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Introduction

After teaching constitutional law for more than twenty years, I often think of it as a collection of stories. The stories are usually about one of two things. The first is great events in constitutional history, such as the framing and ratification of the Constitution or Reconstruction. The second is the institutions established by the Constitution or their leaders. There are many stories about Congress or its most colorful members but even more about the Supreme Court, especially its most famous decisions or justices. The presidency is the subject of more stories than the Court. Especially popular are stories about the few presidents commonly regarded as having had the greatest historical impact – notably, George Washington, Thomas Jefferson, Abraham Lincoln, and Franklin D. Roosevelt. More than a few stories are told about presidents who died in office, committed huge blunders, or presided over major scandals.

This book tells a different set of stories. These stories are about the presidents whose constitutional impact has largely, if not wholly, been neglected in the study of constitutional law.

These presidents' stories are important for several reasons. First, they illuminate the richness of constitutional activity outside the Supreme Court. The Court is not, as most people suppose, the only institution that shapes constitutional law. Non-judicial actors often make monumental constitutional judgments that courts never review.

Second, the forgotten presidents' stories enrich our understanding of constitutional change. A popular theory is that constitutional changes result from the actions of a few people or events. For instance, the eminent constitutional scholar, Bruce Ackerman, once maintained that constitutional law develops only at special times, which he called "constitutional moments," during which the leaders of each of the three branches of the federal government interact with

each other – and the American people – to change constitutional law in enduring ways.¹

Ackerman identified three such moments – the founding, Reconstruction, and the New Deal.

Ackerman’s theory of constitutional moments is ingenious but incomplete. Ackerman’s theory

told the story of American constitutional law from the vantage point of the mountaintops, but

Ackerman has since recognized that that story overlooked the landscape connecting the vistas.

We should recognize that what is happening on the ground is essential for connecting the terrain

and ensuring that constitutional understandings and practices gain traction and endure.

As this book aims to show, many constitutional practices and understandings endure because of the commitments of many presidents over time, including the ones I deem forgotten.

Constitutional construction develops incrementally. It develops through collective, coordinated

action, including but not limited to, one set of leaders following – or interacting with – another

and the efforts of the leaders of the different branches, often in interaction with the American

people, to reinforce, revise, or extend earlier constitutional judgments. Constitutional law is

constructed over time – not made in a day. Outside the Court, it develops just like the common

law in the courts, through a series of cases or incidents over time.

In fact, the forgotten presidents sometimes not only reinforced the critical constitutional judgments of other presidents but also led or directed constitutional change. By strongly

opposing congressional encroachments, they secured some presidential prerogatives. Sometimes

their resistance to congressional encroachments failed. Their failures were instructive; other

presidents and institutions learned from their missteps. Indeed, a common experience shared by

the forgotten presidents is that, as they each pushed to protect the prerogatives of their office,

Congress often pushed back. Together, the two branches shaped the balance of power in many

areas of constitutional law in familiar, if not enduring, ways.

Third, the forgotten presidents broaden our understanding of the presidency. They dispel the popular but mistaken belief that nineteenth-century presidents except for Jackson and Lincoln were weak and ineffective. The opposite is true. To begin with, they each had strong constitutional convictions, which drove them to expand or fortify certain presidential prerogatives but provoked strong political opposition. Moreover, they sacrificed their own political interests to maintain constitutional commitments that they felt compelled to make because they were president. Becoming president altered their priorities. They found that in order to assume the role of president they had to adapt to the demands of the institution and the peculiar challenges of their era. Among the most important of these demands was the protection of presidential prerogatives even if it meant sacrificing important constituencies that had brought these men to power. Their sacrifices demonstrate the presidency's transformative power to draw its occupants into defending its prerogatives.

The stories of these presidencies expand on important work undertaken by historical institutionalists, including the modern classic, Stephen Skowronek's *The Politics Presidents Make*,² which examines how presidents have shaped and been shaped by the institution of the presidency. In attempting "to assess presidents as agents of change," Skowronek analyzed "the different premises which presidents bring to the challenge of orchestrating political change, in the capacity of the American presidency to deliver on these different premises, and in the systemic political effects of presidential efforts to do so."³ In more recent work, Skowronek has emphasized the importance of understanding presidents in their political time, i.e., in light of "the politics of leadership in earlier periods, to prior sequences of change in which presidents took on similar challenges in leadership and wrestled them to similar political effect."⁴ This book does not challenge Skowronek's account but tells the same story from a different perspective –

namely, the development of presidential (and even congressional) power from the perspectives of forgotten presidents rather than the more familiar perspectives of the greatest or most popular presidents. Their stories cannot be told, or understood, without appreciating the peculiar historical, social, economic, and legal contexts in which they addressed various constitutional questions.

Fourth, the forgotten presidents' stories remind us presidents, just like courts, make precedent. To be sure, not everything done in the past by presidents qualifies as a precedent. To qualify as precedent, the constitutional judgments of presidents must be discoverable, by which I mean they are past actions or events that subsequent authorities seek to invest with special normative force or power. These precedents cover a wide range of subjects, including appointments, regulating territories and the national economy, federalism, civil rights, presidential administration, separation of powers including foreign affairs, and removing or censuring presidents and other executive officials.

Of course, this book has a critical premise – namely, that some presidents may be described as forgotten. The purpose of this book is not to explain why some presidents are forgotten but rather why they merit study in constitutional law. Nonetheless, I have considered numerous ways to measure which presidents are “forgotten,” including the numbers of postage stamps issued in their honor, the market for their papers, and how often they are mentioned in constitutional law casebooks or treatises (almost never for each of these). Moreover, I used a quantitative analysis (set forth in the Appendix) to inform my determination of which presidents are the most forgotten in constitutional history. I measured the relative data on (1) how often presidents appear in the most popular American history textbooks used in middle and high schools; (2) how long presidents served in office; (3) biographies and other books about

particular presidencies in the ten largest university libraries in the country; (4) presidential personalities in terms of their creativity and charisma; (5) rhetorical skills (or numbers of public speeches and the frequency of the citation of their speeches by other leaders); (6) presidential greatness or experts' rankings; and (7) presidential libraries.

The pertinence of each of these to public familiarity with presidents' constitutional activities or significance should be evident. For instance, the less time someone was president the less likely he faced dramatic events and the less there may be to write about. Similarly, popular history textbooks and the numbers of biographies or other books about particular presidents in major university library collections reflect how most people are educated about the presidency. (The sales of presidential biographies reflect similar trends.) Collections reflect research priorities, and popular textbooks mostly cover "big" moments in constitutional history, such as Roosevelt's Court-packing plan, the Civil War, and Johnson's push for the Great Society; however, they rarely cover other important actions, such as the forgotten presidents' assault against the Tenure in Office Act, invigoration of the veto, and transformations of the federal judiciary.

Besides my empirical assessments, I relied on three qualitative measures. First, I recognized that, while the objective assessments of presidential scholars indicate some presidents did not accomplish much along standard lines of interest (such as dealing with war or crises) there are important lessons to be learned from them, lessons that still resonate today. Second, I analyzed presidential rhetoric beyond quantitative measures. I assessed the quality of presidents' constitutional discourse based on its clarity, coherence, and appeal to constituencies during and after their presidencies. Moreover, I appreciated the irony of Lincoln's declaration upon consecrating the Gettysburg battlefield that, "The world will little note, nor long remember what

we say here.” The world has little noted, nor long remembered the presidents I discuss because their rhetoric lacked Lincoln’s force or lyricism and was forgettable, they were not war-time presidents or bold leaders, and subsequent generations determine a president’s stature.

Based on my calculations, there are 13 presidents who are forgotten for purposes of this book. This figure is remarkable, because it means that we may have forgotten, at least as far as its relevance to constitutional law is concerned, more than 25% of our 43 different presidents. It may seem odd we have forgotten so many people who occupied what many regard as the most powerful office in the land if not the world. Yet, one important achievement of the forgotten presidents is that they helped to transform the presidency into its present state.

Some readers will no doubt wonder why I did not include other, arguably deserving presidents. I did not because constitutional scholars seem to care more about them – James Buchanan because it is nearly impossible to write about Lincoln’s presidency without mentioning Buchanan; Rutherford Hayes because of his victory in the controversial 1876 presidential election and leadership in dismantling Reconstruction; James Garfield because of his unique, dark horse candidacy and tragic death wrought by a would-be assassin and incompetent doctors; William McKinley because of his leadership during the Spanish American War and tragic death; John Quincy Adams because of his involvement with the controversial 1824 election and his having been the first son of a president to win the presidency in his own right; James Polk because he did more than any other president to realize the United States’ manifest destiny to expand across North America and because of his leadership in the Mexican War that secured the acquisition of Texas and set a controversial precedent for a preemptive war to protect American interests; Warren Harding because of the widespread corruption in his administration; and Gerald Ford because no one can tell the story of Watergate without mentioning Ford’s

pardon of Richard Nixon and the fact that he is the only man to become president without having been elected president or vice-president. While there is much to learn from these presidents' constitutional activities, one purpose of this book is to show what we can learn when we point a spotlight where none (or a dim one) has been previously directed.

I do not mean to overstate the significance or legacies of the presidents I include in the book. This book does not rate presidents. It seeks to fill a significant void in constitutional scholarship. No one – not even Millard Fillmore -- has been president without effecting the office or Constitution. We can learn important constitutional lessons from the forgotten presidents.

I devote a chapter to each forgotten president. They are Martin Van Buren, William Henry Harrison, John Tyler, Zachary Taylor, Millard Fillmore, Franklin Pierce, Chester Arthur, Grover Cleveland, Benjamin Harrison, Grover Cleveland (again), William Howard Taft, Calvin Coolidge, and Jimmy Carter. Each chapter begins with a brief quote encapsulating the constitutional outlook of the president featured in that chapter, after which I explore each forgotten president's most significant constitutional judgments and their consequences.

The conclusion reviews the themes connecting the forgotten presidents and considers how to predict which presidents will be forgotten. One important theme is that presidents cannot wage war on the presidency. It shapes them at least as much as they shape it. The forgotten presidents adapted their constitutional convictions to fit the office and battled with Congress to protect the powers they inherited. Among other themes are the under-appreciated phenomenon of unintended constitutional consequences and the facts that constitutional legacies depend on popular support or adulation, the extent of investment by subsequent public leaders, and the American people's evolving values.

The question of predicting forgotten presidents requires considering why our 43rd president, George W. Bush, will not be forgotten. First, he will be remembered, along with his father, as a historical curiosity – the second father and son, after John and John Quincy Adams, to serve as presidents. While Bush’s father may be best remembered for this fact (and perhaps less so for his leadership in the Persian Gulf War or helping to provide the motivation for much of his son’s policies), George W. Bush has had the further (indelible) distinction of being in office on September 11, 2001, and thus was the first president to respond to the terrorist attacks directed on that day against the United States. The policies crafted by the Bush administration in the wake of these attacks, including the Iraq War and the strategies for holding enemy combatants in detention (including restricting their access to lawyers and courts), provoked so much controversy and political fallout that it is safe to say that Bush will never qualify as a forgotten president for constitutional (and other) purposes. If none of that is enough, the sharp decline in the popularity of his presidency laid the groundwork for the election of the first African-American, Barack Obama, as President of the United States.

Moreover, determining that a president has been – or will be – forgotten is not intended to be a normative comment on the quality of his administration or constitutional analysis. Some presidents are remembered not for what they did well but for what they failed to do. Herbert Hoover, for instance, was not a complete failure as president, but he is remembered because the nation’s worst depression happened on his watch and his efforts to ameliorate its effects set the stage for the charismatic, eloquent, energetic, wartime presidency of Franklin D. Roosevelt. Similarly, Nixon will long be remembered for the sequence of events that led to his becoming the first president to resign from office, while Andrew Johnson is remembered as the first president to have been impeached. Nor, as this book will show, is being forgotten indicative of a

president's lack of success. Indeed, Cleveland won the popular vote each of the three times he ran for the presidency. He merits two separate chapters because we forget that he was not the incumbent either time he won the presidency; he did not have the chance, like other two term presidents, to build directly on his prior term; and he exercised power differently each term.

I would be remiss, however, if I did not address some likely questions readers will ask. First, the proliferation of news outlets and archives makes forgetting presidents increasingly difficult if not impossible. The Internet, the 24-hour news cycle, smart phones, as well as systematic archiving and standardizing presidential libraries ensure posterity will have an ample record for every president, though the challenge will be clarifying rather than overlooking a president's constitutional legacy.

Second, readers should understand what I count as constitutional decisions for purposes of this book. Generally, presidents make three kinds of decisions. First, they make purely constitutional decisions. An example is a presidential decision to support or oppose a constitutional amendment for consideration by Congress or the States. The second are quasi-constitutional decisions. An example is a presidential decision to sign a particular bill into law might turn on a president's judgments about both the Constitution and policy. The third are strictly political or partisan decisions, such as the decisions to make an appointment to appease a particular constituency. I am usually concerned with the first two kinds of decisions insofar as they may comprise precedents, though all three might have constitutional consequences.

Third, three concepts used throughout the book require some explication. I have already discussed the notion of forgotten-ness, which is relative. By "legacy," I mean those presidential decisions, actions, or judgments that meant something important to subsequent leaders or

generations, while I use the word “significance” to convey the importance that subsequent authorities have attached to or tried to invest in some prior action(s).

Fourth, I appreciate that telling these presidents’ stories chronologically is not the only way to illustrate their constitutional impact. For readers concerned that the chronological organization of the book might obscure how these presidents influenced particular areas of constitutional law, I have assembled a Table, available at the end of this introduction, to enable readers to trace the development of various themes over time. It shows in which chapters and on which page(s) I discuss certain recurring subjects.

Last but not least, some readers might be concerned that forgotten presidents appear to be presidents who did not serve for two successive terms or did not face major constitutional crises, such as war. I am confident that many readers would come up with a different list – or different criterion – for forgotten presidents. My list is concededly idiosyncratic, but my criteria for determining which presidents are forgotten are less important than the fact that the presidents whom I discuss have shaped constitutional law in under-appreciated or misunderstood ways. This is, after all, not a book about why certain presidents have been forgotten in constitutional law. Its purpose is to expand awareness of the constitutional impact of the presidency. If people disagree with my criteria for determining forgotten presidents or the constitutional impact I believe these (and other) presidents have had, I welcome the dialogue. It will enrich our understanding of constitutional law, and that is, for me, a very welcome thing indeed.

Chapter Two

WILLIAM HENRY HARRISON:

“YOU FORGET THAT I AM PRESIDENT!”

Being a forgotten president would be an improvement for William Henry Harrison. In 1970, a group of eminent American historians rated every president, except for William Henry Harrison. They, like most other scholars, figured Harrison merited no ranking because his presidency was too short and uneventful to justify any ranking -- he died one month and a day after his inauguration. On a cold March 4, 1841, Harrison, who had just turned 68, tried to dispel doubts about his fitness to serve by delivering the longest Inaugural address in history. Unfortunately, he made the fatal mistake of not wearing a hat or coat as he delivered the speech in icy winds. He caught a severe cold, which lapsed into pneumonia and pleurisy to which he eventually succumbed. As a result, he was weak and ill throughout his month in office.

If that were not enough to justify forgetting his presidency, even the people who voted for Harrison expected little from his presidency. His major accomplishment before he won the 1840 presidential election had been battling Indians on the western frontier, including a bloody victory in the Battle of Tippecanoe.¹ Consequently, his short presidency is widely dismissed as shortening an inevitably inconsequential tenure.

Yet, despite his brief presidency, Harrison's short presidency is distinctive for many reasons. He was the last president who had been born a British subject. At 68, he was the oldest man to be elected president until the inauguration of Ronald Reagan 140 years later. Harrison was the first Whig – the forerunner of the modern Republican Party – to be elected president, and he was the first president to die in office. He holds the record for the shortest tenure of any president in history. Moreover, the 1840 presidential campaign is the first to have been waged

between two well-organized national parties, which used speeches, demonstrations, and printed media to attract the voting public's attention and to mobilize voters. Harrison became one of the first people elected president based on image – in his case, as a war hero and an elder statesman. He was the first presidential nominee to allow women to participate in his campaign. He was the first president to promise to serve only for a single term, and he was the first of eight Ohioans elected president.² In the period from 1828 to 1860, Harrison was the only man elected president, besides Abraham Lincoln, who was not from or sympathetic to the South. Harrison was the third general to be elected president (after George Washington and Andrew Jackson). He was the first president to promise reform of the spoils system. He is the first of four presidents not to have filled a Supreme Court vacancy,³ and he is the only president whose grandson became president.⁴

Of course, none of these distinctions is based on anything Harrison did as president – except for being elected and dying in office. Nonetheless, a closer look at what Harrison did, particularly in the six months between his election in 1840 and his death on April 4, 1841, indicates that, in several ways, he helped to undermine the Whig Party's conception of the president as a weak figurehead who should defer to the will of Congress on domestic policymaking. Harrison was president only for a month, but in that month he began to show that this conception of the presidency could not work and that the office he occupied steered him to sacrifice short-term political advantages and abandon the Whig conception of the president as being subservient to Congress.

I.

To understand Harrison's first blow against the Whig conception of presidency, we need to appreciate the public's expectations for his presidency. His successful run for the presidency

in 1840 was, in fact, his second try. On both tries, he ran as the newly formed Whig party's nominee against the same man – Martin Van Buren. The first time victory was a long shot, but the second time seemed inevitable.

The Whig party was primarily committed to two things: The first was opposition the Whigs' perceived usurpations of executive authority by Jackson and Van Buren. The second was commitment to legislative supremacy, particularly in domestic policymaking. The Whigs envisioned the president as a weak minister whose primary responsibilities were following Congress' lead and implementing the policies that it had enacted into law. No one doubted that Harrison was echoing his party's sentiments and sharply distinguishing himself from Jackson and Van Buren when he emphasized in his inaugural address the limits of executive power and the grand scope of congressional authority. Harrison rejected any "fair construction" of the Constitution that "would be found to constitute the President a part of the legislative power."⁵ He believed, "It is preposterous to suppose that the President . . . could better understand the wants and wishes of the people than their own immediate representatives."⁶

The first major surprise of Harrison's presidency involved his disastrous relationship with Henry Clay. As a founder of the Whig party, Clay had run unsuccessfully as its presidential nominee against Jackson in 1832, and he still longed for the presidency. Clay's fiery temper, large ego, and enormous ambition alienated more than a few people, even many Whigs. Yet, his hunger for the presidency was as strong as ever in the run up to the 1840 presidential election. Well before that election, Clay had known Harrison and been one of his most influential friends and sponsors. In the War of 1812, Clay helped Harrison to obtain a commission as a Brigadier General in the regular Army and later in full command of the Army of the Northwest. In 1828, Clay persuaded President John Quincy Adams to appoint Harrison, then one of Ohio's two U.S.

senators, as Minister to Columbia. By 1835, Harrison's fortunes had turned, and the only job he could find was Clerk of the Cincinnati Court of Common Pleas. It thus came as a huge surprise and disappointment to Clay to lose the Whig presidential nomination to a man of Harrison's low stature in both 1836 and 1840. The 1840 defeat was particularly hard for Clay to take. He had hoped to erase the shame of losing to Jackson in 1832 by defeating Jackson's self-selected successor. By 1840, it was evident to Clay and everyone else that whomever the Whigs nominated for president was going to beat Van Buren in the general election. Nevertheless, Clay lost the nomination to Harrison when Harrison's lieutenants – notably including New York's William Seward and his political mentor, Thurlow Weed – successfully arranged for the convention to count each state's votes for president as a whole, thereby nullifying the advantage Clay would have had if every delegate's vote counted. Counting all the delegates would have given Clay a winning margin, but counting each state as one gave the advantage to Harrison.

Though hurt and angered by his second loss, Clay campaigned hard for Harrison in the 1840 general election. After Harrison won, Clay believed Harrison owed him – big time. He helped Harrison win the popular vote in Kentucky and the Whig candidate to win Kentucky's governorship. He figured Harrison was owed him nothing less than control over the new administration. The most direct way to achieve this objective was to get Harrison to put his people in charge of the administration. Clay knew other Whigs wanted appointments for themselves or their friends, and he was eager to be at the front of the line to make requests of Harrison. When Clay learned shortly after the election that Harrison was traveling to Frankfurt, Kentucky, to meet with Charles Wickliffe, an anti-Clay Whig who had not supported the National Bank which Clay had long championed, Clay wasted no time in going there. Concerned about rumors that he was merely going to be Clay's puppet, Harrison was wary of

Clay. When he learned Clay was on his way to intercept him, Harrison quickly sent a letter telling Clay that he preferred for the two of them not yet to meet in person.⁷ Clay ignored the message and tracked Harrison down. When the two finally met in person, Clay told Harrison what he wanted. Harrison knew he owed Clay, and he agreed to the first favor Clay asked -- not to appoint Wickliffe to the cabinet. Characteristically, Clay did not stop there and implored Harrison to spend a week at his plantation nearby. Harrison reluctantly acquiesced. Harrison understood the significance of the invitation; he had even joked in a speech on the way to meet Clay that, if the Constitution allowed it, he would have happily given the presidency to Clay.

During his ensuing stay with Clay, Harrison reputedly offered Clay any position he wanted in the cabinet, but Clay declined so he could remain in the Senate. Clay repeatedly pressed Harrison to accept his recommendations of other cabinet appointments, including his political ally and fellow Kentuckian, John J. Crittenden, as Attorney General and John Clayton of Delaware as Treasury Secretary. Crittenden was a longstanding friend and fellow senator, while Clayton was a strong advocate for re-invigorating the National Bank, which Jackson had destroyed. Clay made other requests, including a plea for Harrison to call a special session of Congress to address the ongoing fallout from the national depression that had proved to be Van Buren's undoing. Harrison's legendary eagerness to please and to avoid confrontations was put to the test; he struggled to leave without committing himself on appointments and other matters.

Clay's next meeting with Harrison went worse than the first. Shortly after Harrison arrived in Washington -- on his birthday, February 9, 1841 -- to prepare for his inauguration, Clay asked to meet with him to discuss cabinet appointments. By the time they met, Clay was upset because Harrison had decided not to appoint Clayton as Treasury Secretary but rather Thomas Ewing, who had been recommended by Clay's rival for leadership of the Whig Party in

Congress, Massachusetts Senator Daniel Webster. Clay let Harrison know he was unhappy that Webster, whom Harrison had decided to appoint as Secretary of State, was eclipsing him as the real source of power in the new administration. Clay kept pressing Harrison to appoint Clayton to other important posts. On the night before Harrison was going to announce that he was nominating George Badger of North Carolina as Secretary of the Navy, Clay called on Harrison to urge him to appoint Clayton. After Clay repeatedly refused to take no for an answer, Harrison ended the meeting by declaring, “Mr. Clay, you forget that I am the President.”⁸ Clay angrily left the meeting, but he was not done.

Clay decided to stop pressing Harrison on cabinet appointments, because the cabinet turned out to be generally agreeable to him, including his fellow Kentuckian Crittenden as Attorney General and his friend John Bell of Tennessee as Secretary of War. But, whatever satisfaction he had with the cabinet’s composition did not make him feel better about Webster’s expanding influence over administration appointments.

After learning that Webster and three other cabinet members had approved Harrison’s appointment of Edward Curtis to the collectorship of the port of New York City, Clay asked to meet again with Harrison. The collectorship controlled more patronage than any other governmental post with the exception of the Postmaster General, and Clay disliked Curtis because he had helped Harrison to beat Clay in gaining the support of the Pennsylvania delegation in the Whig primary. Clay urged Harrison to change his mind and appoint his preferred candidate. Harrison refused. Clay charged out of the meeting, but not before angrily chastising Harrison for ignoring him and not giving him his due in controlling patronage.

Clay’s third and final encounter with Harrison ruptured their relationship for good. Clay met with Harrison just after the inauguration, this time to continue pressing him to call a special

session of Congress to deal with financial exigencies. Harrison and his advisers knew what Clay wanted, but they were wary, because they knew that the special session would give Clay opportunities to address the nation and to assert control over the administration's agenda. Rather than decide himself, Harrison followed Webster's advice to put the question to his cabinet. It split three-three over the need to call a special session of Congress. Harrison broke the tie with a negative vote. When Clay heard the outcome, he quickly wrote a letter to Harrison saying that he hoped to dine with him that evening, urging him to reconsider the question, and suggesting any inaction on the matter would make Harrison look indecisive.⁹ Clay went further to enclose with his letter a draft of the proclamation Harrison could use in calling the special session. The gesture pushed Harrison over the edge. Upon reading the letter, Harrison angrily wrote back, "You use the privilege of a friend to lecture me and I will take the same liberty with you – you are too impetuous."¹⁰ He said he would make no final decision before the beginning of the next week. He concluded, "I prefer for many reasons this mode of answering your note to a conversation in the presence of others."¹¹

In a fit of anger, Clay responded to Harrison in what turned out to be his final communication with Harrison. He denied trying to dictate policy or appointments. He complained that his political enemies had poisoned Harrison's opinion of him. He suggested that if he could not express his opinions "as a citizen and as a Senator, in regard to public matters," he would be better off retiring from public life.¹² He expressed the "hope" that by remaining in the Senate he could be of service to his country. He closed the letter by writing that, "I do not wish to trouble you with answering this note" and that he trusted that Harrison, "whatever others may say or insinuate," would appreciate the purity of his motives.¹³ Clay then left Washington, though two days later financial exigencies – including the collapse of the national bank in

Philadelphia, a depleted treasury, and the impending bankruptcy of several States -- convinced Harrison to call a special session of Congress to convene on May 31st. Though it was only two weeks into Harrison's term, Clay never saw or spoke to Harrison again.

Clay's abrupt departure from Washington and refusal to speak further with Harrison were remarkable developments because they meant that the nation's first Whig president was no longer speaking to the party's most powerful leader in Congress. And they were not speaking because Harrison had increasingly resisted becoming Clay's puppet. The breach was not just a clash in personalities; it derived from a fundamental disagreement about the Whigs' constitutional philosophy. By the time he died, Harrison had shown every indication of recognizing the unworkability of the Whig notion of the president as a weak minister who should be subservient to the will of Congress. A president could be somewhat, perhaps even largely deferential to Congress, but he could not always defer to congressional leaders' demands. More importantly, Harrison apparently realized that a president's invariable deference to Congress undermined the Constitution's system of checks and balances, which required presidents to maintain their authority and to protect their prerogatives and the executive branch from congressional domination. Indeed, Harrison had almost said as much in his inauguration – words which may have fallen on deaf ears – that “the great danger to our institutions does not appear to me to be in a[n] usurpation by the Government of power not granted by the people, but by the accumulation in one of the departments of that which was assigned to others. Limited as are the powers which have been granted, still enough which have been granted to constitute a despotism if concentrated in one of the departments.”¹⁴ By the time he died, Harrison was realizing that legislative supremacy posed the danger of allowing Congress to usurp presidential powers.

Harrison's resistance suggests he appreciated that the President of the United States could not be as weak as Whigs had envisioned but instead had to be strong enough to protect its peculiar prerogatives from congressional encroachments. Moreover, Harrison's retorts to Clay reflect his apparent realization of the constitutional significance of the President's election itself, suggesting that he had some obligation to represent a different constituency than members of Congress did. If checks and balances were to be genuinely meaningful, legislative supremacy could not be reconciled with presidential abdication of authority. Something had to give.

On this point, as on the next two I will discuss, I realize that it is impossible to say what Harrison would have done had he completed his complete term. Even if Harrison had reached some accommodations with Clay, it is hard to imagine that Harrison could easily forget the words he had spoken to Clay. (Nor, for that matter, could we expect Clay to have forgotten them.) It seems unlikely that a president, chomping at the bit as Harrison was against Clay's domination, would have easily abdicated his prerogatives to the hard-charging Clay. Indeed, Harrison's resistance to Clay's domination was no secret, particularly after Clay's dramatic departure at the end of the legislative session, and its significance would not be lost on two younger Whigs, who revered Clay -- Millard Fillmore and Abraham Lincoln, neither of whom would defer any more than Harrison did to legislative supremacy.

II.

As the ninth president of the United States, Harrison followed eight other chief executives, most of whom had resisted the practice known as rotation in office -- replacing people appointed by their predecessors with their friends and allies. Six of Harrison's predecessors had staunchly opposed the practice -- Washington (in his second term), John Adams, Madison, and John Quincy Adams, while Jefferson, Monroe, and Jackson had embraced

it.¹⁵ The presidents who opposed rotation in office maintained that federal appointees were entitled to remain in office as long as they were performing their jobs well. Monroe had signed the first Tenure in Office Act, which limited the tenure of certain federal appointees to four years but provided that they could be removed from office at the president's pleasure. John Quincy Adams consistently reappointed people, many of whom did not support him, once their commissions expired.

Jackson created a political firestorm when, with Van Buren's help, he implemented what would become known as the spoils system, which was merely rotation in office by another name. The point of the spoils system was to replace the appointees of an outgoing president with allies of the incoming president. Jackson saw this system as a basic presidential privilege – one that was essential for ensuring that a president had in place people whom he could trust to carry out his preferred policies. He believed a president should have complete removal power over any executive branch officials to ensure that they implemented *his* preferred policies or could be replaced with people who would. While Van Buren supported the spoils system Jackson had championed, he had little or no reason to rotate Jackson's friends out of office. Most of them were his friends and allies, too.¹⁶

As a candidate, Harrison followed the Whig orthodoxy of urging reform of the spoils system that Jackson and Van Buren had championed. In his inaugural address, Harrison had pledged, like a good Whig, not to replace Van Buren's appointees with Whigs or to coerce governmental employees to make contributions to the Whigs to retain their positions.

Harrison wanted to find a middle ground between Jackson's and Van Buren's practice of rewarding their friends with appointments and the contrasting practice of John Quincy Adams of allowing high-ranking political appointees to remain in office. Harrison's problem was that, in

spite of the fact most other presidents had resisted rotation in office, keeping Van Buren's people in place meant frustrating the Whigs who had elected him. Too many if not most Whigs, reforming the spoils system simply meant replacing Democrats with Whigs. Nevertheless, Harrison promised in his inaugural address that treasury officers should not be removed without cause, and he vowed he would not remove a treasury officer without explaining it to Congress.

After only four weeks in office, Harrison had a mixed record in keeping his word not to replace political appointees solely for partisan reasons. Although Harrison had been the recipient of an unusually large number of political appointments, he repeatedly vowed to oppose the wholesale removal of Democrats without cause. The vow echoed sentiments he had written in a letter prior to the election of 1836 declaring that executive power was granted for the public good and "not to requite personal favors or gratify personal animosities."¹⁷ Moreover, Harrison's cabinet included Daniel Webster and Thomas Ewing, both of whom had argued in the Senate against the practice of rotation of office.¹⁸ Shortly after his inauguration, Harrison asked Webster to circulate to all department secretaries a message instructing them that the payment of contributions or assessments by governmental employees would be regarded as cause for dismissal. He issued a strict order to all public officers and agents against interference in popular elections and receipt of compensation for party services. He declared that federal employees "are not expected to take an active or officious part in attempts to influence the minds or votes of others, such conduct being deemed inconsistent with the spirit of the Constitution and the duties of public agents acting under it. . . ."¹⁹ Harrison wanted efficiency and honesty in government, and he took the unusual step of visiting every department to observe its operations. He requested reports detailing the activities and responsibilities of every office, and he promised to protect officeholders who were performing their jobs well. Yet, in spite of Harrison's protestations to

the contrary, the pressure from other Whig leaders to remove Democrats to create jobs for their friends was enormous. His cabinet even voted to make an extensive purge of Democrats. Ewing, once a critic of rotation in office, defended the purge to counter Van Buren's "policy . . . to retain in office none but their active political adherents, those who would go for them thorough in all things; and the performance of the official duty, was far less requisite to a tenure in office, than electioneering services. Hence the offices had become for the most part filled with brawling offensive political partisans, of a very low moral standard – their official duties performed by substitutes, nor not performed at all."²⁰ While Clay was persistently asking Harrison to appoint his friends, Postmaster General Francis Granger probably had the highest numbers of dismissals. As one historian found, Granger, during his six months in office, had removed "39 of the 133 presidential postmasters, and by September 1841 almost 2500 postmasters had been appointed in the lesser offices to vacancies [which were caused] by removals. Granger later boasted that that he had removed 1700 postmasters and had he remained in the cabinet two or three weeks longer he would have removed 3000 more."²¹

Although Harrison did not live long enough to fulfill his pledge to reform civil service, his limited success was a reminder of the powerful forces aligned against such reform and for following the practice of rotation in office. No other president would do better than Harrison until the obstacles to genuine civil service reform were overcome in 1881.

III.

The third way in which Harrison deviated from the Whig orthodoxy was in his use of his cabinet. The Constitution provides that a president "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."²² While Jefferson had construed this language as allowing his cabinet

to vote on the most important matters confronting the administration and vesting in him the power to overrule their decisions if he saw fit,²³ the seven other presidents who preceded Harrison did not believe the cabinet had any authority to bind them and differed only to the extent to which they consulted their respective cabinets.²⁴ Nevertheless, the six members of Harrison's cabinet believed in the Whig principle that *they* should direct *all* the president's actions. This belief derived from the Whig conception that the presidency should be subservient not just to Congress but to the cabinet, which existed as an important check on executive usurpation of legislative authority.²⁵ While Harrison's cabinet allowed him to preside over their meetings, they insisted that decisions should be made by majority rule, with each cabinet member having a single vote and Harrison only being entitled to casting a tie-breaking vote if the cabinet was deadlocked.²⁶

Though Harrison initially followed his cabinet's preferred method of decision-making, he sometimes rebelled. The most dramatic confrontation arose when Webster informed Harrison that the cabinet had decided to reject his preferred candidate and instead to appoint James Wilson as the Governor of Iowa. After a prolonged silence, Harrison wrote a few words on a slip of paper, which he asked Webster to read to the cabinet. The message was succinct: "William Henry Harrison, President of the United States."²⁷ Harrison then rose to his feet, and angrily told the cabinet, "And William Henry Harrison, President of the United States, tells you, gentlemen, that, by --, John Chambers shall be Governor of Iowa."²⁸

It is probably no coincidence that Harrison's declaration to his cabinet echoed his earlier remonstrance to Clay that he – and he alone -- was the President of the United States. Clearly, it took some effort for Harrison to make these declarations. They went against his characteristic eagerness to please other people, and contradicted not once but twice the fundamental

philosophy of the party that had nominated him to be president. When Harrison's protestations are coupled together, they suggest that once in office (and freed from the need to run for re-election) Harrison had recognized the need to protect the prerogatives and institutional needs of the presidency. The second rebuke, like the first, reflected his growing awareness that the Whig conception of the presidency was unrealistic and unworkable. He might have realized that Jackson may not have been wrong when he claimed that the president was entitled, even obliged, to assert a constitutional vision independent from that of Congress.

Harrison's presidency may have been short, but it has a constitutional legacy. In his short time in office, he took stands on three great constitutional issues -- legislative supremacy, rotation in office, and the proper role of the cabinet -- that were important, incremental steps in the development of the modern constitutional understandings of these issues. His steps were small, but neither Henry Clay nor other Whig leaders forgot them as they attempted unsuccessfully to assert their dominance over the next two presidents who both proved to be more determined than Harrison to protect presidential prerogatives from congressional encroachments.

End Notes

Introduction

1. See, e.g., 2 Bruce A. Ackerman, *We the People: Transformations* (Belknap Press, 1998).
2. Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Belknap Press, 1997).
3. *Id.* at xi.
4. Stephen Skowronek, *Presidential Leadership in Political Time: Reprise and Reappraisal* vi (2d edition, revised and expanded, 2011). See also *id.* (“The recurrent patterns revealed [in this study] indicate the historical range of political possibilities for presidential leadership in the American system. At issue here is not what we might want presidential leadership to be, but what its capacities are and how it has operated in political circumstances variously configured.”).

Table of Recurrent Themes

* This table lists major recurring themes in the book. A detailed index is available at the back of the book for specific names and subjects.

Chapter 2

1. The classic biography of Harrison is Freeman Cleaves, *Old Tippecanoe: William Henry Harrison and His Times* (1939). Prior to becoming president, Harrison had served in the following public offices: Governor of Indiana Territory (1800-1812); Brigadier General, U.S. Army (1812-1813); Major General, U.S. Army (1813-1814); Member, U.S. House of Representatives (1816-19); U.S. Senator (1825-29); Minister to Colombia (1828-29); Clerk, County Court of Pleas of Cincinnati (1835-40).

2. The other Ohioans elected to president are Ulysses Grant, Rutherford B. Hayes, James Garfield, William McKinley, William Howard Taft, and Warren Harding. An eighth president, Benjamin Harrison, was born in Ohio but was a resident of Indiana at the time of his election.
3. The other presidents who made no Supreme Court appointments were Taylor, Andrew Johnson (1865-1869), and Carter.
4. Arthur Schlesinger, Jr., suggested that “Not since 1796, nearly half a century before, had a conservative candidate gained the presidency. [Moreover,] the people had not only chosen a conservative, but they had chosen a conservative masquerading, as it seemed to the Jacksonians, clumsily and cynically as a democrat.” Arthur M. Schlesinger, Jr., *The Age of Jackson* 391 (1945).
5. William Henry Harrison, Inaugural Address (March 4, 1841), IV *A Compilation of the Messages and Papers of the Presidents 1789-1897* 9 (James D. Richardson, ed., Government Printing Office, 1897).
6. *Id.* at 10.
7. See Letter from William Henry Harrison to Henry Clay, November 15, 1840, in Henry Clay, *The Private Correspondence of Henry Clay* 446 (Calvin Colton ed., 1855).
8. This quote appears in several, widely respected accounts of the period between Harrison’s election and his death. See, e.g., Merrill D. Peterson, *The Great Triumvirate: Webster, Clay, Calhoun* 299 (1987); George Rawlings Poage, *Henry Clay and the Whig Party* 16-17 (1965); Glyndon G. Van Duesen, *The Life of Henry Clay* 338-39 (1937).
9. Letter from Henry Clay to President William Henry Harrison, March 13, 1841, in Henry Clay, *The Private Correspondence of Henry Clay* (ed., Calvin Colton, 1855), at 450-51.

10. Letter from President William Henry Harrison to Henry Clay, March 13, 1841, in *The Private Correspondence of Henry Clay*, *supra* note 9, at 452-53.
11. *Id.*
12. Letter from Henry Clay to President William Henry Harrison, March 15, 1841, in *The Private Correspondence of Henry Clay*, *supra* note 9, at 453-54.
13. *Id.*
14. Harrison, Inaugural Address, *supra* note 5, at 7.
15. *See generally* Leonard D. White, *The Jacksonians: A Study in Administrative Practice, 1829-1861* 300-46 (1954).
16. *Id.* at 309.
17. F. Cleaves, *supra* note 1, at 296 (1939) (quoting *Richmond Whig*, October 30, 1835).
18. *See* White, *supra* note 15, at 310.
19. Senate Doc. 26, 27th Cong., 1st sess., p. 2 (March 20, 1841).
20. “Diary of Thomas Ewing, August and September 1841,” *American Historical Review*, XVIII (1912-13), at 98.
21. White, *supra* note 15, at 311 (citations omitted).
22. U.S. Const., art. II, section 2.
23. Dumas Malone, *2 Jefferson and His Time* 269-79 (1948-81).
24. White, *supra* note 15, at 92.
25. *See* G. Poage, *supra* note 8, at 16-17.
26. White, *supra* note 15, at 93.
27. Parmelee, “Recollections of an Old Stager,” *Harper’s New Monthly Magazine*, XLVII (1873), at 754.

28. *Id.*