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THE LEGACY OF THEODORE ROOSEVELT'S APPROACH TO GOVERNMENTAL POWERS

JULIA L. ERNST*

ABSTRACT

This Article explores how Theodore Roosevelt viewed the structure of government within the United States in the late 1800s and early 1900s. It particularly considers his standpoints on the interrelationships between the three branches of government—executive, legislative, and judicial—at both the federal and state levels. More specifically, it investigates Roosevelt's perspectives on presidential use of executive orders to take action in the face of Congressional inertia in the federal government. Considering state governments, it examines his views in favor of restricting the independence of the judiciary. The Article suggests that, while Theodore Roosevelt's approach to the judiciary has not been followed, he helped set the stage for the active use of executive orders in shaping the federal laws, which has substantially influenced the relationship between the president and Congress. Whether or not one agrees with presidential use of executive orders to effectuate major legal and policy changes, Roosevelt's legacy in originating the extensive use of this practice remains significant today.

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I. INTRODUCTION

This Article arose out of a symposium on President Roosevelt, hosted by the Theodore Roosevelt Center at Dickinson State University, at which I was invited to speak.¹ Therefore, it may read more like an oral presentation for a largely non-legal audience than a traditional law review article. Every year, the Theodore Roosevelt Center in western North Dakota hosts a symposium exploring various issues related to our former president.² One

1. I would like to give a special thanks to Anne Mostad-Jensen, one of our outstanding law librarians at the University of North Dakota School of Law, for her expert research in helping me prepare for this presentation. My Burtness Scholar Research Assistants, Calley Campbell and Thaddeus Swanson, provided additional invaluable support in conducting research for the presentation and this Article.

2. See *Events*, THEODORE ROOSEVELT CTR., <http://www.theodorerooseveltcenter.org/en/Get-Involved/Events.aspx> (last visited Feb. 16, 2017). Each year, the Theodore Roosevelt Center hosts a symposium exploring various issues related to our former president, such as the one in the fall of 2016 addressing Theodore Roosevelt and the 1912 election. Moreover, Dickinson State University has been selected to house the nation’s Theodore Roosevelt Presidential Library, containing a museum as well as public access to both digital and print libraries. Currently only thirteen presidential libraries exist across the United States, so the Theodore Roosevelt Presidential Library would be the fourteenth, which will be a wonderful centerpiece for North Dakota. *Board approves system budget request*, N.D. UNIV. SYS. (Jun. 28, 2016),

might ask, why is the center located in North Dakota? Why was it not established in New York, where Roosevelt was born, became New York City Police Commissioner, served in the New York Legislative Assembly, was elected as Governor of the state, and is buried? In response to these questions, it is important to recall that as a relatively young man, Theodore Roosevelt spent several years (cumulatively) living in the Badlands region of the western part of North Dakota, in part while he was recovering from the death of his wife and mother—both on the same day—on February 14, 1884.³ He subsequently attributed his tremendous success in politics—and particularly his ascendancy to the presidency—to the time that he spent in North Dakota, saying “I never would have been President if it had not been for my experiences in North Dakota.”⁴ We North Dakotans are very proud of this fact and have claimed Theodore Roosevelt as one of our own. Therefore, the Theodore Roosevelt Center was founded in North Dakota and holds an annual conference commemorating the president’s contributions to our region and our nation.⁵

In September 2015, the symposium focused on “Theodore Roosevelt and the Law.”⁶ Clay Jenkinson, the director of the Center, asked me to give a presentation delving into issues relating to Theodore Roosevelt and the U.S. Constitution, particularly investigating his perspectives on presidential use of executive orders and on the independence of the judiciary.⁷ This

<http://blog.ndus.edu/2699/board-approves-system-budget-request/#sthash.0cLSDTEen.M3RIHRjR.dpbs>.

3. Julie A. Oseid, *The Power of Zeal: Teddy Roosevelt's Life and Writing*, 10 LEGAL COMM. & RHETORIC: JALWD 125, 131 (2013).

4. *Theodore Roosevelt National Park*, NAT'L PARK SERV., https://www.nps.gov/nr/travel/presidents/t_roosevelt_park.html (last visited Feb. 16, 2017).

5. I was delighted to participate in this event, as I had heard about the symposium for years but had not had an opportunity previously to attend. I learned a great deal about other aspects of Roosevelt’s life and influence on the law from the other speakers. For example, Professor Kermit Roosevelt, III provided a fascinating keynote speech addressing additional aspects regarding Theodore Roosevelt and the Constitution. I would encourage anyone who is interested in this era of our nation’s history to attend the symposium in the future. The theme for the symposium in September/October 2016 was Theodore Roosevelt: Candidate in the Arena. *Symposia*, THEODORE ROOSEVELT CTR., <http://www.theodorerooseveltcenter.org/en/Get-Involved/Events/Archive/Symposia.aspx> (last visited Feb. 16, 2017).

6. *Id.*

7. I would like to extend my heartfelt thanks to Clay Jenkinson for the opportunity to give this presentation and subsequently to publish an expanded version of my remarks as this Article. Many of the concepts developed in this Article arose from the dialogue that I had with Mr. Jenkinson during the question and answer segment of my presentation at the symposium, for which I am very grateful to him. I also want to thank Shannon Patterson for her kind introduction to my presentation. Shannon was a senior at Dickinson State University majoring in psychology and minoring in leadership studies. She was in her fourth year as a Theodore Roosevelt Scholar and her second year as Vice President of the Theodore Roosevelt Honors Program’s Executive Committee.

Article arises out of that presentation and explores how Roosevelt viewed the structure of government in the United States (“U.S.”) during the late 1800s and early 1900s. In particular, this Article examines how he perceived the checks and balances among the executive, legislative, and judicial branches of government. It explores Roosevelt’s use of executive orders to create sweeping policy changes when he felt that Congress was neglecting its duties to address issues of national significance. Furthermore, it delves into his attacks on judicial independence, such as when he deemed that the courts were erecting reactionary roadblocks to progressive legislation. Roosevelt’s aspirations regarding the courts thankfully largely failed. However, he has left an enduring legacy regarding presidential use of executive orders that remains to this day. Whether or not one agrees with presidential use of executive orders to effectuate major legal and policy changes, Roosevelt’s legacy in originating the extensive use of this practice remains significant today.

II. ROOSEVELT’S EXPANSION OF EXECUTIVE ORDERS

A central aspect of Theodore Roosevelt’s approach to governmental powers that has continuing repercussions is the use of executive authority in the face of Congressional inaction, and particularly his unprecedented and extensive use of executive orders.⁸ An executive order is a directive issued by a president requiring an agency or official within the executive branch of the federal government to take certain actions.⁹ Roosevelt was the first president significantly to expand the use of executive orders and other actions as mechanisms enabling the federal government to take action on

8. THEODORE ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY 420 (1985 ed. 1913) (while discussing “[t]he idea that the Executive is the steward of public welfare,” Roosevelt indicated that “[t]he laws were often insufficient, and it became well nigh impossible to get them amended in the public interest when once the representatives of privilege in Congress grasped the fact that I would sign no amendment that contained anything not in the public interest. It was necessary to use what law was already in existence, and then further to supplement it by Executive action.”).

9. William D. Neighbors, Comment, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105, 106 (1964).

important issues.¹⁰ He issued an average of over 140 executive orders per year, and by the end of his term in office had delivered 1081.¹¹

A. HISTORICAL USE OF EXECUTIVE ORDERS

Of course, executive orders have been used by nearly all Presidents throughout the course of our nation's history, including by Presidents who helped establish the country and its government. For example, the very first President, George Washington, issued eight of them.¹² James Madison also issued one during his term as the fourth president of the United States.¹³ Because Washington and Madison both signed the U.S. Constitution, they were very familiar with the limitations that the U.S. Constitution placed on the presidency. Presumably they felt that the U.S. Constitution did not forbid them from taking this action while they served as President, even though they used executive orders very sparingly. John Adams, who served as the second President, issued one, and Thomas Jefferson, the third President, issued four.¹⁴ One of Jefferson's actions that was not initially termed an executive order but has been deemed so subsequently is the Louisiana Purchase in 1803.¹⁵ This action vastly expanded the territory of the nation, and it was only after the fact that Congress authorized the funds for the purchase.

Although Presidents have issued executive orders since the very founding of our country, their use was not extensive early on in our country's history. Presidents issued fewer than twenty executive orders throughout their terms in office up until the 1850s.¹⁶ William Henry Harrison, the ninth President, is the only one who did not issue an executive order.¹⁷ However, Harrison died of complications from pneumonia on his thirty-second day in office, serving the shortest tenure in United States

10. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 479 (Stating that "occasionally great national crises arise which call for immediate and vigorous executive action, and . . . in such cases it is the duty of the President to act upon the theory that he is the steward of the people, and that the proper attitude for him to take is that he is bound to assume that he has the legal right to do whatever the needs of the people demand, unless the Constitution or the laws explicitly forbid him to do it.").

11. Gerhard Peters & John T. Woolley, *Executive Orders*, THE AM. PRESIDENCY PROJECT (John T. Woolley & Gerhard Peters, eds., Jan. 20, 2017), <http://www.presidency.ucsb.edu/data/orders.php>.

12. *Id.*

13. *Id.*

14. *Id.*

15. Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 37 (2002); *see generally* Neighbors, *supra* note 9, at 106 ("Jefferson purchased the Louisiana Territory from France without any prior authority from Congress.").

16. Peters & Woolley, *supra* note 11.

17. *Id.*

presidential history, from March 4 through April 4, 1841; therefore, he did not have much time to do anything while in office.

Presidential use of executive orders gradually became more popular in the latter part of the 1800s. For example, Ulysses S. Grant issued 217 between 1869 and 1877.¹⁸ Grover Cleveland issued over 250 during his two non-consecutive terms in office in the late 1800s.¹⁹ And immediately preceding Roosevelt, President William McKinley did not shy away from using executive orders, issuing 185 of them, for an average of over forty per year.²⁰ Thus, significant precedent for using executive orders existed prior to President Roosevelt, but not nearly as many compared to his average of 140 per year. Moreover, most of the early executive orders dealt mainly with administrative issues.²¹ During this early era in our nation's history reigned a great suspicion of executive authority, so presidents were conscientiously circumspect in their use of executive power. Certain exceptions arose, of course, such as Thomas Jefferson's action doubling the size of the nation with the stroke of his pen through the Louisiana Purchase.²² Not until Abraham Lincoln issued executive orders in the 1860s—such as the Emancipation Proclamation freeing the slaves in the secessionist states,²³ and another suspending the writ of habeas corpus²⁴—did executive orders frequently because used for more substantive matters.

In a dramatic departure from previous presidents, at the beginning of the Twentieth Century, Roosevelt became a champion for the unabashed use of substantive executive orders to make sweeping changes in law and policy, at times over the objections of the other branches of government. During his term between 1901 and 1909, he issued over 1000 executive

18. *Id.*

19. *Id.*

20. *Id.*

21. Branum, *supra* note 15, at 5 (“Originally, executive orders and other directives were used primarily as administrative tools.”).

22. Alissa C. Wetzel, *Beyond the Zone of Twilight: How Congress and the Court Can Minimize the Dangers and Maximize the Benefits of Executive Orders*, 42 VAL. U. L. REV. 385, 392-93 (2007) (explaining that “two important executive orders were issued prior to the Civil War. First, though seldom classified as such, President Thomas Jefferson’s Louisiana Purchase had all the markings of an executive order, since it was done unilaterally by Presidential order without direct statutory or Constitutional authority. Significantly, neither Congress nor the public challenged the Louisiana Purchase on the grounds that it was issued without Congressional authority.”) (citations omitted).

23. Branum, *supra* note 15, at 37.

24. Emanuel Margolis, *National Security and the Constitution: A Titanic Collision*, 81 CONN. B.J. 271, 276; *see Ex parte Merryman*, 17 F. CASES 144 (Cir. Ct. Md. 1861) (holding that Congress alone was authorized to suspend the writ of habeas corpus and that President Lincoln’s executive order was therefore unconstitutional).

orders—864 more than any previous president.²⁵ His aggressive use of this presidential power emboldened subsequent Presidents to follow suit. For example, William Howard Taft, who immediately succeeded Roosevelt, issued 724 during his single term in office between 1909 and 1913.²⁶ Taft was a lawyer by training and had served as an assistant prosecutor, as a state superior court judge, as the Solicitor General of the United States, and as a federal judge on the U.S. Court of Appeals for the Sixth Circuit.²⁷ Therefore, he would have been very familiar with constitutional powers and constraints. His actions demonstrate that he did not feel that the U.S. Constitution prohibited the president from issuing executive orders. Woodrow Wilson issued 1803 of them during his two terms in office between 1913 and 1921, during and following World War I.²⁸ Although serving as president for less than two and one half years, William Harding issued a total of 522 executive orders.²⁹ Calvin Coolidge issued 1203, and Herbert Hoover issued 968.³⁰ Theodore Roosevelt's younger cousin, Franklin Delano Roosevelt, exceeded him by over 2500, putting into place 3721 executive orders during the New Deal era.³¹

From that high water mark, the use of executive orders has gradually tapered off to a certain extent. For example, Harry S. Truman dropped the number of executive orders down to 907, and the use of executive orders again plummeted under Dwight D. Eisenhower to only 484.³² Since that time, Presidents have issued fewer than 400. For example, George W. Bush issued 291, and Barack Obama had issued 276 by the end of his presidency.³³

B. THEODORE ROOSEVELT'S INCREASING USE OF EXECUTIVE ORDERS

Examining the trajectory of presidential use of executive orders throughout the course of our nation's history puts Roosevelt's actions into a historical context. Although he was by no means the first to use executive orders, he was certainly a pioneer in emphasizing their use, greatly

25. Peters & Woolley, *supra* note 11.

26. *Id.*

27. Stephen E. Hessler, *The Story of Benjamin Cardozo, Learned Hand & the Southern District of New York*, 47 N.Y.L. SCH. L. REV. 191, 212 (2003); Donald F. Anderson, *Building National Consensus: The Career of William Howard Taft*, 68 U. CIN. L. REV. 323, 325-26 (2000).

28. Peters & Woolley, *supra* note 11.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

expanding the powers of the presidency in doing so.³⁴ In part, he wanted to use this mechanism because he felt that if Congress was not acting when he believed it should—if the federal government was not taking steps to address a particular issue that Roosevelt thought was in the national interest—he surmised that he, as president, would need to take that power himself to resolve the problem. As one mechanism for circumventing Congressional inaction, he would issue an executive order to ensure that the problem was addressed. For example, consider conservation of the natural environment.³⁵

By way of background, before he became President, Roosevelt's activities during the late 1800s—including his activities right here in North Dakota—placed him very well to lead the charge highlighting the plight of wildlife, fish, forests, and other natural resources from throughout the country.³⁶ Of course, he had been a first-hand witness to the devastation of the bison that had occurred in the Dakotas and surrounding regions.³⁷ At one point he wrote: “The extermination of the buffalo has been a veritable tragedy of the animal world.”³⁸ While he served as Governor of New York, he developed a concern for forest lands.³⁹ During the late 1800s, the nation also observed the increasing destruction of the migratory bird population

34. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 434-35 (“During the seven and a half years closing on March 4, 1909 [his last day in office], more was accomplished for the protection of wild life in the United States than during all of the previous years, excepting only the creation of the Yellowstone National Park.”).

35. Roosevelt was adamant about protecting the natural environment for future generations. *See, e.g.*, EDMUND MORRIS, THEODORE REX 500 (Random House 2001) (“He repeated what he had said . . . about the gravity of the responsibility Americans had to pass on to their children a protected natural heritage.”).

36. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 299. As governor of New York, “I was able to do a good deal for forest preservation and the protection of our wild life. All that I later strove for in the Nation in connection with Conservation was foreshadowed by what I was able to obtain for New York State when I was Governor.” *Id.* Indeed, since his early childhood, he had always had an affinity for nature. *See* PAUL RUSSELL CUTRIGHT, THEODORE ROOSEVELT: THE MAKING OF A CONSERVATIONIST 1-13, 212 (1985) (“No other president—before or since—has been so well prepared for the task of inaugurating and implementing a comprehensive, aggressive, nationwide conservation program.”).

37. CUTRIGHT, *supra* note 36, at 161 (“[A]bove all else, he had been spectator to the rapid, remorseless destruction of the buffalo and other game animals, this causing him to cry out, ‘The frontier has come to an end, it has vanished.’”).

38. Oseid, *supra* note 3, at 131, 140 (“Gone forever are the mighty herds of the lordly buffalo. A few solitary individuals and small bands are still to be found scattered here and there in the wilder parts of the plains . . . but the great herds . . . have vanished forever. The extermination of the buffalo has been a veritable tragedy of the animal world.”).

39. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 408 (“Like other men who had thought about the national future at all, I had been growing more and more concerned over the destruction of the forests.”); *see also* CUTRIGHT, *supra* note 36, at 199-207.

through hunting for their plumes, particularly in Florida.⁴⁰ Many had also raised concern over the severe reduction in the population of other species, such as the passenger pigeon that had once been abundant.⁴¹ Moreover, public support was continually increasing for more vigorous action on the part of the federal government to reverse some of these negative trends.

Toward the end of the Nineteenth Century, as a result of increasing awareness of the devastation that was happening to the environment, and particularly that was happening to fish and wildlife, the federal government created the Federal Office for the Commission of Fisheries⁴² and the Division of Economic Ornithology and Mammalogy, which later became the Department of Agriculture.⁴³ These entities helped the nation gain better information about the damage to wildlife occurring throughout the country.⁴⁴ From the studies that these agencies performed, it became very apparent that vast federal resources—and more specifically, the country's natural resources—were in significant jeopardy.⁴⁵ Around this timeframe, sportsman's groups and conservation organizations began to lobby Congress, urging it to do something to alleviate these harms.⁴⁶ For example, Roosevelt and numerous influential colleagues, including

40. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 436 (noting “the ruthless destruction of plume birds for the millinery trade”); *see also* CUTRIGHT, *supra* note 36, at 223.

41. Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 691-92 (2005) (“The fate of the passenger pigeon vividly illustrates how early non-regulation of market hunting played out. At the time of America’s discovery, passenger pigeons ranged from the Atlantic Coast westward to the Rocky Mountains; their numbers were estimated in the billions. . . . By the mid-1800s, this excessive hunting resulted in a marked reduction of passenger pigeons. But most Americans refused to believe that the once bountiful species was in danger of extinction. . . . A victim of America’s pro-capture mindset, the last wild passenger pigeon was shot in September of 1908, and the last captive bird died in a Cincinnati zoo on September 1, 1914.”).

42. *USFWS History*, U.S. FISH & WILDLIFE SERVICE (Mar. 7, 2014), <https://training.fws.gov/history/USFWS-history.html>.

43. *Origins of the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERVICE (Feb. 21, 2014), <https://training.fws.gov/history/TimelinesOrigins.html>; *see also History and Organization*, USGS PATUXENT WILDLIFE RESEARCH CENTER (Aug. 1, 2011), <https://www.pwrc.usgs.gov/history/bsphist2.htm>.

44. Sandra B. Zellmer, *Wilderness Management in National Parks and Wildlife Refuges*, 44 ENVTL. L. 497, 512-13 (2014) (“The FWS [Fish and Wildlife Service] traces its origins back to 1871, when Congress created the United States Commission on Fish and Fisheries in the Department of Commerce to study population declines of fish species harvested for food. It also has roots in the Division of Economic Ornithology and Mammalogy, created in 1885 in the Department of Agriculture to study the effects of birds in controlling agricultural pests and to track the geographical distribution of animal and plant species throughout the country.”) (citations omitted).

45. *Origins of the U.S. Fish and Wildlife Service*, *supra* note 43; *see also History and Organization*, *supra* note 43.

46. Jason Scott Johnston, *The Tragedy of Centralization: The Political Economics of American Natural Resource Federalism*, 74 U. COLO. L. REV. 487, 540 n.123 (2003).

renowned figures in government, scientists, authors, and others, founded an organization in 1887 called the Boone and Crockett Club, named after early explorers and national icons Daniel Boone and Davy Crockett.⁴⁷ Roosevelt became a prominent leader in this alliance.⁴⁸

Despite growing public support for preserving natural resources, Congress would not budge. When Congress did not act to protect wildlife, Roosevelt became impatient. He did not want to wait until Congress responded, if indeed it ever would. As public concern increased, Roosevelt was exceedingly aware of the urgent necessity to manage natural resources more effectively and was at the forefront of the efforts to stem the losses of natural resources and the harms to the environment.⁴⁹ Thus, when he became president in 1901 following the assassination of President William McKinley, the conservation-minded Roosevelt was aptly situated to take on the daunting problem of protecting the United States' natural resources.⁵⁰ The following year, Roosevelt supported members of the Boone and Crockett Club in cultivating a proposal to establish a national network of wildlife refuges to help alleviate those problems.⁵¹ As the initial step in implementing this plan, President Roosevelt issued the very first executive order establishing a national wildlife refuge, in this instance, to preserve the habitat of the brown pelican and other types of birds.⁵² This order led to the creation of the Pelican Island National Wildlife Refuge along Florida's Atlantic coast, a move that was also supported by the Florida Audubon Society.⁵³ This was the earliest federal land specifically set apart to ensure

47. *125-year Snapshot: Boone and Crockett Club 1887-2012*, BOONE AND CROCKETT CLUB, http://www.boone-crockett.org/about/about_overview.asp?area=about (last visited Feb. 17, 2017); see also Thomas Lund, *Nineteenth Century Wildlife Law: A Case Study of Elite Influence*, 33 ARIZ. ST. L.J. 935, 945 (2001); see also Devin Kenney, *A Goat Too Far?: State Authority To Translocate Species On And Off (And Around) Federal Land*, 8 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 303, 312 (2015-2016); see also CUTRIGHT, *supra* note 36, at 167 ("In 1887 he and George Bird Grinnell took the first steps in forming the Boone and Crockett Club"); see also *id.* at 168-69.

48. Lund, *supra* note 47, at 945 ("When Theodore Roosevelt became President, Stewart Udall has pointed out, 'the Boone and Crockett wildlife creed . . . became national policy.'").

49. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 422 ("The Conservation movement was a direct outgrowth of the forest movement. It was nothing more than the application to our other natural resources of the principles which had been worked out in connection with the forests. Without the basis of public sentiment which had been built up for the protection of the forests, and without the example of public foresight in the protection of this, one of the greatest natural resources, the Conservation movement would have been impossible.").

50. *Id.* at 409.

51. *125-year Snapshot: Boone and Crockett Club 1887-2012*, *supra* note 47.

52. CUTRIGHT, *supra* note 36, at 233.

53. *Pelican Island: History*, U.S. FISH & WILDLIFE SERVICE (Oct. 14, 2015), https://www.fws.gov/refuge/pelican_island/about/history.html; see also J. Michael Scott et al., *National Wildlife Refuge System: Ecological Context and Integrity*, 44 NAT. RESOURCES J. 1041, 1042 (2004).

the survival of a particular species. Immensely enjoying his power, President Roosevelt “indeed delights in every aspect of his job: . . . in setting aside millions of acres of unspoiled land at the stroke of a pen (‘Is there any law that will prevent me from declaring Pelican Island a Federal Bird Reservation? . . . Very well, then I so declare it!’).”⁵⁴

This may seem like an insignificant initiative by itself, yet it was only the beginning of a major program developing a nationwide network of ecological preserves. In the wake of this modest beginning at Pelican Island, Roosevelt issued a total of fifty-one executive orders to set aside federal lands for the protection of wild birds across seventeen states, as well as three territories.⁵⁵ He also issued other executive orders advancing conservation initiatives.⁵⁶ Responding to Roosevelt’s leadership and to public sentiment, Congress finally started to acquiesce. For example, it established the first game preserves in the country in 1905—the Wichita Game Preserves.⁵⁷ It passed the National Monuments Act in 1906—preserving such icons as the Muir Woods in California and the Mount Olympus National Monument in Washington.⁵⁸ It also created the National Bison Range in Montana in 1908.⁵⁹ Currently, the National Wildlife Refuge System covers almost 94 million acres spread across more than 500 refuges, in addition to several thousand waterfowl production areas.⁶⁰ Roosevelt also urged the creation of five additional national parks, including Sully Hill National Park near Devil’s Lake in North Dakota, which doubled the total number of national parks in the country.⁶¹

54. EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* 17 (Coward, McCann & Geoghegan, Inc., 1979).

55. ROOSEVELT, *THEODORE ROOSEVELT: AN AUTOBIOGRAPHY*, *supra* note 8, at 436; *see also* CUTRIGHT, *supra* note 36, at 223.

56. ROOSEVELT, *THEODORE ROOSEVELT: AN AUTOBIOGRAPHY*, *supra* note 8, at 424 (“The task of [the National Conservation Commission] was to prepare an inventory, the first ever made for any nation, of all the natural resources which underlay its property. The making of this inventory was made possible by an Executive order which placed the resources of the Government Departments at the command of the Commission.”).

57. *Id.* at 435.

58. *Id.*

59. *Id.* at 436.

60. *America’s National Wildlife Refuge System*, U.S. FISH AND WILDLIFE SERVICE, <https://www.fws.gov/refuges100/facts/wpas.html.htm> (last visited Feb. 17, 2017) (“Nearly 95 percent of waterfowl production areas are located in the prairie wetlands or ‘potholes’ of North and South Dakota, Minnesota, and Montana. North Dakota alone is home to more than a third of the nation’s waterfowl production areas. If wetlands in this vast prairie pothole region were not saved from drainage, hundreds of species of migratory birds would have been seriously threatened or become extinct. . . . Nearly 3,000 waterfowl production areas cover 668,000 acres nationwide. They average 223 acres in size. The smallest is less than an acre (Medicine Lake WPA in North Dakota) and the largest is 3,733 acres (Kingsbury Lake WPA in Montana).”).

61. CUTRIGHT, *supra* note 36, at 225.

C. EXECUTIVE ORDERS AND THE U.S. CONSTITUTION

Executive orders are not at all mentioned in the U.S. Constitution. This raises the question as to where presidents derive their authority to issue an executive order, as the U.S. Constitution does not explicitly give the president this power. To respond to this question, a historical perspective on the separation of powers between the three branches of government helps to provide context. The U.S. Constitution was preceded by the Articles of Confederation, the initial founding document establishing the United States government.⁶² The Articles of Confederation were intentionally constructed to establish a very limited central government.⁶³ At the start of our nation's history, the founding fathers were very wary of their experiences with King George III of England and his heavy handedness in ruling the colonies from afar.⁶⁴ They were concerned about tyrannical governments and about rulers who were too far removed from the people.⁶⁵ Therefore, they wanted to develop a system of government that would preserve the powers of the people and keep governmental authority as close to the people as possible. This was accomplished, in part, by reserving significant powers to the states and by maintaining a very limited role for the federal government.

However, the new nation soon found that the Articles of Confederation had established such a weak central government that it caused a great deal of infighting among the states.⁶⁶ The leaders of the new nation were worried that the United States would completely fall apart, and that their experiment of trying to found a new country would ultimately fail.⁶⁷ So, they came together in Philadelphia for the Constitutional Convention and hammered out the new U.S. Constitution, which was adopted in 1787 and

62. James E. Hickey, Jr., *Localism, History and the Articles of Confederation: Some Observations About the Beginnings of U.S. Federalism*, 9 IUS GENTIUM 5, 23 (2003).

63. *Id.* at 12.

64. *Id.* at 9; Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413, 462 (2006) ("The introduction sets forth the background against which the second part of the Declaration, the evidence of tyranny by the King, is judged. The body of the Declaration provides evidence for the Declaration's "indictment" of the King. The list of "evils" visited by King George on the colonists consists of violations of the English constitution. . . . The final two paragraphs of the Declaration announce the separation of the colonies from the mother country.") (citations omitted).

65. Hickey, Jr., *supra* note 62, at 9-10.

66. Daniel Stepanich, *Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion*, 18 U. PA. J. CONST. L. 1507, 1515-16 (2016).

67. Steven T. Voigt, *The General Welfare Clause: An Exploration of Original Intent and Constitutional Limits Pertaining to the Rapidly Expanding Federal Budget*, 43 CREIGHTON L. REV. 543, 545 n.9 (2010).

ratified in 1788.⁶⁸ Through this document, the founders attempted to structure the government to give more power to the national government—because they did not want the nation to collapse, as it had been trending toward under the Articles of Confederation—but also to continue to have the federal government be one of limited powers. Again, the founders were anxious about executive authority, having recently lived under the oppression of King George III, and they designed the second national charter—our current Constitution—with limited executive authority.⁶⁹ They were clearly in favor of legislative preeminence—the legislative branch would be the branch that spoke for the people of the United States.⁷⁰ The president was duty-bound to apply the will of the people as distilled through the legislative authority. But did the founders truly circumscribe the executive power more so than the power of the legislative branch?

Let's look at the specific wording of the U.S. Constitution. Article I establishes the legislative branch, assuming the place of prominence as the first section of the U.S. Constitution, because the legislature is the closest to the people.⁷¹ Citizens elect the members of the House of Representatives from their legislative districts within each state.⁷² Although the U.S. Constitution originally gave to the state legislatures the authority to elect the states' two U.S. Senators,⁷³ this power has now been granted directly to the people in each state through the Seventeenth Amendment.⁷⁴ Either way, both chambers of the U.S. Congress were intended to reflect more closely the will of the general population than the executive or judicial branches of the federal government. Because members of Congress have smaller constituencies than the president, who represents the entire nation, the legislature is deemed to be the closest branch to the people and the most highly representative of the peoples' wishes.

Article I vests those powers “herein granted” to the legislative branch—to Congress.⁷⁵ Clause 1 of Article I reads: “All legislative Powers *herein granted* shall be vested in a Congress of the United States, which

68. Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 461 (2010).

69. Hickey, Jr., *supra* note 62, at 15.

70. *Id.* at 20.

71. *Id.*

72. U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second year by the People of the several States.”).

73. U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof.”).

74. U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof.”).

75. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

shall consist of a Senate and of a House of Representatives.”⁷⁶ Stated another way, only those powers that are enumerated in the U.S. Constitution shall be assumed by the federal legislature. Any other powers that are not delineated in the U.S. Constitution are reserved to the states or to the people, which was made explicit in the Tenth Amendment to the U.S. Constitution in 1791.⁷⁷ Although the enumerated powers can either be express or implied, as elucidated in *M’Culloch v. Maryland*,⁷⁸ they are nevertheless circumscribed, such that Congress has definite limitations beyond which it may not encroach.

Article II, on the other hand, establishes the executive branch, and in particular, the presidency.⁷⁹ Article II vests executive powers in the president, without the limiting “herein granted” clause.⁸⁰ The first clause of Article II reads “The executive power shall be vested in a president of the United States of America.”⁸¹ It does *not* say, “The executive power *herein granted* shall be vested in the president of the United States of America.” Instead, it seems to provide a broad grant of all executive power without the limiting clause.⁸²

So what difference does this distinction make? Over the years, many debates have ensued in terms of how much power this clause, without the limiting phrase, actually grants to the president. Does it grant to the president additional or general executive powers that are not specifically listed in Article II? Or does the president have only the powers that are indicated in the rest of Article II, and this clause simply provides an explicit granting of those powers listed in Article II to the president, which are still limited only to those powers? This ambiguity has raised a question as to whether the president may have executive powers beyond those that are expressly granted under Article II of the U.S. Constitution.⁸³ These questions have fostered an ongoing constitutional debate that remains

76. U.S. CONST. art. I.

77. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

78. *M’Culloch v. Maryland*, 17 U.S. 316, 361 (1819).

79. U.S. CONST. art. II.

80. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

81. U.S. CONST. art. II, cl. 1.

82. Stepanicich, *supra* note 66, at 1519.

83. Neighbors, *supra* note 9, at 108 (“The principal issue is whether the executive power as set forth in section 1 of article II of the Constitution is a broad specific grant of power or is merely a summary of powers which are granted in the succeeding sections of the article.”).

relevant today concerning executive orders and other issues surrounding recent presidents who have made extensive use of presidential powers.⁸⁴

These issues came to the fore with President Roosevelt, when he vastly expanded the powers of the president, in part, through his extensive use of executive orders.⁸⁵ Under the U.S. Constitution, the legislative power—the power to make law—is generally held by the legislative branch.⁸⁶ By contrast, the power to give effect to those laws—to implement law—is held by the President.⁸⁷ And the power to interpret or apply those laws lies with the judiciary, and ultimately with the Supreme Court.⁸⁸ Even with this system of separation of powers, there is often a blending of powers, and the separation is not strict, but overlapping.⁸⁹ The U.S. Constitution has been interpreted in ways such that each branch has attempted to aggrandize its own powers.⁹⁰ For decades, this claim has arisen with respect to the judiciary, including concerns that the judicial branch has aggrandized itself and has taken on too much power.⁹¹ Claims of a unitary or imperial president, have also appeared, portending a president who has assumed too much executive power, including through the use of “presidential legislation” via executive orders.⁹² Interestingly, contrary claims also exist that—on the one hand Congress has appropriated too much power via federal legislation—and on the other hand, Congress is mired in federal gridlock where it should be taking action on issues but cannot, and therefore, is shirking its responsibilities and is not appropriately using its power when it should.⁹³

84. Stepanicich, *supra* note 66, at 1519; *see also* Justin Pierce, *Who Lets the Dogs Out?: A Look at Executive Authority to Wage War Without Prior Legislative Acquiescence*, 1 GEO. J. L. & PUB. POL'Y 381, 386-87 (2003).

85. Kiyan Bigloo, *Aggregation of Powers: Stem Cell Research and the Scope of Presidential Power Examined through the Lens of Executive Order Jurisprudence*, 18 PSYCHOL. PUB. POL'Y & L. REV. 519, 531 (2012) (explaining that “presidents have not shied away from issuing executive orders to expand the powers of their office during times of relative peace. President Theodore Roosevelt went further, perhaps, than any other president in declaring that he needed no ‘specific authorization’ for his powers but could ‘do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the law.’”) (citations omitted).

86. Neighbors, *supra* note 9, at 105.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* (“The Judiciary, especially the United States Supreme Court, has been the most-criticized branch for allegedly acting outside the scope of its constitutional authority.”).

92. Neighbors, *supra* note 9, at 106.

93. The Hon. Jerome LaBarre, *Where Democracy Lives*, 74 OR. ST. B. BULL. 70, 70 (2014) (“‘Congressional Gridlock.’ . . . ‘Americans Down On Government.’ These are frequent headlines in the news. Recent polling data show that 95 percent of U.S. citizens simply do not believe that our democracy is working.”).

Of course, the president does have certain enumerated powers, such as the power as Commander in Chief, the power to issue pardons, and the power to enter into treaties with the advice and consent of the Senate.⁹⁴ The U.S. Constitution, however, does not explicitly give the president the power to issue executive orders. Therefore, when delivering executive orders, presidents usually claim either that they are promulgating the executive order pursuant to their powers granted by a particular statute, through which a statute delegates power to the executive branch, or if there is no explicit statutory delegation of power to the president, they may declare that they are issuing the executive order “By virtue of the authority vested in me as President of the United States.”⁹⁵

The fact that executive orders are not expressly mentioned in the U.S. Constitution does not necessarily mean that they are unconstitutional.⁹⁶ The U.S. Constitution is one of the shortest, and oldest, written constitutions in the world.⁹⁷ It provides a skeletal framework for our nation’s government, and was written that way, in part, to facilitate a great deal of flexibility with respect to our system of government.⁹⁸ The U.S. Constitution has been amended only twenty-seven times in over 200 years.⁹⁹ It is an ingenious document in terms of framing our government with enough specificity to enable the government to function, yet with enough malleability to allow

94. U.S. CONST. art. II, § 2; Neighbors, *supra* note 9, at 105.

95. Neighbors, *supra* note 9, at 106 (quoting 17 C.F.R. § 3139 (Apr. 8, 1952)).

96. Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 873 (1983) (“[T]he belief that there is a need for the President to exercise powers not specifically enumerated in the Constitution or not expressly granted by Congress. For example, the Constitution makes no mention of a Presidential power to recognize foreign governments or to remove Presidential appointees from office, nor has Congress ever granted such powers in a statute. Yet it is conceded that the President does have these powers. Inherent powers such as these are not objectionable so long as they do not disrupt the ‘balance of powers’ among the branches; that is, action is allowed so long as one branch does not infringe on the authority of another.”) (citations omitted).

97. Wm. David Lytle, *Celebrating the Constitution*, 36-SEP COLO. LAW. 5, 5 (2007).

98. See *M’Culloch v. Maryland*, 17 U.S. 316 (1819) (noting that “we must never forget that it is a constitution we are expounding. . . . This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.”). For example, the Constitution is silent on the number of members of the Supreme Court, but the number has worked out to be nine. Stephen R. Alton, *From Marbury v. Madison to Bush v. Gore: 200 Years of Judicial Review in the United States*, 8 TEX. WESLEYAN L. REV. 7, 21 (2001) (“The Constitution does not specify the number of justices who must serve on the United States Supreme Court. Indeed, in the nation’s first century, Congress had by statute varied that number from as few as six to as many as ten justices. But, since 1869, the number of justices had remained unchanged at nine—the very same number that serve today.”).

99. Lytle, *supra* note 97, at 5-6.

for the vast changes that we have seen in both our country and our world from the late 1700s through to the present.¹⁰⁰ Therefore, many functions, roles, and activities of the federal government are not written into the text of the U.S. Constitution, but have evolved over time through precedent effectuated by the necessity of changing circumstances. George Washington, John Adams, Thomas Jefferson, James Madison, and the other initial presidents had to figure out what a president is supposed to do and how a president faithfully executes the laws. The use of executive orders is one manner in which presidents have attempted faithfully to execute the laws.

Roosevelt was the first president under which the use of executive orders burgeoned, and the process for issuing them was still quite haphazard.¹⁰¹ In 1906, for example, there is an executive order that he would have signed, but it is not even dated.¹⁰² And sometimes throughout the early presidencies, the secretaries or cabinet members would write out an order that they wanted the president to issue, and the president would simply write “Approved” or “Let it be done” on the document.¹⁰³ In 1935, under Franklin Delano Roosevelt—the president who issued the most executive orders by a vast margin—the federal government initially started to make the process for establishing executive orders much more regularized.¹⁰⁴ Congress enacted a law and the president issued an executive order that, together, provided details in terms of how executive

100. Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 FLA. ST. U. L. REV. 259, 277 (2013) (“To survive in the face of rapidly changing cultural and technological development, a constitution must be flexible—it must bend so that it does not break. And this kind of flexibility is among the qualities we value most in our Constitution; its critical joints have enough play that we are able to avoid catastrophic political crises and incorporate even dramatically changed circumstances into the constitutional apparatus. It is, in part, this very flexibility—and the value we place upon it—that makes constitutional interpretation necessary and controversial.”).

101. Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 543 (2001) (discussing Theodore Roosevelt’s “unprecedented” number of executive orders); John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 349 n.131 (2010) (citing KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER, 66-67 (2001) (“Until the standardization of the format and publication of executive orders in the 1920s and 1930s, it was unclear which directives by the President constituted executive orders. This uncertainty resulted in the haphazard issuance and recording of executive orders. For example, the President might write ‘approved’ or ‘let it be done’ at the bottom of Cabinet members’ recommendations, or department heads might sign orders in place of the President, making it unclear which documents had the effect of an executive order.”)).

102. Neighbors, *supra* note 9, at 107.

103. *Id.* (quoting COMM. ON GOV’T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS I (Comm. Print 1957)).

104. *Id.*

orders would go forward in the future.¹⁰⁵ For example, each executive order would be published in the Federal Register.¹⁰⁶ Previously, anyone who wanted to find out what executive orders were currently in place would be required to hunt down whatever documentation existed to determine what executive orders had been issued by all of the presidents over the years, and whether they had been superseded.¹⁰⁷ In response to this chaotic system, the initiative in 1935 significantly regularized the process.¹⁰⁸ Of course, establishing a regularized course of action made it easier for presidents to issue more executive orders and increased the perception of this mechanism as a legitimate and constitutional use of presidential authority. Since Congress gave its stamp of approval on the use of executive orders by passing a law regularizing the process for issuing them, a majority of people serving in the legislative branch also clearly believed that executive orders fell within the purview of presidential authority under the U.S. Constitution.

D. THEORIES OF PRESIDENTIAL POWER AND EXECUTIVE ORDERS

Several theories have emerged to explain the use of presidential power and how the president should execute that power while in office. The most restrictive theory, sometimes known as the constitutional theory, holds that the president only has the powers that are explicitly designated to that office in the U.S. Constitution or given by Congress to the president.¹⁰⁹ If a power has not been expressly delegated to the president in the text of the U.S. Constitution, then the president does not have that power, because—just as with the legislature—the president is part of the federal government, and any powers not expressly listed in the U.S. Constitution are reserved to the states and to the people.¹¹⁰ Although President William Howard Taft

105. *Id.*

106. *Id.*

107. Fortunately, today such research is much easier. In addition to being listed in the Federal Register since 1935, now anyone with access to the Internet can find many of them listed on-line. Peters & Woolley, *supra* note 11.

108. Neighbors, *supra* note 9, at 107.

109. *Id.* at 108; ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 378 (“Other honorable and well-meaning Presidents . . . took the opposite and, as it seems to me, narrowly legalistic view that the President is the servant of Congress rather than of the people, and can do nothing, no matter how necessary it be to act, unless the Constitution explicitly commands the action.”).

110. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 380 (“These persons conscientiously believe that the President should solve every doubt in favor of inaction as against action, that he should construe strictly and narrowly the Constitutional grant of powers both to the National Government, and to the President within the National Government.”); *see also* Chemerinsky, *supra* note 96, at 871.

espoused this theory,¹¹¹ his extensive use of executive orders belies this claim, at least with respect to this particular expansion of presidential authority.¹¹²

An intermediate theory was embodied by President Roosevelt, labeled the “stewardship theory.”¹¹³ Under this theory, the president is supposed to act as the steward of the people.¹¹⁴ Therefore, as long as an action is not explicitly forbidden to the president under the U.S. Constitution or legislation, it is allowed.¹¹⁵ The president is able to take that action in furtherance of the good of the nation.¹¹⁶ If the U.S. Constitution or laws explicitly forbid the president from taking an action, then he cannot do it, but otherwise he is free to do so.¹¹⁷ He has broad executive powers, as can be seen in the difference between the first clauses of Article I and Article II, giving the legislature only those powers “herein granted,” yet giving the president executive powers without that limitation.¹¹⁸

The third theory is an extension of the stewardship concept, and has been called the “presidential prerogative theory.”¹¹⁹ Under this theory, the president has the power to act at his discretion for the public good, not only without explicit legal authority, but sometimes even against legal or

111. Neighbors, *supra* note 9, at 108 (quoting WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 16 (1925 ed.) (“This constitutional theory is best summarized by the following quotation from Taft’s book, *Our Chief Magistrate and His Powers*: ‘The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to exercise.’”).

112. *Id.* at 115 (noting that although Taft was supposedly an opponent to the stewardship theory, he still made use of an executive order in contravention of a federal statute).

113. *Id.* at 108; ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 371-72.

114. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 371-72; THEODORE ROOSEVELT CYCLOPEDIA 466 (Albert Bushnell Hart & Herbert Ronald Ferleger eds., Roosevelt Mem’l Ass’n 1941).

115. *Id.*

116. *Id.*

117. *Id.*

118. See, e.g., Robert F. Turner, *Understanding the Separation of Foreign Affairs Powers under the Constitution*, 60-OCT N.Y. ST. B. J. 8, 10 (1988); see also Shayana Kadidal, *Does Congress Have the Power to Limit the President’s Conduct of Detentions, Interrogations and Surveillance in the Context of War?*, 11 N.Y. CITY L. REV. 23, 33 (2007) (“Could uncheckable authority over the battlefield derive from the idea that the Framers intended the president to exercise discretion in interpreting and enforcing the laws? The textual source typically cited for this is the Vesting Clause: ‘The executive Power shall be vested in a President of the United States of America.’ The Vesting Clause could easily be seen as simply stating that the President has power to exercise all discretionary choices left to him by Congress. However, the Clause is seen by advocates of executive power as implying inherent executive powers not enumerated in the Constitution, owing to the differences between it (‘The executive power’) and the Legislative Vesting Clause (‘All legislative powers herein granted’). Alexander Hamilton was likely the first to make such an argument, and James Madison perhaps the first to refute it.”) (citations omitted).

119. See Neighbors, *supra* note 9, at 108.

constitutional mandates.¹²⁰ For example, this expansive use of presidential authority arose during the Civil War, when the country was in the middle of a crisis. The United States faced one of its most atrocious wars. President Abraham Lincoln felt he must take action, even if that action was contrary to the U.S. Constitution—for example, his suspension of the writ of habeas corpus.¹²¹ He felt it was better to preserve the nation in violation of the U.S. Constitution, than to be faithful to the U.S. Constitution during a time of crisis and let the nation itself disintegrate.¹²² Of course, as a lawyer by profession, President Lincoln had a tremendous respect for the law and the U.S. Constitution, so he would not have taken this action lightly.¹²³ In fact, one of the most renowned executive orders was his Emancipation Proclamation that freed the slaves.¹²⁴ Yet even here, under his authority as Commander in Chief, he felt that he could only free the slaves in states that were in rebellion and remain consistent with the U.S. Constitution.¹²⁵ He

120. *Id.* at 108-09.

121. *Id.* at 109 n.29 (“The most notable example of a President actually disregarding constitutional restrictions was Lincoln’s suspension of the privilege of habeas corpus. . . . These instances of questionable use of presidential power have occurred only in war-time or grave domestic crisis. The Presidents have based this exercise of their power on what they believe are their inherent powers given them by the Constitution in Article II, § 1.”) (citation omitted).

122. Joseph A. Ranney, *Abraham Lincoln’s Legacy to Wisconsin Law, Part 2: Inter Arma Silent Leges: Wisconsin Law in Wartime*, 82-FEB WIS. LAW. 14, 16 (2009) (“Relying heavily on Article I, § 8 of the U.S. Constitution (which enumerates Congressional powers and prohibits the suspension of habeas corpus ‘unless when in cases of rebellion or invasion the public safety may require it’), Taney issued an opinion declaring that only Congress, not the president, was empowered to suspend habeas. Lincoln ignored Taney’s decision. In a subsequent message to Congress Lincoln tacitly acknowledged that Congress, not the president, had primary power over habeas but he made a powerful appeal to the laws of necessity and interpreted his presidential oath (which also is prescribed by the Constitution) to require him to preserve the government at all costs. ‘[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?’ Lincoln asked. ‘Even in such a case, would not the official oath [to support the Constitution] be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?’”) (citations omitted).

123. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 366 (writing about President Lincoln’s actions in the 1860s in light of politically powerful members of Congress in the early 1900s, Roosevelt noted, “These men still from force of habit applauded what Lincoln had done in the way of radical dealing with the abuses of his day; but they did not apply the spirit in which Lincoln worked to the abuses of their own day.”).

124. John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 340 (2010) (“The President’s most famous executive order is the Emancipation Proclamation, issued September 22, 1862, and amended January 1, 1863, which proclaimed the freedom of currently enslaved residents of selected Confederate States.”).

125. Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349, 385-86 (2008) (“On January 1, 1863, the final Proclamation was put into effect. Here Lincoln made the constitutional argument even more precise. He issued it ‘by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion.’ This was, constitutionally, a war measure designed to cripple the ability of those in rebellion to resist the lawful authority of the United States. It applied only to those states and parts of states that were still in rebellion. This was constitutionally essential.

did not free the slaves in the northern states because he saw his authority as constitutionally constrained.¹²⁶ Therefore, although he normally abided by the stewardship theory,¹²⁷ he was not afraid to take extraconstitutional action when necessary. Thus, if a president does not have specific authority, or is even expressly forbidden from exercising certain powers, under the presidential prerogative theory, the president should still seize that authority when deemed in the best interests of the nation. Again, this view has been attributed to Abraham Lincoln, and to a certain extent to Franklin Delano Roosevelt and Harry S. Truman.¹²⁸ With respect to President Lincoln, the nation was in crisis, but normally presidents would presumably not need to take that stance and would not do something so extreme as to act in direct contradiction to the U.S. Constitution.¹²⁹

Regarding these three theories, on one end of the spectrum is William Howard Taft, who viewed himself as a strict compliance executive who refused to stray from what he understood to be the enumerated powers of the president under the U.S. Constitution¹³⁰—even though he made extensive use of executive orders, despite the fact that executive orders are not mentioned in the text of the U.S. Constitution.¹³¹ On the other end of

Lincoln only had power to touch slavery where, as he had told the ministers from Chicago, he could not 'enforce the Constitution.' Where the Constitution was in force, federalism and the Fifth Amendment prevented presidential emancipation. The document was narrowly written, carefully designed to withstand the scrutiny of the Supreme Court, still presided over by Chief Justice Taney. It narrowly applied only to the states in rebellion. It would not threaten Kentucky or Missouri and it would not threaten the constitutional relationship of the states and the federal government.") (citations omitted).

126. I would like to extend my appreciation to Harry Lembeck for discussing these points during the symposium.

127. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 378 ("The course I followed, of regarding the executive as subject only to the people, and, under the Constitution, bound to serve the people affirmatively in cases where the Constitution does not explicitly forbid him to render the service, was substantially the course followed by both Andrew Jackson and Abraham Lincoln.").

128. *See* Neighbors, *supra* note 9, at 108.

129. *Id.* at 110 (noting "[s]ome of the most serious constitutional problems arose during the Civil War under the presidency of Abraham Lincoln," including the suspension of the writ of habeas corpus) (citing RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (Rev. ed. 1963)).

130. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 378 ("Other honorable and well-meaning Presidents, such as James Buchanan, took the opposite and, as it seems to me, narrowly legalistic view that the President is the servant of Congress rather than of the people, and can do nothing, no matter how necessary it be to act, unless the Constitution explicitly commands the action. . . . My successor in office [Taft] took this, the Buchanan, view of the President's powers and duties.").

131. Alissa C. Wetzel, *Beyond the Zone of Twilight: How Congress and the Court Can Minimize the Dangers and Maximize the Benefits of Executive Orders*, 42 VAL. U. L. REV. 385, 397-98 (2007) ("President Taft continued the trend of setting land aside, even without the statutory authority that Congress had been unwilling to provide. Significantly, in *U.S. v. Midwest Oil Co.*, the Court upheld Taft's decision to issue an executive order without Congressional

the spectrum is Abraham Lincoln, who decided that he was going to save the country, and if that meant he must explicitly contravene provisions of the U.S. Constitution—he did so anyway and was confident that his actions would be vindicated.¹³² Roosevelt stood in the middle, as a steward of the people and not espousing either extreme. In his own words, he described his theory of presidential leadership:

The most important factor in getting the right spirit in my Administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition. I did not care a rap for the mere form and show of

authority, holding that Congress had ‘acquiesced’ to Taft’s authority by failing to act itself. Known as the ‘acquiescence doctrine[,]’ the Court’s holding would come to be an important method for upholding executive orders in the face of legislative unwillingness to act.”) (citation omitted).

132. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J. L. & PUB. POL’Y 667, 726 (2003) (“In short, constitutional necessity provided its own justification. Whether his actions were legal or not, Lincoln undertook them, seemingly backed by the populace and the impetus of public exigency. He trusted that Congress would later vindicate his decisions. Further constitutional controversy was averted when, as Lincoln predicted, Congress and a sharply divided Supreme Court ratified all of Lincoln’s actions after the fact. The only unilateral action Lincoln undertook that was not immediately authorized by Congress was his suspension of the writ of habeas corpus, and even that was later ratified by Congress.”) (citation omitted).

power; I cared immensely for the use that could be made of the substance.”¹³³

As another way of looking at executive orders—instead of viewing them as an expansion of executive authority, they could be seen as a self-imposed restriction on executive authority.¹³⁴ For example, when the federal government has authority to enter into contracts with vendors, the president could indicate that the executive branch will limit its own ability to enter into contracts only with vendors who pay their employees a specified minimum wage. Another example is where the president mandates that the federal government will not allow private exploitation of the natural resources on certain federal lands, but instead will set them aside for the public good.¹³⁵ Therefore, the executive branch is not expanding its authority, but instead is placing a limitation upon its own authority. This technique is analogous to the Supreme Court's approach to its own powers in *Marbury v. Madison*,¹³⁶ the seminal case whereby the Supreme Court refused an expansion of its own power by Congress, indicating that such expanded authority would go beyond the limits of its powers granted under the U.S. Constitution.¹³⁷ Its decision in *Marbury* was self-executing, because the Supreme Court needed merely not act—it did not need to rely upon the actions of another branch of government to enforce its decision. An example of this self-restraint by the president in exercising his role as the steward of the people was Roosevelt's approach to issues concerning Native Americans. In his autobiography, he explained:

In connection with the Indians, by the way, it was again and again necessary to assert the position of the President as steward of the whole people. . . . On one occasion, for example, Congress passed a

133. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 371-72.

134. I would like to extend my thanks to Stephen Sepinuck, Associate Dean for Administration, Gonzaga University School of Law, who suggested these ideas during the 2016 Annual Scholarship Conference of the Central States Law Schools Association, held at the University of North Dakota School of Law on September 23-24, 2016.

135. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 378 (“I acted on the theory that the President could at any time in his discretion withdraw from entry any of the public lands of the United States and reserve the same for forestry, for water-power sites, for irrigation, and other public purposes. Without such action it would have been impossible to stop the activity of the land thieves.”).

136. *Marbury v. Madison*, 5 U.S. 137, 174-75 (1803). Interestingly, this case involved a dispute over an executive order. Neighbors, *supra* note 9, at 108 (“The first case in modern constitutional law, *Marbury v. Madison*, was precipitated by an ‘executive order.’ The order in question was President Thomas Jefferson’s order to Secretary of State James Madison to withhold a judicial commission from William Marbury.”) (citation omitted).

137. *Marbury*, 5 U.S. at 176 (“The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution.”).

bill to sell to settlers about half a million acres of Indian land in Oklahoma at one and a half dollars an acre. I refused to sign it, and turned the matter over to [Indian Commissioner] Leupp. The bill was accordingly withdrawn, amended to as to safeguard the welfare of the Indians, and the minimum price raised to five dollars an acre. Then I signed the bill. We sold that land under sealed bids, and realized for the Kiowa, Comanche, and Apache Indians more than four million dollars—three millions and a quarter more than they would have obtained if I had signed the bill in its original form.¹³⁸

Although many executive orders could be viewed as self-imposed restrictions on the executive branch's own power (such as restricting its own ability to enter into contracts, or limiting the use of federal lands), others clearly cannot (such as the suspension of the writ of habeas corpus).

Roosevelt deemed that, so long as an action was not forbidden to him under the U.S. Constitution, he would go ahead and take that action and see what transpired, both with respect to his reelection and with respect to whether the Supreme Court would deem the action to be unconstitutional.¹³⁹ If he took an action as president, and the Supreme Court did not strike it down as unconstitutional, then logically it must be constitutional.¹⁴⁰ This is an example of a situation where the practice of government—the practice of presidents, for example—if unchallenged by the other branches or by affected people, has enabled the government's power to evolve. Of course, people working in any branch of government have the responsibility to interpret and apply the U.S. Constitution, so they fully utilize the authority granted to them by the U.S. Constitution yet remain within the bounds of their authority. The Supreme Court only steps in when a case is brought before it to determine whether those interpretations by others are correct. As a practical matter, if no one brings a challenge against a president's action, or if someone brings a challenge and the court defers to the president, then precedent is established that the president can take that

138. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 377.

139. *Id.* (regarding another action Roosevelt had taken with respect to Native Americans, he opined, “[a] subsequent bill was passed on the lines laid down by the Indian Bureau [which he supported after vetoing a previous bill], referring the whole controversy to the courts, and the Supreme Court in the end justified our position.”).

140. Branum, *supra* note 15, at 59-60 (“In contrast to the number of presidential directives issued, few challenges have been made. Even when challenges are brought, the most notable contribution of the courts has been its reluctance to get involved. Typically, courts uphold the presidential directive, find that the plaintiff lacks standing, or hold that the dispute revolves around a political question that should not be judicially resolved.”) (citation omitted).

authority.¹⁴¹ And once the precedent has been set, the president and future presidents will undoubtedly continue to retain that authority as a tool in their toolbox, magnifying their authority under the constitution a little more each time such an expansion of authority is exerted. At times, Congress will also subsequently validate a president's use of power that was not previously indicated expressly.¹⁴²

E. HISTORICAL CONTEXT SHAPING THEODORE ROOSEVELT'S EXPANSION OF EXECUTIVE POWER

As discussed above, President Roosevelt regarded himself as a trustee of the lands that were owned by the people via the federal government and felt that such lands should be put to public use instead of exploited by private interests.¹⁴³ This role was both his prerogative and his duty. He was convinced that he needed to stop the activity of the "land thieves,"¹⁴⁴ as he called them, and to reserve the best of the country's national lands for permanent public use.¹⁴⁵ He unequivocally rejected the narrowly legalistic view of his predecessors that he could function only when a statute gave him the authority to do so. Roosevelt was a servant of the people, not of Congress, and the charter to which he looked for that power was the U.S. Constitution itself.¹⁴⁶ As another example of an executive order by Roosevelt with sweeping consequences, "[i]n 1907, the area of the National Forests was increased by Presidential proclamation more than forty-three million acres."¹⁴⁷

141. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 378 ("I acted on the theory that the President could at any time in his discretion withdraw from entry any of the public lands of the United States and reserve the same for forestry, for water-power sites, for irrigation, and other public purposes. Without such action it would have been impossible to stop the activity of the land thieves. No one ventured to test its legality by lawsuit.")

142. *Id.* at 379 ("Again Congress showed its wisdom by passing a law which gave the President the power which he had long exercised.")

143. *Id.* at 416-17 ("[T]he rights of the public to the natural resources outweigh private rights, and must be given its first consideration. Until [Roosevelt restructured the executive branch], in dealing with the National Forests, and the public lands generally, private rights had almost uniformly been allowed to overbalance public rights. The change we made was right, and was vitally necessary; but, of course, it created bitter opposition from private interests.")

144. *Id.* at 378.

145. *Id.* at 374, 378 ("Through Francis Heney I was prosecuting men who were implicated in a vast network of conspiracy against the law in connection with the theft of public land in Oregon.")

146. *Id.* at 380-81 ("The President's duty is to act so that he himself and his subordinates shall be able to do efficient work for the people, and this efficient work he and they cannot do if Congress is permitted to undertake the task of making up his mind for him as to how he shall perform what is clearly his sole duty.")

147. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 418.

Many of Roosevelt's critics, and even supporters, thought he was magnifying his lawmaking clout in an exceedingly dangerous manner, so he certainly did not have the entire country's support behind him.¹⁴⁸ When President Roosevelt wanted to establish national wildlife refuges, parks, and monuments, and to preserve public lands from exploitation by private interests, his ideas had staunch opponents in some leading members of Congress.¹⁴⁹ For example, the Speaker of the House of Representatives, Joseph Cannon of Illinois, infamously claimed, "[n]ot one cent for scenery!"¹⁵⁰ It is important to keep in mind that Speaker Cannon also ruled the House with an iron fist.¹⁵¹ This one man singlehandedly set the agenda for the House, only allowing debate and action on legislative proposals that he supported.¹⁵² Through a blatant patronage system, he appointed his supporters as committee chairs and punished his opponents, thereby neutralizing their efficacy.¹⁵³ So, the Congress of the United States—under the command of Speaker Cannon—was not interested in President Roosevelt's conservation measures.

In light of his hegemony, the legislature, under the domination of "Uncle Joe," as he was called, was not as representative of the people as the

148. See, e.g., Marc Landy, *Incrementalism v. Disjuncture: The President and American Political Development*, 50 TULSA L. REV. 635, 646 (2015) ("William Howard Taft's 'Anti-Greatness' lay in his efforts to curb what he took to be the unconstitutional excesses of his predecessor Theodore Roosevelt. TR had repudiated the strict reading of the Constitution to which all his predecessors had at least paid lip service. Instead of limiting the powers of the federal government to those expressly enumerated in that document, he believed that the document should be interpreted to permit the federal government to do whatever the Constitution did not expressly forbid, as long as those actions were in the public interest. Taft sought to revive the earlier, restrictive understanding. He was especially critical of TR's extensive use of executive orders to withdraw public lands for conservation purposes. Such policies were legislative in nature and therefore required congressional not presidential action.") (citation omitted).

149. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 422 (stating "[t]he refusal of Congress to act in the public interest was solely responsible for keeping these lands from entry").

150. Tom Udall, *Foreword*, 56 NAT. RESOURCES J. vii (2016) ("We have come a long way from the days of Teddy Roosevelt, when House Speaker Joe Cannon famously said, 'Not one cent for scenery!'" That seems ridiculous to us now. It probably was ridiculous to a lot of folks even then.").

151. Ivan Ermakoff, *Patrimony and Collective Capacity: An Analytical Outline*, 636 ANNALS AM. ACAD. POL. & SOC. SCI. 182, 187-88 (2011).

152. See, e.g., Margaret Sanregret Shockley, "Canonizing" Under Newt Gingrich: *The Speaker's Consolidation of Power in the House of Representatives*, 9 STAN. L. & POL'Y REV. 165 (1998) ("The turn of the century brought a steady rise in power of the Speaker of the House of Representatives that reached its peak during the Speakership of Joseph Gurney Cannon (R-IL). During Cannon's reign as Speaker from 1903 to 1911, House power was virtually consolidated into one person—the Speaker. Cannon's unbridled reign and successful manipulation of House procedure to implement his personal agenda resulted in a House revolt led by House Democrats and empowered by Progressive House Republicans.").

153. *Id.*

founding fathers may have anticipated.¹⁵⁴ The Federalists—Jefferson, Madison, and other early proponents of limited government authority—may have intended that if Congress has decided it is not interested in an issue, it is not for the president to surpass the sovereignty of Congress and take up that issue by the sole authority of the powers vested in the executive office. Yet perhaps if they had anticipated a heavy-handed authoritarian leader controlling the legislative branch—a perceived tyrant who was championing the interests of a handful of wealthy tycoons wanting to pillage the nation's national resources and pocket the profits for themselves instead of for the public good—under those circumstances the founders may have wanted a strong president to serve as a counterweight. While President Roosevelt attempted to press through progressive measures, Speaker Cannon and his colleagues continued to block them.¹⁵⁵

In political debates, one often hears a mantra, by whomever is frustrated with one of the branches of the federal government, that we should go back to the intent of the founders and live according to the founders' vision of government and society. Yet, it is important to remember that the founders' vision of society was that it is ever changing, and their vision of the U.S. Constitution was that it must be sufficiently flexible in order to meet the ever changing needs of the nation. As Chief Justice John Marshall expounded in *McCulloch v. Maryland*, the U.S. Constitution is a malleable document.¹⁵⁶ The words of the U.S. Constitution are the same today as they were in 1889, with the exception of the twenty-seven amendments that have modified specific portions of the original document.¹⁵⁷ Therefore, the U.S. Constitution today is largely the same as it was at the start of our country; although amendments have changed it in some vitally important ways. It is a skeletal framework for how our government should function, and although the ways in which that

154. *Id.*

155. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 367 (“We succeeded in working together . . . for some years, I pushing forward and they hanging back. Gradually, however, I was forced to abandon the effort to persuade them to come my way, and then I achieved results only by appealing over the heads of the Senate and House leaders to the people, who were the masters of both of us. I continued in this way to get results until almost the close of my term.”).

156. *M’Culloch*, 17 U.S. at 407 (explaining that “we must never forget that it is a constitution we are expounding. . . . This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.”).

157. Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217, 224 (2016).

skeleton have been fleshed out have evolved over the years, the skeleton created by the founders endures.

There are many ways in which one could interpret the words in our written U.S. Constitution. Because it is skeletal, it does not explicitly list all of the powers granted to, and all of the restrictions upon, any of the branches of government.¹⁵⁸ Roosevelt, therefore, interpreted the U.S. Constitution to provide himself with authority to issue substantive executive orders. If Speaker Joseph Cannon was going to put a hold on legislation for the public good—for example, for scenery that was so grand that Roosevelt felt it should have national prominence and protection—then Roosevelt was going to take that authority for himself under the power that was granted to him as the chief executive.¹⁵⁹ The president must interpret the U.S. Constitution to try to determine the extent of his or her powers, the legislature must interpret the U.S. Constitution to try to determine the extent of its powers, and the judiciary must interpret the U.S. Constitution—not only to determine the extent of its powers, but also using the doctrine of judicial review to resolve whether the president and Congress have exceeded their powers under the U.S. Constitution. The president can conclude that when he perceives a need to take a particular action, and considers such an action to be constitutional, he can take that action. The only thing that would hold back the president in this situation is if someone challenged that action in court, and the federal courts using their power of judicial review decided the action contravenes the U.S. Constitution.¹⁶⁰ In his autobiography, Roosevelt wrote:

In a number of instances the legality of executive acts of my Administration was brought before the courts. They were uniformly sustained. For example, prior to 1907 statutes relating

158. This not only pertains to the separation of powers at the federal level, but also with respect to the powers of the federal government vis-à-vis the states. Those who are in favor of states' rights would want to go back in time and assert that the federal government as a whole has too much power today. They advocate that we should decentralize the power of the federal government and devolve that power back onto the states.

159. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 420 (While discussing “[t]he idea that the Executive is the steward of public welfare,” Roosevelt indicated that “The laws were often insufficient, and it became well nigh impossible to get them amended in the public interest when once the representatives of privilege in Congress grasped the fact that I would sign no amendment that contained anything not in the public interest. It was necessary to use what law was already in existence, and then further to supplement it by Executive action.”).

160. Unless something is expressly permitted (“The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States. . . .” U.S. CONST. art. II, § 2, cl. 1.) or expressly forbidden in the Constitution (“No Bill of Attainder or ex post facto Law shall be passed. . . .” U.S. CONST. art. I, § 9, cl. 3.), it would be rare that there could not be a debate about a particular issue and good arguments made on both sides.

to the disposition of coal lands had been construed as fixing the flat price at \$10 to \$20 per acre. The result was that valuable coal lands were being sold for wholly inadequate prices, chiefly to big corporations. By executive order the coal lands were withdrawn and not opened for entry until proper classification was placed thereon by Government agents. There was a great clamor that I was usurping legislative power; but the acts were not assailed in court until we brought suits to set aside entries made by persons and associations to obtain larger areas than the statutes authorized. This position was opposed on the ground that the restrictions imposed were illegal; that the executive orders were illegal. The Supreme Court sustained the Government. In the same way our attitude in the water power question was sustained, the Supreme Court holding that the Federal Government had the rights we claimed over streams that are or may be declared navigable by Congress. Again, when Oklahoma became a State we were obliged to use the executive power to protect Indian rights and property, for there had been an enormous amount of fraud in the obtaining of Indian lands by white men. Here we were denounced as usurping power over a State as well as usurping power that did not belong to the executive. The Supreme Court sustained our action.¹⁶¹

Roosevelt, although he had a massive personality, probably did not intend to set himself up as a new American monarch, seizing as much power for the presidency as he could muster. In fact, his primary concern was for the common person, as opposed to the upper class,¹⁶² and for wildlife preservation in the face of large corporate interests.¹⁶³ Roosevelt was a strong believer in democracy, in the will of the people, and in the legislature as the representative of the people. For example, he was very supportive of state legislatures taking action to further progressive causes.¹⁶⁴ He was very supportive of the will of the people acting through

161. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 376-77.

162. *Id.* at 417 (“One of the principles whose application was the source of much hostility was this: It is better for the Government to help a poor man make a living for his family than to help a rich man make more profit for his company.”).

163. *Id.* at 434 (“Even more important was the taking of steps to preserve from destruction beautiful and wonderful wild creatures whose existence was threatened by greed and wantonness.”).

164. See, e.g., Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 780 (2009) (discussing Roosevelt’s attack on the U.S. Supreme Court’s decision in *Lochner*, striking down a progressive New York statute: “The Court had struck down the law, despite the approval of the

their elective representatives to solve the problems of the times. Although he may certainly have enjoyed the significant powers that the U.S. Constitution bestowed upon the president and exercised them to the fullest to accomplish his objectives, it is doubtful that his intent would have been to contravene the U.S. Constitution and take powers that were clearly beyond those granted to the executive. His primary concern was for the public good, and if Congress refused to act or was incapable of acting, that was when he felt the need to step up and take the power granted to the executive under the U.S. Constitution and take action.

Roosevelt's detractors feared that he had magnified his own power in ways that made him too independent of the separation of powers and checks and balances so carefully laid out in the U.S. Constitution, even if such powers were theoretically permissible under its text. Yet, one must remember that when the country first emerged, government, society, the economy, the military, and most other aspects of life were much simpler. Shortly after the country's founding, the federal government had fewer than 3000 employees.¹⁶⁵ During the nation's transformation from a primarily agrarian and rural country to a largely industrialized and increasingly urban country, the federal government correspondingly burgeoned to deal with the rapidly growing and increasingly complex problems of the nation.¹⁶⁶ Shortly after Roosevelt's presidency, the number of civilian employees had increased to nearly 400,000 in 1916.¹⁶⁷ Fast-forward to the present time, and the federal government consists of over 2,600,000 civilian employees in the executive branch alone (not taking into account military employees,

New York legislature and the New York courts, on the theory of a 'liberty to work under unhygienic conditions.' It was a decision 'nominally against State rights . . . but really against popular rights, against the democratic principle of government by the people under the forms of law.'") (citation omitted).

165. STAFF OF CONG. BUDGET OFF., 95TH CONG., THE FEDERAL WORK FORCE: ITS SIZE, COST AND ACTIVITIES I (Mar. 1977), <https://www.cbo.gov/sites/default/files/95th-congress-1977-1978/reports/77doc720.pdf> ("The federal government, as organized in 1789, consisted of the Departments of State, Treasury, and War; plus the Office of the Attorney General. In 1792 the Post Office was added; and a separate Department of the Navy was established in 1798. By 1800 the number of people working in these various departments had reached an estimated 3,000 employees.") (citation omitted).

166. *Id.* at 2 ("During the years between the end of the Civil War and the end of World War I, the United States changed from a rural, agrarian society into an industrial, increasingly urban society.").

167. *Id.* at 3 ("Civilian staffing of the executive branch increased substantially during this period. Total staffing in 1916, just prior to the large buildup associated with World War I, was 391,000—a 1,000 percent increase from 1861. The Post Office Department still represented the largest component (212,000), but the staffing for other federal activities had grown much more rapidly than the Post Office Department during the period.").

which number around 1,500,000).¹⁶⁸ For the president to manage such an enormous bureaucracy and that massive number of employees—most of whom are in the executive branch—the president needs to be able to exercise considerably more power than the president had to do so when there were only 3000 employees and he led a much simpler governmental system. So, by virtue of the fact that our society, our country, and the world have become so much more complex, all three branches of government have significantly expanded their powers and authorities under the U.S. Constitution to survive in modern times.¹⁶⁹

Passionate debates continue to this day about the benefits of federalism and a strong national government versus the benefits of decentralization and strong state governments. These debates reflect those that occurred at the founding of the country—both during the intentionally weak federal government and much stronger state governments under the Articles of Confederation, and during the debates surrounding the Constitutional Convention establishing a stronger federal government so the country would not collapse. If the United States had a federal government today as in its infancy, with only several thousand employees, the country could not function, because the present is so much more complex.

Roosevelt became president at the beginning of the Twentieth Century, when vast changes were taking place within society and the economy, and the government needed more resources to be able to respond to those changes.¹⁷⁰ Industrialization, urbanization, and the expansion of major corporations were all occurring around the time that Roosevelt was in office.¹⁷¹ Many of the wealthy elite and corporate interests were attempting to plunder public lands for their own private interests.¹⁷² He intended to ameliorate some of the problems caused by industrialization and urbanization, which other leaders at the time, such as Jane Addams, were

168. OFFICE OF PERSONNEL MGMT., *Historical Federal Workforce Tables*, <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962/> (last visited Feb. 17, 2017).

169. Neighbors, *supra* note 9, at 105-06 (“The office of the President has been expanded both as to numbers and varieties of activities which are carried out by the President. This increase in executive power is an outgrowth of both hot and cold wars, economic crises and the multitude of complex problems which confront the highly industrialized American society.”).

170. STAFF OF CONG. BUDGET OFF., 95TH CONG., *supra* note 165, at 2 (“The growth of the modern corporation and its domination of large segments of the economy also brought a major addition to the federal government’s administrative machinery.”).

171. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 437.

172. *Id.* at 425 (“Throughout the early part of my Administration the public land policy was chiefly directed to the defense of the public lands against fraud and theft.”).

trying to address.¹⁷³ The increase in the nation's population also put great pressure on the country's natural resources, which Roosevelt championed. As described above, he addressed wildlife devastation and the potential threats to the nation's lands through executive orders and other initiatives, which have left a wonderful legacy through the national parks, monuments, and wildlife refuges.¹⁷⁴ Because of the increasing complexity and increasing problems that the nation has had to address, by virtue of necessity, the federal government has had to increase the use of its powers. Of course, every time the government does so, one can expect pushback. There will be claims of presidential tyranny and the unitary executive, of legislative tyranny wherein Congress is taking on too much power, and judicial tyranny via the activist courts.

Roosevelt was certainly willing to push the envelope with respect to interpreting the U.S. Constitution's grant of executive authority. However, when considered as one episode along the course of the nation's history, Roosevelt's actions could be seen as fitting squarely within an American tradition and its flexible U.S. Constitution that allows a certain amount of fluctuation back and forth with respect to presidential power vis-à-vis that of the other branches of government. At the turn of the Twentieth Century, his actions would have raised numerous red flags, because he was taking initiatives that had not been done before. But if one considers his actions through the perspective of the course of time, they could be considered as measured steps that were calculated to push against, yet not rupture, the bounds of the U.S. Constitution.¹⁷⁵

F. JUDICIAL REVIEW OF EXECUTIVE ORDERS

Presidents have issued many other executive orders throughout history—some clearly in the public interest, and some that have not been viewed as charitably under the gaze of time. For example, a later-maligned executive order was Franklin Delano Roosevelt's initiative in 1942

173. William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO ST. L. J. 1115, 1125 (2011) ("Figures like Teddy Roosevelt, Louis Brandeis, Jane Addams, and Herbert Croly insisted that the United States could not remain a constitutional republic without social and economic reform. Overwork, joblessness, material insecurity, tyrannical workplaces, and a lack of decent housing and education left the nation's working classes ill-equipped for democratic citizenship. America was becoming a corporate oligarchy; working people were wage slaves, ciphers, and servants.") (citation omitted).

174. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 435-36.

175. Neighbors, *supra* note 9, at 118 ("[I]t is nonetheless quite obvious that Presidents who are considered "great Presidents" have made the greatest use of the executive order thereby permitting the country to move forward and to solve the problems confronting it.").

mandating the internment of Japanese Americans during World War II.¹⁷⁶ This action is now widely perceived to be a negative mark, not only on the presidency but also on the Supreme Court, which upheld that order in a decision that has subsequently been strongly criticized.¹⁷⁷

Although executive orders are not unconstitutional per se, they may be declared unconstitutional by the courts, if the president uses this mechanism to go beyond executive authority with a particular action.¹⁷⁸ Another infamous executive order was issued by President Harry S. Truman, which was reviewed by the U.S. Supreme Court in what is known as the *Steel Seizure Case* in 1952 during the Korean War.¹⁷⁹ Employees working in steel factories across the United States had threatened to strike as a result of a labor dispute with the management of the companies.¹⁸⁰ President Truman was afraid that steel production would grind to a halt. The country was involved in a war, and he was concerned that a strike would affect the war effort.¹⁸¹ Therefore, using his power as Commander in Chief, he issued an executive order to his secretary of commerce, commanding the secretary to take over the operation of all of the steel mills within the United States to prevent the labor stoppage and to keep the steel mills open.¹⁸² When the federal government began running the private steel mills, the companies' leaders caused an uproar, and quickly brought a lawsuit up to the U.S. Supreme Court.¹⁸³

176. Branum, *supra* note 15, at 28.

177. Craig Green, *Ending The Korematsu Era: An Early View from The War on Terror Cases*, 105 Nw. U. L. REV. 983, 985 ("Every American lawyer knows *Korematsu v. United States* as a discredited precedent.").

178. Neighbors, *supra* note 9, at 112.

179. *Id.*; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

180. Kimberley L. Fletcher, *The Court's Decisive Hand Shapes the Executive's Foreign Affairs Policymaking Power*, 73 MD. L. REV. 247, 267 (2013).

181. Jason Hart, *To Preserve, Protect, and Defend: An Imminent Threat Approach to Resolving the Question of Inherent Powers After ACLU v. NSA*, 112 PENN ST. L. REV. 315, 322 (2007) ("Fearing that such a strike would endanger American lives and national security by paralyzing the steel industry, Truman authorized the Federal Government to nationalize the steel mills, thereby placing the steel industry under government control").

182. *Id.* ("Specifically, Truman's order directed the Secretary of Commerce to take possession of the steel mills. To accomplish this end, the Secretary ordered the presidents of the seized companies to serve as operating managers of the mills pursuant to his instructions.") (citation omitted).

183. *Youngstown Sheet & Tube Co.*, 343 U.S. at 582-84; Fletcher, *supra* note 180, at 267 ("This announcement was met with uniform shock."). The media also reacted extremely negatively to Truman's action. Charles C. Hileman et.al, *Supreme Court Law Clerks' Recollections of October Term 1951, Including the Steel Seizure Cases*, 82 ST. JOHN'S L. REV. 1239, 1265 (2008) ("The response to this action by President Truman was swift and negative. The Chicago Daily News called it 'leaping socialism.' The New York Daily News said 'Hitler and Mussolini would have loved this.' The Washington Post wrote, 'President Truman's seizure of the steel industry will probably go down in history as one of the most high-handed acts committed by an American President.'").

The Supreme Court needed to establish an approach for determining the constitutionality of executive orders—whether a particular executive order would be considered within the authority of the president.¹⁸⁴ The majority held that President Truman’s executive order indeed overstepped the bounds of authority of the president.¹⁸⁵ Issuing an executive order to take over private corporations was too far removed from the president’s power as Commander in Chief to be deemed a legitimate use of that power.¹⁸⁶ However, the majority opinion was not the most influential opinion arising out of the Steel Seizure Case.¹⁸⁷ Instead, the concurring opinion by Justice Jackson has become the seminal opinion.¹⁸⁸ He delineated three categories of presidential power, depending on whether the president has the backing of Congress, whether Congress has been silent, or whether Congress has spoken out against the president having the power to take a particular action.¹⁸⁹ If the latter, then the president will only have those powers that are designated solely to him under the U.S. Constitution, and not any of the powers that are shared with, or designated to, the legislative branch.¹⁹⁰ In terms of presidential power, Justice Jackson indicated that when the president is acting in concert with Congress, such as when Congress has enacted a statute authorizing the president to take an action, and the president takes an action under that statute, then the president has all of the powers that can be delegated to him by Congress.¹⁹¹ Therefore, the president has the weight of all of the legislative powers behind him, in addition to all of the president’s own independent powers under Article II of the U.S. Constitution. That is when the president’s powers are at their strongest. If Congress has not spoken—if Congress has been silent on the issue—then the president has all of the powers designated to the executive, as well as any powers that are not expressly denied to the president by the U.S. Constitution or by Congress. Under the third category, if Congress has expressly denied the president certain powers to

184. Fletcher, *supra* note 180, at 267-68.

185. *Youngstown Sheet & Tube Co.*, 343 U.S. at 588-89.

186. Timothy D. A. O’Hara, *Without Justification: Misplaced Reliance on United Nations Security Council Resolutions for Presidential War Making*, 31 J. MARSHALL L. REV. 583, 605 (1998) (“The Court held that neither the President’s power as Commander-in-Chief nor as Chief Executive could sustain the order to seize the mills.”).

187. Fletcher, *supra* note 180, at 268 (explaining that “Justice Jackson’s concurring opinion in Steel Seizure has become the leading authority”).

188. *Youngstown Sheet & Tube Co.*, 343 U.S. at 637-38 (Jackson, J., concurring); Neighbors, *supra* note 9, at 115.

189. James Park Taylor, *Singularity: We Have Met the Enemy and He Is Us: A Legal Guide to U.S. Citizens as ‘Enemy Combatants’*, 29-APR MONT. LAW. 8, 27 (2004).

190. Neighbors, *supra* note 9, at 115.

191. *Id.*

take an action, and yet the president takes that action anyway, then the president's action will be upheld only if that power has been explicitly delegated solely to the president, and not to Congress.¹⁹² In the Steel Seizure Case, Congress had considered granting the power to the president that would have allowed him to take this action through an amendment, but had decided against granting that power.¹⁹³ The Supreme Court considered that action to be a signal that Congress did not want to grant this authority to the president, and therefore, the president's powers were at their lowest ebb. Because Congress also had the authority under the Commerce Clause to regulate steel mills, its decision not to accept the amendment effectively denied the president this power. Therefore, his executive order seizing the steel mills was struck down by the Supreme Court as unconstitutional.

Under *Dames & Moore v. Regan*, the Supreme Court examined the intersection of presidential and congressional actions along a continuum, rather than in the three, clear-cut categories that Justice Jackson had delineated in the Steel Seizure Case.¹⁹⁴ Congress does not always explicitly grant the president the authority to take a specific action, nor does it always explicitly deny the president particular authority to take a specific action. The Steel Seizure Case was actually one of those cases in the gray area along the continuum. Congress did not pass a law refusing to grant this authority to the president. It simply considered adopting into a bill an amendment that would have granted the president this authority, but decided against it.¹⁹⁵ The Supreme Court determined that by not adopting the amendment, Congress intended not to grant the president this authority. However, attempting to determine congressional intent is not always easy, especially when making a leap in logic that congressional refusal to adopt

192. Taylor, *supra* note 189, at 27 ("The third category is for cases in which the president acts contrary to the express will of Congress. In this category the president's actions will be sustained only if Congress was without authority to legislate on the subject.").

193. Neighbors, *supra* note 9, at 115.

194. John Cary Sims, *Ten Questions: Responses of John Cary Sims*, 33 WM. MITCHELL L. REV. 1593, 1595 (2007) ("*Dames & Moore v. Regan* affirms the vitality of Justice Jackson's approach, while suggesting that it is more of a continuum than a set of three firm categories.").

195. Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87, 140 (2002) ("Justice Frankfurter focused in part on the fact that, in considering the Taft-Hartley Act, the House had rejected an amendment that would have granted the President seizure authority. In addition, one of the Senate sponsors of the legislation specifically noted that the Senate Labor Committee had considered and rejected including a seizure provision. The other concurring Justices embraced Justice Frankfurter's conclusion. In other words, Congress's consideration and rejection of a particular tool for dealing with industrial strife precluded the President's reliance on it. Even if Congress had not occupied the field by providing alternative procedures, legislative history indicating a specific rejection of the seizure authority signaled Congress's opposition to that course of action. Inferences from the legislative landscape thus influenced the Court's determination that the President acted in opposition to Congress's will.") (citation omitted).

an amendment means that Congress specifically intended to deny the president that authority. If Congress had intended to deny the president the authority to take a particular action, why did it not do so explicitly, by passing a law forbidding such an action? Using legislative inaction to interpret congressional intent may not always be accurate. Nevertheless, this method of statutory interpretation is frequently utilized by the courts, as exemplified in the Steel Seizure Case.

The Supreme Court will only rarely decide that a president's executive order is unconstitutional.¹⁹⁶ The Supreme Court and the lower federal courts have generally been quite deferential when the president takes action, particularly under executive orders, such as occurred during President Roosevelt's time in office.¹⁹⁷ It will be interesting to see how the courts handle these issues in the future.

G. RECENT USE OF EXECUTIVE ORDERS

These questions have fostered an ongoing constitutional debate that is relevant today, as well, concerning executive orders and other issues surrounding President Barak Obama, in addition to other recent presidents who have made extensive use of presidential powers. A historical examination of Roosevelt's approach to governmental powers offers insight into what is sometimes referred to in more recent times as the aggrandizement of presidential power, or the development of the "imperial presidency."¹⁹⁸

196. Branum, *supra* note 15, at 37 ("Only three Presidents have had executive orders overturned in their entirety by the courts."); *id.* at 59 ("From the inception of our republic through 1999, only 253 presidential directives had been modified or revoked, either by Congress or by the courts. A Cato Institute study completed late in 1999 found that Congress had modified or revoked 239 executive orders, while the courts had struck down only fourteen orders, either in whole or in part. The orders struck down by the courts resulted from eighty-six challenges, and only two orders had been wholly overturned. Since that time, one additional executive order has been overturned in its entirety by a lower court.") (citation omitted); Neighbors, *supra* note 9, at 117 ("The courts have shown a marked reluctance to declare acts of the chief executive unconstitutional.")

197. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 421 (For example, in light of Roosevelt's unprecedented actions concerning the Forest Service, "Suits were begun wherever the chance arose. It is worth recording that, in spite of the novelty and complexity of the legal questions it had to face, no court of last resort has ever decided against the Forest Service. This statement includes two unanimous decisions by the Supreme Court of the United States (U.S. vs. Grimaud, 220 U.S. 506, and Light vs. U.S., 220 U.S. 523).")

198. Melissa K. Mathews, *Restoring The Imperial Presidency: An Examination of President Bush's New Emergency Powers*, 23 HAMLIN J. PUB. L. & POL'Y 455, 456 (2002); *see also* Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 34 (2016) ("Many see the President as increasingly 'imperial,' helming 'the most dangerous branch,' unimpeded by the separation of powers, and even posing an existential threat to constitutional democracy.") (citation omitted).

For example, an August 2016 New York Times article entitled “Once Skeptical of Executive Power, Obama Has Come to Embrace It” notes:

Blocked for most of his presidency by Congress, Mr. Obama has sought to act however he could. In the process he created the kind of government neither he nor the Republicans wanted—one that depended on bureaucratic bulldozing rather than legislative transparency. But once Mr. Obama got the taste for it, he pursued his executive power without apology, and in ways that will shape the presidency for decades to come.¹⁹⁹

President Obama has not hesitated to use executive orders in the face of congressional inaction on issues he believes are of vital importance to the nation. In his State of the Union address, Mr. Obama announced: “[w]henver I can take steps *without legislation* to expand opportunity for more American families, that’s what I’m going to do.”²⁰⁰ For example, he introduced an executive order raising the minimum wage to \$10.10 per hour for several hundred thousand federal contract workers, and many large corporations soon followed suit.²⁰¹

Previously, President George W. Bush also evoked claims of an “imperial presidency.”²⁰² For example, one article posited that his actions “should trouble all Americans who believe in the democratic process and the preservation of constitutional limitations on the power of the executive. American freedom and democracy cannot coexist with an imperial presidency.”²⁰³

In their book *The Executive Unbound: After the Madisonian Republic*, Eric A. Posner and Adrian Vermeule argue that “law does little to constrain the modern executive . . . whereas politics and public opinion do constrain the modern executive . . .”²⁰⁴ They echo the presidential prerogative theory previously discussed. In particular, Posner and Vermeule explore

199. Binyamin Applebaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html?_r=1; see also ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 15 (2010) (Arguing that “law does little to constrain the modern executive . . . whereas politics and public opinion do constrain the modern executive.”).

200. President Barack Obama, State of the Union Address (Jan. 28, 2014), in *President Barack Obama’s State of the Union Address*, THE WHITE HOUSE OF BARACK OBAMA (2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address> (emphasis added).

201. Applebaum & Shear, *supra* note 199.

202. *The Imperial Presidency*, THE NATION (Aug. 29, 2002), <https://www.thenation.com/article/imperial-presidency/>.

203. *Id.*

204. POSNER & VERMEULE, *supra* note 199, at 15.

presidential actions in response to emergencies such as 9/11 and the 2008 economic crisis.²⁰⁵ Perhaps shockingly, they surmise that the president is not bound by law—whether by statutes or constitutional confines, but instead they are, as a practical matter, only bound by public opinion and politics.²⁰⁶ During a president’s first term in office, he is only bound by his desire to be re-elected, and during his second term, by his desire to assure his place in history. The argument should not necessarily go that far, because Congress still controls the purse strings that provide funding for all executive branch programs. Therefore, legislation enacted by Congress can still tie the hands of the executive branch—including the president—and affect the lives of millions. Although the president retains veto power, he or she cannot force their will on every issue, and those compromises have real effects constraining the actions of the executive branch.

Yet, the balance of power regarding policy initiatives has shifted significantly toward the president and the executive branch. This examination of President Roosevelt’s deliberate aggrandizement of presidential power suggests that this shift occurred over one century ago. An August 2013 New York Times article discusses how “executive power has expanded steadily under both Republican and Democratic presidents *in recent decades*.”²⁰⁷ Again, this Article demonstrates that the expansion of executive power has not only occurred in recent decades, but has been a part of the American constitutional system for over one hundred years, originating in significant measure with President Roosevelt and his legacy.

III. ROOSEVELT’S ATTEMPTS TO REIN IN THE JUDICIAL BRANCH

In contrast to Roosevelt’s success in expanding the use of the executive order to rebalance power between the executive and legislative branches, he was less successful in his attempts to limit the powers of the judicial branch.²⁰⁸ This section will examine his changing perspectives on the appropriateness of an independent judiciary.²⁰⁹

Judicial recall is a process by which, when the populace is displeased with a particular judge, it can take measures to hold a recall election,

205. *See generally id.*

206. *Id.*

207. Applebaum & Shear, *supra* note 199 (emphasis added).

208. G. Alan Tarr, *Do Retention Elections Work*, 74 MO. L. REV. 605, 606-07 (2009) (“Although none of these proposals was adopted nationally, they did enjoy some success in the states. During the early twentieth century, seven states provided for the recall of judges.”).

209. Professor Kermit Roosevelt, III, also highlighted Theodore Roosevelt’s approach to these issues during his fascinating keynote lecture at the symposium.

meaning it can vote the judge out of office.²¹⁰ This could either be a vote of the general public or it could be a vote by the legislature to remove the judge from office, depending on the process that has been established in a given state.²¹¹ Although, initially, a regular judicial election and a judicial recall vote may appear similar, the differences between the two are significant. Judicial elections are regularly scheduled, the judge knows when he or she will be up for election again, the terms are generally quite long, and an incumbent judge may be challenged by a specific individual who is vying for that position.²¹² For example, in the North Dakota Supreme Court, each justice is elected once every ten years.²¹³ Judicial elections arise only periodically, so the judge is not constantly looking over his or her shoulder in fear after making an unpopular decision. Elections enable the electorate to consider the aggregate of the judge's opinions, rather than casting their ballots immediately in the aftermath of a highly controversial decision. However, with judicial recall, if judges make a contentious opinion, then shortly thereafter, that judge can be voted out of office. Knowing this, judges may be more reluctant to rule according to the law if they know their ruling may be unpopular, and may feel impelled to rule according to popular sentiments, even if they feel that decision is not the right one.

Judicial recall should also be distinguished from impeachment, which entails a more difficult process to remove a judge for specific misconduct (a higher threshold than a simple majority vote as required during recall campaigns).²¹⁴ Impeachment is another way in which members of the

210. Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 532 (2013) (Removal of judges can be effected through “the legislative address, which authorizes the legislature to seek the removal of a judge by petitioning the governor; automatic removal of a judge upon conviction of specified crimes, which gives the executive branch a role to play in judicial removal through criminal prosecution; and *judicial recall*, in which the electorate is enabled to seek the removal of a judge in special elections.”) (emphasis added).

211. *Id.*

212. *See, e.g.*, the provision for judicial elections in the North Dakota Constitution at N.D. CONST. art. VI, § 7.

213. N.D. CONST. art. VI, § 7.

214. *See, e.g.*, N.D. CONST. art. XI, §§ 8-10:

Section 8. The house of representatives shall have the sole power of impeachment. The concurrence of a majority of all members elected shall be necessary to an impeachment.

Section 9. All impeachments shall be tried by the senate. When sitting for that purpose the senators shall be upon oath or affirmation to do justice according to the law and evidence. No person shall be convicted without the concurrence of two-thirds of the members elected. When the governor or lieutenant governor is on trial, the presiding judge of the supreme court shall preside.

Section 10. The governor and other state and judicial officers, except county judges, justices of the peace and police magistrates, shall be liable to impeachment for

judiciary, or of the executive or legislative branches, can be removed from office. However, impeachment has several important distinctions from judicial recall. For example, at the federal level, the power to impeach lies with the House of Representatives,²¹⁵ and the power to try an official who has been impeached lies with the Senate.²¹⁶ Therefore, checks and balances are built into the impeachment process, so federal judges are protected against the whims of members of Congress who may not like a judge's unpopular decision. Moreover, the impeachment process normally requires higher standards regarding the actions for which a judge can be impeached, not merely an unpopular decision,²¹⁷ and includes significant procedural safeguards such as supermajority requirements.²¹⁸ However, if a procedure for recall exists within a particular state, that procedure is constantly hanging over the judge's head as a constant reminder that if he or she makes an unpopular decision, there is a distinct possibility that the judge could be removed from office.

Under judicial review, judges determine whether a statute is constitutional, examining it to decide if the legislature had the authority to enact it and whether its provisions contravene the U.S. Constitution. The power of judicial review, meaning the court's authority to review a statute to determine whether it complies with the U.S. Constitution, was not explicitly granted to the federal judiciary or the Supreme Court under the text of the U.S. Constitution.²¹⁹ The U.S. Constitution does not expressly give federal judges the power to review the constitutionality of statutes passed by Congress and signed by the President. Instead, the power of judicial review was established by one of the first cases decided by the Supreme Court, *Marbury v. Madison*, in 1803, shortly after the founding of our country.²²⁰ In *Marbury*, the Court determined that a provision in a statute conflicted with a provision in the U.S. Constitution. In weighing which law to follow—the statute or the Constitution—Chief Justice John Marshall expounded:

habitual drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office, but judgment in such cases shall not extend further than removal from office and disqualification to hold any office of trust or profit under the state. The person accused, whether convicted or acquitted, shall nevertheless be liable to indictment, trial, judgment and punishment according to law.

215. U.S. CONST. art. I, § 2, cl. 5.

216. U.S. CONST. art. I, § 3, cl. 6.

217. *E.g.*, at the federal level, removal by impeachment is only for “treason, bribery, or other high crimes and misdemeanors.” U.S. CONST. art. II, § 4.

218. U.S. CONST. art. I, § 3, cl. 6 (“[N]o person shall be convicted without the concurrence of two thirds of the members present.”).

219. *Marbury*, 5 U.S. at 177.

220. *Id.*

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law [e.g., a statute] be in opposition to the constitution, if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law [e.g., a statute].

This doctrine would subvert the very foundation of all written constitutions.²²¹

In *Marbury*, Chief Justice Marshall claimed the authority of the federal courts to declare a statute unconstitutional when it conflicts with the U.S. Constitution.²²² Therefore, a law that was passed by the democratically-elected branches of government could be struck down by a judge who considers the law in light of the U.S. Constitution and deems that law to be unconstitutional. If the judge is going to be faithful to that Constitution, and yet the statute contradicts the U.S. Constitution, which should the judge apply—the statute or the U.S. Constitution? Should the judge adhere to the statute, effectively meaning that the U.S. Constitution is simply an amalgamation of words written on a piece of paper and has no real meaning

221. *Id.* at 177-78.

222. *Marbury*, 5 U.S. at 177 (“It is emphatically the province and duty of the judicial department to say what the law is. . . . Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. . . . If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply . . . a law repugnant to the constitution is void; and . . . [the] courts . . . are bound by that instrument.”).

or effect, and that neither the judges nor the other branches of government have to follow it? Or, if there is a conflict between the statute and the U.S. Constitution, should the judge apply the U.S. Constitution, meaning that he or she must strike down the conflicting statute as unconstitutional. When Chief Justice Marshall wrote the *Marbury* opinion, he determined that when the Court considers a statute that has been enacted by Congress, and compares it with the U.S. Constitution, it is the U.S. Constitution that is the highest law of the land—not the statute.²²³ Therefore, the Court may determine that a statute passed by the state legislature or by Congress is unconstitutional—in other words, that the legislative branch does not have the authority under the U.S. Constitution to enact such a statute, or that the statute conflicts with a provision in the U.S. Constitution.

Similarly, state courts have the power to determine whether state laws are consistent with or conflict with their state constitutions.²²⁴ Sometimes their power is written expressly in the state constitutions. For example, North Dakota's constitution allows the North Dakota Supreme Court to strike down legislation as unconstitutional, but it requires a supermajority of votes to do so (or four of the five justices, instead of three of the five justices to decide a regular case).²²⁵

The idea is that judges are wise jurists who respect the U.S. Constitution—both the U.S. Constitution at the national level and the state constitutions that structure each state's governmental system. Judges are supposed to protect the country against extraconstitutional behavior by the other branches of government and by the federal and state governments vis-à-vis each other.

President Roosevelt was not initially in favor of curtailing the independence of the judiciary.²²⁶ In fact, at the outset of his presidency,

223. *Id.*

224. See generally Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19 (1989) (discussing the power of judicial review by state courts).

225. Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 95 (1998); see also N.D. CONST. art. VI, § 4 (“A majority of the supreme court shall be necessary to constitute a quorum or to pronounce a decision, provided that the supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide.”); Tarr, *supra* note 208, at 607 (“[T]hree states—Nebraska, North Dakota, and Ohio—amended their constitutions to require super-majority votes of their supreme courts to invalidate statutes.”).

226. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 83 (“I had been brought up to hold the courts in especial reverence. The people with whom I was most intimate were apt to praise the courts . . . and to speak of them as bulwarks against disorder and barriers against demagogic legislation. These were the same people with whom the judges who rendered these decisions were apt to foregather at social clubs, or dinners, or in private life. Very naturally they all tended to look at things from the same standpoint. Of course it took more than

Roosevelt had opposed initiatives such as establishing judicial recall and abolishing judicial review of the constitutionality of legislation.²²⁷ He was not unfamiliar with the potential for corruption among the judicial branch, but chose to fight against it using traditional methods. For example, as the youngest member of the New York state legislature, he railed against the “. . . unblushing corruption involving . . . a Judge of the Supreme Court.”²²⁸ Believing that “. . . an unsullied judiciary was the ground fabric of society[.]”²²⁹ Roosevelt called for removal of the judge through the impeachment process.²³⁰ His efforts, however, were unsuccessful due to the judge's associations with “the notorious Jay Gould,”²³¹ one of the most powerful men in the United States.²³²

But when courts started striking down reformist laws—for example, minimum wage laws, labor laws, and other progressive laws²³³—Roosevelt switched his view and began to espouse judicial recall and curtailing the power of judicial review.²³⁴ During the Progressive Era, concern rose to preeminence over the rise of large corporations wielding inordinate power over ordinary people, as well as over political parties and the government

one experience such as this Tenement Cigar Case to shake me out of the attitude in which I was brought up.”).

227. See Carrington, *supra* note 225, at 94; William Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967, 979 (2006) (“The idea of popular ‘recall’ of judicial decisions . . . was a moderate alternative to judicial recall, which Roosevelt largely abjured, and to abolishing judicial review, which he also opposed.”) (citation omitted).

228. JACOB A. RIIS, *THEODORE ROOSEVELT: THE CITIZEN*, 52-53 (The MacMillan Company, 1918).

229. *Id.* at 54.

230. *Id.* at 54-55 (quoting “an unnamed writer in the ‘Saturday Evening Post,’ . . . ‘It was on April 6, 1882, that young Roosevelt took the floor in the Assembly and demanded that Judge Westbrook, of Newburg, be impeached.’”).

231. DAVID MCCULLOUGH, *MORNINGS ON HORSEBACK*, 260 (Simon and Schuster, 1981).

232. *Id.* at 260-66. For another account of this incident, see MORRIS, *THEODORE REX*, *supra* note 35, at 175-81.

233. RIIS, *supra* note 228, at 60-61 (After hearing “[t]he bitter cry of the virtually enslaved tenement cigarmakers . . . Roosevelt went to their rescue at once. He . . . went through the tenements and saw for himself. The conditions he found made a profound impression upon him. . . . He told the Legislature what he had seen, and a bill was passed to stop the evil, but it was declared unconstitutional in the courts.”).

234. Talmage Boston, *Feature: In the Arena: Theodore Roosevelt and the Law*, 74 TEX. B.J. 508, 514 (2011) (“Like most presidents, Roosevelt wanted federal courts to rule and the Constitution to be interpreted one way—his way. Unlike most presidents, when judges saw issues differently than he did, Roosevelt believed they were purposefully betraying his trust. Small wonder that after leaving the White House, as judgments and appellate opinions were rendered by various courts against his desires, Roosevelt attempted to persuade the American electorate to vote for the repeal of those errant decisions and for the immediate removal from the bench of the judges who had authored them. Fortunately, Americans rejected Roosevelt’s pitch for personal power over the rule of law.”).

itself.²³⁵ Progressives, such as Roosevelt, called upon the legislative branch to resolve social problems, including those caused by the rise of large unregulated corporations, only to see the successful law reform efforts thwarted by courts willing to strike down such legislation as unconstitutional.²³⁶ For example, the New York Court of Appeals struck down a law Roosevelt had championed that would have alleviated the horrific conditions under which the “virtually enslaved”²³⁷ workers in New York tenements labored.²³⁸ In his autobiography, Roosevelt noted that “[t]his decision completely blocked tenement-house reform legislation in New York for a score of years. . . . It was one of the most serious setbacks which the cause of industrial and social progress and reform ever received.”²³⁹

The progressives questioned the courts’ ability to invalidate legislation that was duly enacted by the legislative branch and signed into law by the executive branch.²⁴⁰ More specifically, they questioned the ability of the courts to wield constitutional provisions, whether in federal or state courts, to strike down statutes that the public wanted—and that their duly elected representatives had enacted—that would have promoted justice and fairness for average citizens.²⁴¹ Are not each of the three branches of government supposed to be co-equal branches of government, so that no one branch was more powerful than any of the others? How then, could the courts—often considered to be the least democratic branch of government, because they

235. Forbath, *Popular Constitutionalism in the Twentieth Century*, *supra* note 227, at 975 (“How could ‘We the People’ rule in the face of the rise of the large-scale corporation and the asymmetries of wealth, power, and organization it produced? How could it contend with corporate domination of the nation’s political parties and legislatures?”).

236. Peter Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers*, 1975 SUPREME CT. REV. 123, 125 (1975) (“Theodore Roosevelt . . . numbered among the conservative reformers’ chief antagonists. Such social progressives looked to government to ameliorate defects in the fabric of society. But often they looked in vain as courts, particularly federal courts, struck down or otherwise emasculated legislative efforts to meet new industrial conditions. To progressives the ‘activist’ superlegislative role of judges in construing constitutions and statutes in a manner according extensive protection to corporate property ranked as their fundamental objection to the judiciary.”).

237. RIIS, *supra* note 228, at 60.

238. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 82.

239. *Id.* at 83.

240. THEODORE ROOSEVELT CYCLOPEDIA, *supra* note 114, at 508.

241. ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 8, at 83 (“[V]arious decisions, not only of the New York court but of certain other State courts and even of the United States Supreme Court, during the quarter of a century following the passage of this tenement-house legislation, did at last thoroughly wake me. . . . I grew to realize that all that . . . could be said with equal truth and justice about the numerous decisions which in our own day were erected as bars across the path of social reform, and which brought to naught so much of the effort to secure justice and fair dealing for workingmen and workingwomen, and for plain citizens generally.”).

are supposed to be insulated from political pressures—tell the other branches of government what they can and cannot do? This, the progressive reformers believed, was a particularly irksome problem—and particularly the courts' faulty interpretation and application of the U.S. Constitution, according to the reformers' beliefs.²⁴² The progressives were angry with the courts for exerting the power of judicial review to invalidate the actions of the legislative and executive branches that would have ameliorated the conditions of the poor as against the rich who exploited them.²⁴³

Roosevelt felt that the courts were purportedly handing down principled decisions by wielding the power of judicial review to strike down progressive legislation as unconstitutional, but that they were actually engaged in making policy decisions.²⁴⁴ He felt that these were activist judges furtively inventing constitutional interpretations that they could use to prevent progressive legislation throughout states with reform-minded legislatures.²⁴⁵ Roosevelt felt this situation was intolerable—that people who fundamentally want to prevent change are using this constitutional doctrine as a way to defeat progressive legislation.²⁴⁶ These judges could not be removed by the process of impeachment, so he led the fight to implement measures to override the judges, such as judicial recall, so the

242. *Id.* at 478-79 (Roosevelt indicated, “[n]ot only some of the Federal judges, but some of the State courts invoked the Constitution in a spirit of the narrowest legalistic obstruction to prevent the Government from acting in defense of labor on inter-State railways.”).

243. *Id.* at 473 (“The judge who by word or deed makes it plain that the corrupt corporation, the law-defying corporation, the law-defying rich man, has in him a sure and trustworthy ally, the judge who by misuse of the process of injunction makes it plain that in him the wage-worker has a determined and unscrupulous enemy, the judge who when he decides in an employers’ liability or a tenement house factory case shows that he has neither sympathy for nor understanding of those fellow-citizens of his who most need his sympathy and understanding; these judges work as much evil as if they pandered to the mob, as if they shrank from sternly repressing violence and disorder.”).

244. *Id.* at 82 (“[T]he courts were not necessarily the best judges of what should be done to better social and industrial conditions.”).

245. *Id.* at 438 (“The courts, not unnaturally, but most regrettably, and to the grave detriment of the people and of their own standing, had for a quarter of a century been on the whole the agents of reaction, and by conflicting decisions which, however, in their sum were hostile to the interests of the people, had left both the nation and the several States well-nigh impotent to deal with the great business combinations.”).

246. *Id.* (“Sometimes [the courts] forbade the Nation to interfere, because such interference trespassed on the rights of the States; sometimes they forbade the States to interfere (and often they were wise in this), because to do so would trespass on the rights of the Nation; but always, or well-nigh always, their action was negative action against the interests of the people, ingeniously devised to limit their power against wrong, instead of affirmative action giving to the people the power to right wrong.”).

worst of these obstructionists could be neutralized and no longer impede the progressive agenda.²⁴⁷

Therefore, during his presidency, Roosevelt began expressing frustration with the courts and advocating the need to curtail their power.²⁴⁸ After 1910, Roosevelt began to speak about judicial recall, because he believed that the courts were frustrating his progressive political program.²⁴⁹ Roosevelt felt that some of the men who served as judges at the turn of the century were habitually staunch conservatives—reactionaries who could not be trusted—and were holding back the progressive movement in this country.²⁵⁰ Therefore, he sought to establish mechanisms to avoid letting these perceived intransigents deny the will of the people for progressive reforms.²⁵¹

Roosevelt particularly advocated for state constitutional reform to allow for the procedures of popular override of judicial decisions.²⁵² This type of judicial referendum describes a procedure undertaken when the populace is displeased with a particular judicial decision, so that decision is put to a vote and the general population can overturn that decision.²⁵³

247. THEODORE ROOSEVELT CYCLOPEDIA, *supra* note 114, at 507-11.

248. Edward Hartnett, *Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 934 (1997) (“As president, Roosevelt ‘had been critical of the judiciary for blocking social legislation and was convinced that no comprehensive program of reform could be achieved unless the courts could be curbed.”) (citation omitted).

249. *Id.* at 935 (“Roosevelt proposed a way to reverse such cases: recall of judicial decisions, an idea that took shape during 1911. In the summer of that year, when the admission of Arizona to the Union was under consideration, Roosevelt criticized President Taft for opposing the provision in the Arizona Constitution for recall of judges.”) (citation omitted).

250. THEODORE ROOSEVELT: AN AUTOBIOGRAPHY, *supra* note 9, at 438 (“[The courts] had rendered these decisions sometimes as upholders of property rights against human rights, being especially zealous in securing the rights of the very men who were most competent to take care of themselves; and sometimes in the name of liberty, in the name of the so-called ‘new freedom,’ in reality the old, old ‘freedom,’ which secured to the powerful the freedom to prey on the poor and the helpless.”).

251. THEODORE ROOSEVELT CYCLOPEDIA, *supra* note 114, at 507-11.

252. Hartnett, *supra* note 248, at 935 (“In November of 1911, after Judge Learned Hand had expressed concern that Roosevelt’s writing would be construed as a dangerous invitation to exert popular pressure on judges, Roosevelt wrote to Hand: ‘Evidently I must try to make my expression more clear. I absolutely agree with you as to bringing pressure to bear on the judges, but in Constitutional cases the alternative must be to have the right of appeal from the judges. Take the New York cases to which I refer. My idea would be to have the Constitutional Convention provide that the people shall have the right to vote as to whether or not the judges’ interpretation of the law in such a case is correct, and that their vote shall be decisive.’”) (citation omitted).

253. The term “judicial referendum” can also refer to a process by which voters cast and up or down vote on judicial incumbents in a regularly scheduled election, as opposed to holding contested elections. See Blair T. O’Connor, Note, *Want to Limit Congressional Terms? Vote for “None of the Above”*, 29 VAL. U. L. REV. 361, 402-03 (1997).

Roosevelt also considered the possibility of abolishing the practice of judicial review in state courts, thereby not allowing state judges or justices to declare a law unconstitutional if it was popularly voted upon and approved by the branches of government that were elected by the people.²⁵⁴ The progressive reformers perceived that the problem with the courts was that judges were hostile to legislative efforts to ameliorate the concerns of laborers and the working poor who were being exploited by the new, wealthy, and powerful corporate interests.²⁵⁵ State courts continued to strike down progressive legislation using the state and federal constitutions as a sword.²⁵⁶

In response, movements across the country arose to attempt to curb the power of judges. Part of these efforts were to put into place mechanisms allowing for judicial recall. Considering these mechanisms, Roosevelt emphatically stated:

Massachusetts has the right to have appointive judges who serve during good behavior, subject to removal, not by impeachment, but by simple majority vote of the two houses of the Legislature whenever the representatives of the people feel that the needs of the people require such removal. . . . I prefer the Massachusetts [approach].²⁵⁷

Some states adopted constitutional provisions allowing for recall of judges and other elected officials.²⁵⁸ Other states attempted to limit judicial power by instituting referenda over judicial decisions.²⁵⁹ This was a call for popular democracy over the independence of the judicial branch.²⁶⁰ Of course, this was part of the overall Progressive Party's push toward the direct primary, the initiative, referendum, and recall, as well as a constitutional amendment to make it easier to amend the U.S.

254. THEODORE ROOSEVELT CYCLOPEDIA, *supra* note 114, at 282.

255. Fish, *supra* note 236, at 125.

256. Hartnett, *supra* note 248, at 935-36 ("Again and again in the past justice has been scandalously obstructed by State courts declaring State laws in conflict with the Federal Constitution, although the Supreme Court of the nation had never so decided or had even decided in a contrary sense.").

257. Theodore Roosevelt, *A Charter of Democracy*, Address Before the Ohio Constitutional Convention (Feb. 21, 1912), <http://www.theodore-roosevelt.com/images/research/txtspeeches/704.pdf>.

258. Carrington, *supra* note 225, at 94 ("Seven states adopted constitutional provisions for the recall of elected officers, including judges, a proposal horrifying to political conservatives professing to cherish the independence of the judiciary from political intimidation.") (citation omitted).

259. *Id.* at 94 ("Colorado took a different step, providing in its constitution for review by referendum of judicial decisions.").

260. Fish, *supra* note 236, at 125.

Constitution.²⁶¹ The 1912 Progressive Party Platform called for “such restriction of the power of the courts as shall leave to the people the ultimate authority to determine fundamental questions of social welfare and public policy.”²⁶² In 1912, Roosevelt espoused that “the judge is just as much the servant of the people as any other official.”²⁶³ He advocated that the people should have the final decision-making authority as to constitutional matters, and therefore, should have the ability to overturn judicial decisions on constitutional cases by popular referendum.²⁶⁴

As a result of being outraged by the decision of New York’s highest court to abrogate the state’s mandatory worker’s compensation statute, Roosevelt supported an amendment to the New York constitution that would allow for the people to overturn by referendum judicial decisions on the constitutionality of legislation.²⁶⁵ The court had held that the worker’s compensation statute, which provided that employers would be liable for injuries to employees on the job, was unconstitutional under both the federal and state constitutions.²⁶⁶ Roosevelt responded: “It is out of the question . . . that the courts should be permitted permanently to shackle our hands as they would shackle them by decisions such as this.”²⁶⁷

However, even Roosevelt’s supporters questioned the wisdom of his approach out of concern that the use of popular referenda in determining the

261. Forbath, *Popular Constitutionalism in the Twentieth Century*, *supra* note 227, at 977-78.

262. Fish, *supra* note 236, at 125 (citing *The Progressive Party Platform of 1912, in THE PROGRESSIVE MOVEMENT: 1900-1915*, 129-30 (Hofstadter, ed., 1965)).

263. *Id.* at 126 (quoting HENRY F. PRINGLE, *THEODORE ROOSEVELT: A BIOGRAPHY* 558 (1931)).

264. Forbath, *Popular Constitutionalism in the Twentieth Century*, *supra* note 227, at 979 (“[H]igh court decisions ought to be subject to review by the people through referendum. ‘If any considerable number of the people feel’ that a constitutional decision ‘is in defiance of justice’ or misjudges the proper bounds of the state’s police power, ‘they should be given the right by petition to bring that decision before the voters’; a progressive state constitution must ‘permit the people themselves by popular vote, after due deliberation and discussion, but finally and without appeal, to settle what the proper construction of any Constitutional point is.’”) (citing Roosevelt, *A Charter of Democracy*, *supra* note 257); *see also* THEODORE ROOSEVELT CYCLOPEDIA, *supra* note 114, at 119 (“[T]here is no justification for refusing to give the people the real, and not merely the nominal, ultimate decision on questions of constitutional law.”).

265. Carrington, *supra* note 225, at 94-95 (“He proposed for New York the Colorado provision allowing a right of appeal to the people through a referendum on the constitutionality of legislation.”).

266. *Id.* (“Disregarding social and economic data depicting the oppression of labor, the court held that employers were guaranteed the right by both federal and state constitutions to employ workers without taking responsibility for their work-related injuries.”).

267. *Id.* at 95 (citing *Workmen’s Compensation*, 98 THE OUTLOOK 49 (May 13, 1911); *see also* Theodore Roosevelt, *Introduction*, in WILLIAM L. RANSOM, *MAJORITY RULE AND THE JUDICIARY: AN EXAMINATION OF CURRENT PROPOSALS FOR CONSTITUTIONAL CHANGE AFFECTING THE RELATIONS OF COURTS TO LEGISLATION*, 3-24 (1912)).

constitutionality of statutes may not be advisable.²⁶⁸ For example, his close friend, Henry Cabot Lodge, strongly opposed Roosevelt's position, which irreparably tarnished their longstanding friendship.²⁶⁹ This is another area where a stark contrast can be seen between President Taft and President Roosevelt. This stance diminished Roosevelt's chances in the 1912 presidential election.²⁷⁰ Roosevelt's detractors, such as William Howard Taft, Henry Cabot Lodge, Elihu Root, and others, were worried that he was attempting to undermine the rule of law.²⁷¹ The American public had not fully embraced popular constitutionalism and has been wary of popular control over the judiciary or judicial decision-making.²⁷² Therefore, even many who supported the progressive platform feared having the general population be able to overrule a decision of the courts and impose their own interpretation of the constitution.²⁷³ The founding fathers created the U.S. Constitution and framework of government via the three coequal branches of government—they intentionally fractured the government.²⁷⁴ They did not want to reinstitute the tyranny they had experienced under King George,

268. Carrington, *supra* note 225, at 94 (“Even Learned Hand, though a devoted follower of Roosevelt, thought ill of this idea as a perversion of the judicial role in constitutional adjudication.”).

269. Forbath, *Popular Constitutionalism in the Twentieth Century*, *supra* note 227, at 980 (“Even Henry Cabot Lodge, who owed Roosevelt his reelection to the Senate in 1911, now wrote his lifelong friend that he could not support his quest for the White House: ‘I found myself confronted with the fact that I was opposed to your policies declared at Columbus [at the Ohio Constitutional Convention] with great force in regard to changes in our Constitution and principles of government. . . . I knew of course that you and I differed on some of these points but I had not realized that the difference was so wide.’”).

270. Carrington, *supra* note 225, at 94; *see also* Forbath, *Popular Constitutionalism in the Twentieth Century*, *supra* note 227, at 979 (“[O]f all the innovations in “the machinery of government” that Roosevelt championed, the “recall of state judicial decisions” proved most controversial. His bold statement of the people’s interpretive authority hobbled Roosevelt’s chance of securing the Republican nomination.”).

271. Hartnett, *supra* note 248, at 937-38.

272. Forbath, *Popular Constitutionalism in the Twentieth Century*, *supra* note 227, at 968 (“When matters came to a head, [Americans] embraced only halfway the counsel and vision of Progressives like Theodore Roosevelt who looked to undo judicial finality, dethrone the courts, and institute a new democratic allocation of interpretive authority. . . . Popular sway over constitutional questions in both eras stood in tension with a deeply conservative current of popular skepticism about the people’s collective enthusiasms about the uses of state power, a current that ran in favor of judicial finality.”).

273. Hartnett, *supra* note 248, at 942 (“The platform, however, did not endorse Roosevelt’s recall proposal but instead called for a less radical method of reversing state court decisions invalidating state statutes on federal constitutional grounds, which had been proposed by the American Bar Association: review of such a decision by the Supreme Court of the United States. It appears that not all Progressives shared Roosevelt’s ‘distrust and suspicion of the judiciary.’”) (citations omitted).

274. Hon. Harold Baer, Jr., & Arminda Bepko, *A Necessary and Proper Role for Federal Courts in Prison Reform: The Benjamin V. Malcom Consent Decrees*, 52 N.Y.L. SCH. L. REV. 3, 6-7 (2007-2008).

so they separated the branches of government and separated the federal and state governments as well, providing many checks and balances between all of these separate entities.²⁷⁵ The legislature would pass the laws, which the president would either sign or veto.²⁷⁶ The judiciary was supposed to be the independent branch—to be the neutral arbiter.²⁷⁷ Thus, when parties come before a judge, multiple safeguards have been put into place allowing the judge to be neutral and not subject to the will of the people in determining the case. Particularly in the federal system, the judges and justices are appointed by the president and approved by a majority of the Senate.²⁷⁸ Once federal judges are in office, they are appointed for life, presuming good behavior.²⁷⁹ No Supreme Court justice and very few lower court judges have ever been removed through the impeachment process;²⁸⁰ therefore, Congress cannot realistically use the threat of impeachment to sway judges against making unpopular decisions. Both the perception and hopefully the fact of neutrality have been built into the federal judicial system, to protect it from being buffeted by political winds or the caprice of the populace.

Roosevelt's attempt to curtail the independence of the judiciary was one of the factors that cost him his friendship with Henry Cabot Lodge and Elihu Root, as well as his relationship with William Taft.²⁸¹ Many of Roosevelt's supporters felt that his position on these issues was particularly unwise.²⁸² It lost him a great deal of support in the Progressive Party and in

275. Eric J. McDonald Guadalupe, *Double Jeopardy, Dual Sovereignty, and Other Legal Fictions*, 28 REV. JURIDICA U. INTER. P.R. 201, 218 (1994) (“A strong central government, like foreign alliances, was viewed with suspicion. The experiences of the founding fathers had forged this mind set. The American revolution was less a war for civil liberties than one fought against a distant and strong centralized government. To many legal scholars of that time, the States, not the People, had replaced King George III as the Sovereign. It was these same Sovereigns that had convened in Philadelphia in 1789 to forge a new compact.”).

276. U.S. CONST. art. I, § 7, cl. 2-3.

277. See generally Bruce Fein & Burt Neuborne, *The Case for Independence: Why Should We Care About Independent and Accountable Judges?*, 61-APR OR. ST. B. BULL. 9, 10 (2001).

278. U.S. CONST. art. II, § 2, cl. 2.

279. U.S. CONST. art. III, § 1.

280. Joel B. Grossman & David A. Yalof, *The Day After: Do We Need A “Twenty-Eighth Amendment?”*, 17 CONST. COMMENT. 7 (2000); KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW, 31 (19th ed. 2016) (“No Supreme Court Justice has ever been removed under that provision”); Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 100 n.381 (2016) (noting that only “fifteen Article III judges were impeached during the period 1803-2010”) (citation omitted).

281. Talmage Boston, *Review of in the Arena: Theodore Roosevelt and the Law*, 74 TEX. B. J. 508, 511-12 (2011).

282. Hartnett, *supra* note 248, at 934-43.

his campaign in 1912 to seek reelection to the presidency against President Taft, and it contributed to his loss during that election.²⁸³

Both judicial recall and judicial referendum are anathema to people who are concerned about preserving the independence of the judiciary. The two lawmaking branches of government, the legislature (which passes the bills) and the executive (which signs the bills into law and ensures that they are carried out) are elected by the people and subject to the will of the people.²⁸⁴ These are the political branches of government, meaning that by structural design, both are intended to be responsive to popular will and are influenced greatly by politics, the political parties, media, polling, and so on. By contrast, the judicial branch of government was intended by the framers—at least at the federal level—to be independent and not to be influenced by the whims of the populace.²⁸⁵ Judges are supposed to be neutral adjudicators who interpret and apply the law in a fair and impartial manner, and who are not unduly swayed in their decisions by outside forces, such as popular opinion. Instead, federal judges are nominated by the president and appointed to the judiciary with the advice and consent of the Senate.²⁸⁶ Although that process is also influenced by politics, it is perceived to be less so than elections.²⁸⁷ Moreover, federal judges are appointed for life as long as they maintain good behavior,²⁸⁸ which makes a tremendous difference in their ability to maintain both the perception and

283. *Id.*

284. U.S. CONST. art. 1, §§ 1-2; art. 2, § 1.

285. David K. Stott, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 B.Y.U. L. REV. 481, 484 (2009) (“In the eighteenth century, the framers of federal and state constitutions firmly believed in creating a bench sanitized from the democratic whims of the people, and early methods of judicial selection emphasized this principle. Perhaps because they viewed British judges as mere puppets of the King, the Framers of the United States Constitution made judicial independence the bedrock principle of Article III.”) (citation omitted).

286. U.S. CONST. art. 2, § 2, cl. 2.

287. Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States*, 75 MICH. B. J. 904, 904-05 (1996) (“Four primary methods are used to select judges in the United States: gubernatorial appointment, gubernatorial appointment with retention election, partisan election and nonpartisan election. Three states select judges by legislative appointment or election. Three states fill unexpired terms by Supreme Court appointment. The gubernatorial appointment without a retention election most closely emulates the federal system of judicial selection. U.S. District Court judges are appointed by the executive (the president), with consent of the Senate, for life. . . . The very nature of periodic elections is to give the electorate an opportunity to directly either select or reject judges. Gubernatorial appointment without a retention election removes the electorate from directly influencing the judicial selection process. Judicial selection becomes a function of elected representatives of the people.”) (citations omitted).

288. U.S. CONST. art. 3, § 1.

the reality of independence.²⁸⁹ Although judges are appointed by presidents with a particular political stance, believing that the judges they appoint also reflect that stance, once in office, with the guarantees of independence brought by lifetime tenure, the judges or justices will sometimes adopt positions that starkly diverge from that of the president who appointed them.²⁹⁰

By contrast, judicial recall would subject judges directly to popular will.²⁹¹ Therefore, as previously described, judges would more likely be responsive to popular opinion in deciding each case or face the possibility of being recalled from office. Having the possibility of judicial recall looming over one's head is even more onerous than facing periodic judicial elections, where people vote on aggregate of decisions, not immediately in reaction to one highly unpopular decision that can trigger a recall campaign. Judicial referendum would subject the outcome of particular cases to popular will, in effect enabling the general population to sit in judgment of two parties in a lawsuit.²⁹²

More moderate reformers, such as then-President William Taft, emphatically opposed Roosevelt's position. This assault on the courts

289. David McLean, *Judicial Tenure in Vermont: Does Good Behavior Merit Retention?*, 27-MAR VT. B. J. 39 (2001) ("Federal judges have independence secured by lifetime tenure during good behavior and a salary guaranteed not to diminish during that time. The federal provisions provide the greatest possible independence for judges, at least as compared to other likely selection and tenure options. Lifetime appointments mean that judges do not have to worry about currying the favor of an executive officer, appointing committee, or the general public when deciding cases. A secure salary provision makes it impossible for the legislature to reduce a judge's salary as means of expressing disapproval over a specific decision. In addition, appointment as a means of putting judges on the bench increases independence because judges are not dependent on popular opinion in order to obtain a position. In contrast, popular elections decrease independence by turning judges into politicians, creating the possibility that thoughts of winning the next election may enter the decision calculus in cases that catch the public eye.") (citation omitted).

290. SULLIVAN & FELDMAN, *supra* note 280, at 30-31 ("It has long been accepted that the President may choose nominees who share his ideological views."); James J. Brudney, *Foreseeing Greatness: Measurable Performance Criteria and the Selection of Supreme Court Justices*, 32 FLA. ST. U. L. REV. 1015, 1016 (2005) ("Warren Burger and Harry Blackmun . . . were nominated for the Supreme Court by the same President, who had made clear that he wanted new members of the Court to reflect a certain judicial philosophy. As Supreme Court Justices, however, Burger and Blackmun came to differ sharply in their doctrinal and ideological orientation.") (citation omitted).

291. *See, e.g.*, THEODORE ROOSEVELT CYCLOPEDIA, *supra* note 114, at 106 ("We wish to see the people the masters of the court not to overthrow the Constitution but to overthrow those who have perverted the Constitution into an antisocial fetich [sic], used to prevent our securing laws to protect the ordinary working man and working woman in their rights."); *see also id.* at 119 (quoting Roosevelt's approval of judicial recall in certain instances).

292. *See, e.g.*, THEODORE ROOSEVELT CYCLOPEDIA, *supra* note 114, at 119 ("The safe way to prevent popular discontent with the courts from becoming acute and chronic, is to provide the people with the simple, direct, effective, and yet limited power to secure the interpretation of their own constitution in accordance with their own deliberate judgment.").

offended Taft, who was a leading advocate for independence of the judiciary.²⁹³ Taft, who served as president between 1909-1913, revered judges and the judiciary.²⁹⁴ In fact, Taft advocated for judicial reform of the laws as a more effective and efficient way to achieve needed changes in the law than simply relying on legislatures,²⁹⁵ and he zealously worked to preserve the independence of the judiciary throughout his tenure as President.²⁹⁶ He believed that judges must be insulated from popular caprice and political pressure. Therefore, he supported judicial structures favoring independence, such as an appointment process rather than direct elections for judges and lifetime tenure during good behavior.²⁹⁷ Taft was vehemently opposed to elections for judges, the adoption of provisions for judicial recall, the adoption of referendum processes to overturn judicial decisions by popular vote, and other so-called reforms that would curb the ability of judges to decide cases based upon merit than upon the whims of the people.²⁹⁸ Taft was concerned that “law would become dependent ‘on the momentary passions of a people,’ expressed via initiative, referenda, and recall of judicial officials and decisions.”²⁹⁹ His aim for reforming the courts, and the aim of other conservative reformers, was to address the concern that the courts were too “slow, costly, and inefficient.”³⁰⁰ His faith in the judicial system served him well, as he ultimately became the tenth Chief Justice of the Supreme Court, serving between July 1921 and February 1930.³⁰¹

293. Hartnett, *supra* note 248, at 938-39 (“Roosevelt’s position on judges stood in stark contrast to that of the incumbent President Taft, who in August of 1911 had vetoed statehood for Arizona because its constitution permitted the recall of judges. Taft once said, ‘I love judges, and I love courts. . . . They are my ideals, that typify on earth what we shall meet hereafter in heaven under a just God.’ He believed what his father had told him, that ‘to be Chief Justice is more than to be President,’ but sought the Presidency largely at his wife’s urging. As President, Taft ‘remained a jurist in a political office.’ He ‘idolized the court system as the greatest protector of property rights and needed brake on democracy, and looked upon its critics as anarchists or communists.’ Roosevelt’s speech advocating recall of judicial decisions ‘greatly alarmed President Taft and solidified his intention to go down fighting.’”) (citation omitted).

294. *Id.*

295. Carrington, *supra* note 225, at 93 (“He advocated judicial law reform for the purpose of reducing cost and delay, urging that reforms of that sort would better serve the interests of disadvantaged citizens encountering difficulty in enforcing their rights than would an enlargement of their substantive entitlements.”).

296. *Id.* at 94 (“As President, he invested much of his energy and political capital in resisting law reforms aiming to hold judges accountable to an electorate.”).

297. Fish, *supra* note 236, at 126.

298. *Id.* at 128.

299. *Id.* (citing HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT: A BIOGRAPHY* 766 (1939)).

300. *Id.* at 125.

301. William H. Rehnquist, *Remarks of the Chief Justice: My Life in the Law Series*, 52 DUKE L.J. 787, 798 (2003).

Moreover, confidence began to wane in the wise deliberation of the popular vote that underpinned the movement toward each of the progressive governmental reforms—direct democracy through the initiative, recall, referendum, direct primaries, and an easier constitutional amendment process.³⁰² The rise of mass advertising and propaganda machineries during World War I gave rise to the concern that the will of the people would be manufactured and manipulated by moneyed interests and eroded support for direct democracy movements.³⁰³ And of course, Woodrow Wilson, who advocated for a more moderate progressivism within the current constitutional structure, won the 1912 election, defeating both Roosevelt and Taft.³⁰⁴

Judicial review is still alive and well, because Roosevelt's attempts to curb the court's ability to uphold the U.S. Constitution against conflicting statutes did not prevail. Given the recurring attacks on the Supreme Court and the federal and state judiciaries, with some activists calling for ways to bring the courts more in keeping with their own political proclivities, it is interesting to examine the parallels with Roosevelt's time.³⁰⁵

VI. CONCLUSION

President Theodore Roosevelt achieved great accomplishments throughout the course of his career in public service, endearing himself to many.³⁰⁶ His massive personality, charisma, and energy enabled him to create sweeping changes in the operation and integrity of both state and

302. Forbath, *Popular Constitutionalism in the Twentieth Century*, *supra* note 227, at 982-83.

303. *Id.* (“The war saw the creation of massive propaganda machinery by the federal government in collaboration with the emerging advertising industry. In the ‘20s both experiences-war-time propaganda and burgeoning ‘modern’ advertising-inspired thinkers like Walter Lippman to forge a new conception of modern, urban publics-as manipulable, irrational, ‘emotional’ vessels for opinions ‘manufactured’ for them by media and political technicians. Thus, the idea of ‘public opinion’ underwent a sea change. From meaning the considered views of the citizenry, which must guide and constrain state policy and constitutional development, and from being a project of progressive reformers, intellectuals and activists, ‘public opinion’ became the product of new professionals and new techniques: advertising, polling, mass media. And the pre-war Progressive ideas about democratic citizenship and popular rule came to seem hopelessly naive.”).

304. *Id.* at 983.

305. *See, e.g.*, Stephanie Francis Ward, *Referendum Results Are No End to the Battles: Public perception, ambivalence fuel anger with judiciary*, 5 No. 45 ABA J. E-REPORT 1 (2006).

306. RIIS, *supra* note 228, at 268-69 (“As I am writing this now, there comes to mind really the finest compliment I ever heard paid him, and quite unintentionally. The lady who said it was rather disappointed, it seemed. She was looking for some great hero in whom to embody all her high ideals, and, said she, ‘I always wanted to make Roosevelt out that; but, somehow, every time he did something that seemed really great it turned out, upon looking at it closely, that it was only just the right thing to do.’ I would not want a finer thing said of me when my work is done. . . . And it comes as near as anything could to putting him just right.”).

federal governments, particularly impacting the nation's natural resources.³⁰⁷ Although he did not achieve everything he set out to accomplish (such as ensconcing popular will over the judiciary), his tremendous expansion of presidential power through the use of executive orders helped reshape the relationship between Congress and the executive branch that has endured to the present day. His legacy helps to inform the current debates about the appropriate role of the executive and legislative branches at the federal level.

307. As his presidency came to a close, "for millions of contemporary Americans, he was already memorialized in the eighteen national monuments and five national parks he had created by executive order, or cajoled out of Congress. The 'inventory,' . . . included protected pinnacles, a crater lake, a rain forest and a petrified forest, a wind cave and a jewel cave, cliff dwellings, a cinder cone and skyscraper of hardened magma, sequoia stands, glacier meadows, and the grandest of all canyons." MORRIS, THEODORE REX, *supra* note 35, at 554.