (And today, a razor- thin electoral college margin may require recounts in a number of closely contested states even if there is a clear national popular winner.)

Inertial, Burkean, arguments take two forms. First, the argument goes, a change in presidential selection rules would radically change the game in ways hard to foresee: Candidates would not care about winning states-only votes-and campaign strategies might change dramatically and for the worse. But it is hard to see why. Given that, historically, the electoral college leader has also tended to be the popular vote leader, the strategy for winning should not change dramatically if we switch from one measure to the other. This sets up the second inertial point: The dreaded specter of a clear popular loser becoming the electoral college winner has not materialized since Hayes and Harrison last century-so "Why worry"? But that is what someone might say after three trigger pulls in Russian Roulette. One day, we will end up with a clear loser President-clear beyond any quibbles about uncertain ballots. And the question will be, will this loser/winner be seen as legitimate at home and abroad? If our modern national democratic ethos, when focused on the thing, would balk at a byzantine system that defies the people's choice on Election Day, true Burkean theory would seem to argue against the electoral college. If We the People would amend the Constitution after the loser President materializes-and I should think we would-why are we now just waiting for the inevitable accident to happen?

IV. Conclusion

In my lecture today, I have tried to honor not simply a man, but also a place-his home, his state-by paying particular attention to the Ohio Presidents. I think I have mentioned them all-Harrison, Grant, Hayes, Garfield, Harrison, McKinley, Taft, and Harding-but I should like to close by paying more homage to President Taft, and noting his connection to two other Ohio Presidents. First, I should be

remiss in not giving credit to President Harding for one of his finest moments as President: the appointment of Taft as Chief Justice. (Perhaps it also bears note that in the election of 1920 that brought Harding to the White House, his Democratic opponent was a fellow Ohioan, James *392 Cox. This election was one of the few times in American history that both candidates hailed from the same state, a striking fact confirming the political centrality of Ohio in this era.) [FN73] Second, a few facts about President Grant. Grant tapped Alphonso Taft, our honoree's father, as secretary of war and, later, attorney general. [FN74] Grant himself had been asked by President Johnson to replace secretary of war Edwin Stanton; and of course it was precisely this set of events that lay at the heart of the Tenure of Office Act and the impeachment of Andrew Johnson. And these issues, in turn, were at the heart of Chief Justice Taft's great decision in *Myers v. United States*, [FN75] a decision that no doubt reflected the lessons Taft had learned in his own service as secretary of war and, later, as President.

The great *Myers* opinion reminds us of the awesome powers of the Presidency. In light of those awesome powers, my lecture today in honor of the author of *Myers* has tried to stress the importance of vesting the office in someone who has earned the respect of the people before becoming President. Some have criticized Taft's performance as President, while others have defended him. Whatever we might think of this debate, my lecture today in honor of Taft should make one thing clear: unlike so many others, here was a man who had earned the right to be President.

[FN1]. Southmayd Professor of Law, Yale Law School. This address was delivered on October 28, 1998, at the University of Cincinnati College of Law as the William Howard Taft Lecture on Constitutional Law.

[FN1]. The standard biographies include the following: Henry F. Pringle, *The Life and Times of William Howard Taft* (1939); Alpheus T. Mason, *William Howard Taft: Chief Justice* (1965); Paolo E. Coletta, *The Presidency of William Howard Taft* (1973); and Judith I. Anderson, *William Howard Taft: An Intimate History* (1981).

[FN2]. See William A. DeGregorio, *The Complete Book of U.S. Presidents 397- 98* (5th ed. 1996).

[FN3]. [272 U.S. 52 \(1926\)](#).

[FN4]. See [Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849 \(1989\)](#).

[FN5]. See [Carl McGowan, Perspectives on Taft's Tenure as Chief Justice and Their Special Relevance Today, 55 U. Cin. L. Rev. 1143 \(1986\)](#).

[FN6]. See [Senator Orrin G. Hatch, Modern Marbury Myths, 57 U. Cin. L. Rev. 891 \(1989\)](#).

[FN7]. See [Patricia M. Wald, Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts, 61 U. Cin. L. Rev. 963 \(1992\)](#).

[FN8]. See [Sandra Day O'Connor, The Judiciary Act of 1789 and the American Judicial Tradition, 59 U. Cin. L. Rev. 1 \(1990\)](#); Kenneth W. Starr, William Howard Taft: The Chief Justice as Judicial Architect, 60 U. Cin. L. Rev. 963 (1992).

[FN9]. See [Lee C. Bollinger, Public Institutions of Culture and the First Amendment: The New Frontier, 63 U. Cin. L. Rev. 1103 \(1995\)](#).

[FN10]. See DeGregorio, *supra* note 2, at 397.

[FN11]. See *id.* at 388.

[FN12]. See *id.* at 137.

[FN13]. See *id.* at 3, 39, 56, 74, 261-442.

[FN14]. See *id.* at 140.

[FN15]. See *id.* at 144.

[FN16]. See *id.*

[FN17]. [U.S. Const. art. II, § 1, cl. 6](#).

[FN18]. See Cong. Globe, 27th Cong. 144 (3d Sess. 1843); Wilfred E. Binkley, President and Congress 118-20 (1962); Congressional Quarterly's Guide to Congress 770 (3d ed. 1982); Charles Black, Some Thoughts on the Veto, 40 Law and Contemp. Probs., Spring 1976, at 87, 90-91.

[FN19]. See Paul F. Boller, Jr., *Presidential Anecdotes* 97 (1981).

[FN20]. [U.S. Const. art. II, § 1, cl. 6.](#)

[FN21]. See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Act Unconstitutional?*, [48 *Stan. L. Rev.* 118, 133, 138 n.144 \(1995\).](#)

[FN22]. Act of Mar. 1, 1792, 1 Stat. 239 (repealed 1886).

[FN23]. See [U.S. Const. art. II, § 1, cl. 7](#) ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected . . .").

[FN24]. See Gordon Wood, *The Radicalism of the American Revolution* (1991).

[FN25]. See [U.S. Const. art I, § 9, cl. 8](#) (barring federal titles of nobility); *id.* § 10, cl. 1 (barring state titles of nobility). The Articles of Confederation imposed similar restrictions on both Congress and the states—a fact that is quite striking when we recall how few limits that document generally imposed on so-called "sovereign" states. See Art. of Confed., art. VI, cl. 1 (1781).

[FN26]. This amendment would have stripped U.S. citizenship from any American accepting a foreign title of nobility. Amendment Not Ratified (visited Oct. 25, 1998) <<http://www.house.gov/Constitutional/Amendnotrat.html>>.

[FN27]. See Max Farrand, *The Framing of the Constitution of the United States* 163 (1913).

[FN28]. See DeGregorio, *supra* note 2, at 241.

[FN29]. See *id.* at 253.

[FN30]. See *id.* at 254.

[\[FN31\]](#). See *id.* at 295.

[\[FN32\]](#). See *id.* at 302.

[\[FN33\]](#). See Henry F. Graff, *The Presidents: A Reference History 277-78* (2d ed. 1996).

[\[FN34\]](#). For a superb general discussion, see John D. Feerick, *From Failing Hands: The Story of Presidential Succession 117-39* (1965).

[\[FN35\]](#). See Paul F. Boccer, *Presidential Anecdotes* 168, 173 (1981); DeGregorio, *supra* note 2, at 298, 310-11.

[\[FN36\]](#). Feerick, *supra* note, 34 at 118.

[\[FN37\]](#). *Id.* at 118-19.

[\[FN38\]](#). See DeGregorio, *supra* note 2, at 303.

[\[FN39\]](#). See *id.* at 415.

[\[FN40\]](#). See *id.* at 425.

[\[FN41\]](#). See *id.* at 576.

[\[FN42\]](#). U.S. Const. amend. XXV, § 1.

[\[FN43\]](#). *Id.* § 4 (emphasis added).

[\[FN44\]](#). See Amar & Amar, *supra* note 21, at 139.

[FN45]. See U.S. Const. amend. XXV, § 2.

[FN46]. See DeGregorio, *supra* note 2, at 592, 610.

[FN47]. See Akhil Reed Amar & Vik Amar, President Quayle?, [78 Va. L. Rev. 913 \(1992\)](#).

[FN48]. See DeGregorio, *supra* note 2, at 156.

[FN49]. See *id.* at 254.

[FN50]. Many people believe that Lincoln's assassins were similarly motivated-though once again, there is little evidence that the Vice President himself was in any way involved in the plot.

[FN51]. See DeGregorio, *supra* note 2, at 313, 315.

[FN52]. See *id.* at 362, 367, 380-81.

[FN53]. See Amar & Amar, *supra* note 47. Professor Richard Friedman made this suggestion even earlier. See [Richard D. Friedman, Some Modest Proposals on the Vice-Presidency, 86 Mich. L. Rev. 1703, 1726-29 \(1988\)](#).

[FN54]. [U.S. Const. art II, § 1, cl. 6](#).

[FN55]. See 14 Papers of James Madison 235 (Robert A. Rutland et al. eds., 1983) (concerning a letter to Edmund Pendleton dated February 21, 1792).

[FN56]. See Amar & Amar, *supra* note 21.

[FN57]. See DeGregorio, *supra* note 2, at 252.

[FN58]. See John D. Feerick, *The Twenty-Fifth Amendment* 214 (2d ed. 1992).

[\[FN59\]](#). See Act of Jan. 19, 1886, ch. 4, § 1, 24 Stat. 1 (repealed 1947).

[\[FN60\]](#). See [3 U.S.C. § 19 \(1994\)](#).

[\[FN61\]](#). See DeGregorio, *supra* note 2, at 267.

[\[FN62\]](#). See *id.*

[\[FN63\]](#). See *id.*

[\[FN64\]](#). See [Akhil Reed Amar, Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap](#), 48 Ark. L. Rev. 215 (1995).

[\[FN65\]](#). For much more discussion and analysis of the issues raised in this section, see *id.*

[\[FN66\]](#). See Boller, *supra* note 19, at 163.

[\[FN67\]](#). See DeGregorio, *supra* note 2, at 337, 346.

[\[FN68\]](#). For a somewhat similar suggestion, see Carl N. Degler, *The Age of the Economic Revolution 1876-1900*, at 89-93 (2d ed. 1977).

[\[FN69\]](#). The material presented over the next few paragraphs is borrowed from Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, 12 Const. Comm. 143 (1995).

[\[FN70\]](#). See Michael P. Riccards, *The Ferocious Engine of Democracy: A History of the American Presidency 18* (1995).

[\[FN71\]](#). See *id.* at 18, 25-27.

[\[FN72\]](#). See id.

[\[FN73\]](#). See DeGregorio, *supra* note 2, at 437.

[\[FN74\]](#). See id. at 269-70.

[\[FN75\]](#). [272 U.S. 52 \(1926\)](#).

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