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The Architecture of Constitutional Time

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THE ARCHITECTURE OF CONSTITUTIONAL TIME

Richard Alexander Izquierdo*

ABSTRACT

Bruce Ackerman’s account in his *We the People* series urges the legal recognition of constitutional amendments enacted outside of Article V as part of a larger descriptive project concerning the creation of distinct republics within the Constitution of 1787. One of its limitations is that he and other scholars have not fully appreciated the way in which the original institutional design of the Constitution has facilitated—and perhaps even anticipated—the construction of subregimes during extraordinary times. This Article presents constitutional time and presidential incentives for a lasting legacy as the most important factors influencing constitutional meaning. It is constitutional time—the extraordinary historical triggers that open space for a new regime—that changes constitutional meaning, as the President’s vision tends to prevail over the Court’s. Presidents are incentivized to construct constitutional regimes by the desire to lock in a legacy against future presidents, political opposition, rival branches, and the bureaucracy. This process of maintenance and renewal has been in place since George Washington’s presidency in 1789 and raises important questions for constitutional theory.

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INTRODUCTION: THE ARCHITECTURE OF CONSTITUTIONAL TIME

As a descriptive matter, the idea that the Constitution has been transformed from its eighteenth century foundations seems plausible and perhaps even persuasive. When Bruce Ackerman introduced the idea that the United States had three distinct republics within the same formal, written Constitution of 1787,¹ he used a great deal of constitutional theory and history to describe the workings of a dualist regime operating within higher law and normal politics. Ackerman noted in his “myth of rediscovery” discussion that lawyers needed to strain history in order to conclude that Franklin Roosevelt’s Constitution remained faithful and consistent with Madison’s.² As a result, his project—greeted with renewed interest after a much-anticipated third volume in 2014³—sought to reconcile the New Deal within American constitutionalism by emphasizing its ratification by popular mandate. The New Deal in the 1930s, like Reconstruction in the 1860s, represented a legitimate interpretation of the Constitution because it was a “new” Constitution approved by the people.⁴ Thus, Roosevelt may not follow Madison or even Lincoln and the 39th Congress, but his innovations deserved equal recognition as those of his predecessors. Moreover, if the New Deal created a new constitutional regime defined by positive government, then it might seem easier to justify the Warren Court’s civil liberties “revolution” of the 1950s and 1960s as a particular extension of the new regime.⁵ Recognizing the New Deal as a constitutional moment—and not just as a restoration of Chief Justice Marshall’s Constitution—clears the way for a more accurate reading of its far-reaching changes.⁶

While Ackerman’s account is provocative and sophisticated, gathering its fair share of interest and skepticism, it only begins to shift the emphasis on understanding constitutional law in a more holistic direction. One of its limitations is that he (like other scholars writing in this subgenre) may not fully appreciate the way in which the original institutional design of the Constitution has facilitated—and perhaps even anticipated—the construction of constitutional regimes during extraordinary political times. There is an institutional logic to the cycle of constitutional maintenance and

¹ 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 58–67 (1991).

² *Id.* at 62–66.

³ *See* 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

⁴ STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* (1997).

⁵ 3 ACKERMAN, *supra* note 3, at 6–7.

⁶ 1 ACKERMAN, *supra* note 1, at 62.

renewal that has been in operation since 1789—and it differs in important ways from his account. Ackerman’s signaling stages are numerous and imprecise, having certain branches play leading roles in one period, and others providing the crucial “switch in time” at others.⁷ The President only comes into play as a major constitutional actor during the Civil War with Lincoln, as if Presidents Washington, Jefferson, and Jackson were minor players with limited impact on constitutional baselines.⁸ Moreover, there is little discussion of the possible motivations that presidents, justices, or members of Congress may have for taking such risky constitutional maneuvers during constitutional moments. For this reason, the motivations for such maneuvers have to be addressed from a broader theoretical framework: one that accounts for incentive structures within the Constitution. And most importantly, however rich the historical descriptions of process in Ackerman’s theory, he does not discuss the deeper implications of historical context imbedded within some of his work: that the largest changes in American politics—foundational shifts in constitutional baselines—are mainly the product of constitutional time or exogenous historical shocks that open available space for new interpretations of the Constitution.

This Article presents constitutional time and presidential incentives for a constitutional legacy as the most important factors influencing constitutional meaning. Constitutional time refers to the extraordinary historical events that destabilize the regime and open space for new interpretations and constructions to change or supplement constitutional meaning. The idea of constitutional time here draws inspiration from Stephen Skowronek’s political time concept in his book *The Politics Presidents Make*,⁹ which provides a typology of presidential authority connected to particular political regimes. When constitutional time is matched with formal Article II executive power, the President’s authority to offer a substantive constitutional vision is at its greatest.¹⁰ It is at this point when constitutional baselines realign. While Congress and the Court may participate in forming and consolidating these changes during constitutional time, it is the President who takes the risks to engage in them—and he does so in order to lock in his presidential legacy by the strongest means available: the construction of a constitutional regime within the formal, written Constitution of 1787.¹¹ In other words, not only did the institutional design of the Constitution divide power among the three branches, but it also incentivized actions consistent with each office.

The Presidency was the most innovative creation of the Philadelphia Convention—and a crucial part of its originality was its centrality to the regime as a whole. That is to say that it had a role in forming and shaping the regime’s foundations and constitutional baselines. Examples include Washington’s construction of a Federalist

⁷ See generally 1 ACKERMAN, *supra* note 1.

⁸ See generally 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

⁹ See generally SKOWRONEK, *supra* note 4, at xi–xvii.

¹⁰ See *infra* Part III.

¹¹ See *infra* Parts II–III.

Constitution during the 1790s,¹² Lincoln's attempt to redeem the promissory note of the Declaration of Independence with the Republican Constitution during the 1860s,¹³ and Franklin Roosevelt's institutionalization of positive government on a national scale through sweeping legislation and judicial consolidation in the 1930s.¹⁴ This process of maintenance and renewal has been in place since 1789, which has broader implications for constitutional theory: specifically, that the creation of the Executive anticipated the need for reconciling constitutional time. While the leading Founders never used the term constitutional time, the political science they applied was designed to overcome the uncertainty and destabilization that historical events had caused to republics since antiquity.¹⁵ American political institutions were crafted with an awareness of this, especially the Presidency.

In Part I, this Article introduces the unique incentives that presidents have to lock-in their preferred political commitments through constitutional politics despite the considerable obstacles and costs associated with such high-risk endeavors. Presidents care about their historical legacy above all else. This institutional orientation inclines presidents to seek structures that safeguard their priorities against political uncertainty. Part II then explores the reasons why presidents attempt to lock-in their political commitments by constructing a new constitutional regime. Since presidents tend to seek the most secure means available to entrench their legacy, the constitutional regime offers the highest form of protection against encroachments by presidential successors, the rival political party, the Supreme Court, and the bureaucracy. Part III introduces the importance of constitutional time in construing, changing, and consolidating meaning through its connection to reconstructive presidential authority and the constitutional regime. Constitutional time opens constitutional space, which the President aggressively fills in with a substantive constitutional vision through a number of different actions. At its extreme, this includes the controversial practice of departmentalism where the President interprets the Constitution *de novo*, disregarding judicial decisions that interfere with it. This set of dynamics changes the Constitution by rearranging constitutional baselines. Yet it is only the presence of constitutional time that enables political and judicial actors to push their vision forward. In Part IV, the Article concludes with examples of constitutional time applied to presidents who achieved different degrees of success in securing their respective constitutional visions. The crisis of the 1780s and the Founding enabled President Washington to construct a Federalist constitutional regime that endured considerable threats to its core commitments from President Jefferson, who actually wielded power more aggressively than Washington did in office. The space that Washington inherited was

¹² See *infra* Part IV.A.

¹³ See generally 2 ACKERMAN, *supra* note 8, at 120–85.

¹⁴ See generally SKOWRONEK, *supra* note 4, at 288–324.

¹⁵ See generally *infra* Part IV.A (describing Washington's use of constitutional time, even though he never said that exact phrase).

a blank slate in comparison to the more thickened environments that all of his successors would experience. It was the extraordinary historical context that opened that space and necessitated a substantive constitutional vision that would fill it. Finally, the analysis in Part IV concludes with a brief discussion of Theodore Roosevelt's presidency, which despite its political potency was quite limited in its constitutional achievements. This example in particular highlights the elegance of constitutional time because it shows that even a politically influential president needed a historical opening to achieve a lasting constitutional legacy.

I. PRESIDENTIAL LEGACY AND THE CONSTITUTION

More than anyone else on the national stage, American presidents care about their historical legacy.¹⁶ The presidency has a long-range perspective built in its orientation to political affairs due to its institutional position and operation.¹⁷ The office was designed this way, as Alexander Hamilton alluded to in *Federalist 72* describing the president's ability to undertake "extensive and arduous enterprises for the public benefit, requiring considerable time to mature and perfect them."¹⁸ From this institutional inclination, the President desires and tends to build political structures that last and can speak to his principles and priorities while in office. Presidents are remembered for their lasting accomplishments above all else, evident in Thomas Jefferson's expansion of the nation's boundaries through the Louisiana Purchase, Andrew Jackson's democratization of national politics, Abraham Lincoln's eradication of slavery, Theodore Roosevelt's nationalist Progressive agenda, Franklin Roosevelt's New Deal, and Ronald Reagan's Conservative Revolution. The President's natural tendency towards long-term objectives even pushes him to engage in undertakings that might be unpopular at the time or that risk becoming so over the long run.¹⁹ He is allowed this luxury as a result of his four-year term in office, his less-pronounced incentives for re-election (especially during his second term),²⁰ and his heterogeneous

¹⁶ Terry M. Moe, *Presidents, Institutions, and Theory*, in *RESEARCHING THE PRESIDENCY* 337, 364 (George C. Edwards III et al. eds., 1993) (arguing that the knowledge they will be evaluated historically motivates presidents to prioritize leadership over popularity while electoral incentives encourage legislators to seek popularity).

¹⁷ *Id.*

¹⁸ THE FEDERALIST NO. 72, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁹ The only reason that the President is always referred to with a masculine pronoun in this Article is that no President, as of this writing, has been a woman. In time, that may be expected to change.

²⁰ Some scholars have stated that the President's re-election incentive is non-existent in his second term. See Moe, *supra* note 16, at 363. However, an alternative view of the President's second term may attribute a re-election incentive by including the President's desire to have his own party's nominee elected as part of the President's broader legacy. At the very least, it may provide some minimal level of constraints in office, albeit much less direct than would be the case in the President's own re-election.

national constituency, all of which tend to insulate him from the sorts of pressures that a member of the House of Representatives faces.²¹

The importance that a president attaches to his historical legacy focuses each occupant of the office on a quest for leadership. As Terry Moe explains in his analysis of presidential structure and institutions:

If there is a single driving force that motivates all presidents, it is not popularity with the constituency, nor even governance per se. It is leadership. Above all else, the public wants presidents to be strong leaders, and presidents know that their success in office and place in history hinge on the extent to which citizens, political elites, academics, and journalists see them as fulfilling these lofty expectations.²²

There are various barometers of presidential leadership, including: the President's handling of the domestic and foreign agenda, overall effectiveness of administration, management of political popularity and political capital towards favored ends, as well as a range of other strategies aimed at overcoming political obstacles.²³

Recently, research within the schools of new institutionalism and historical institutionalism in political science has sharpened the focus by positing an almost architectural leadership task for all presidents: the charting of new paths for American politics. New institutionalist Terry M. Moe defines this leadership role as

hav[ing] the capacity for rising above politics when necessary, for pursuing their own vision in the face of political odds, for doing what is right and best rather than what is politically safe and expedient. Strong leaders have to demonstrate their true metal by being selectively *unresponsive*—by being autonomous.²⁴

Similarly, for historical institutionalist Stephen Skowronek, the “*presidency is a governing institution inherently hostile to inherited governing arrangements*,” imbuing

²¹ David Mayhew made the classic statement about the Member of Congress's re-election incentive. See generally DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13–19 (1974).

²² Moe, *supra* note 16, at 364.

²³ For a sample of the ways that other leading political scientists have approached presidential leadership, see FRED I. GREENSTEIN, THE PRESIDENTIAL DIFFERENCE 1–10 (3d ed. 2009) (arguing that understanding presidential leadership requires considering “each chief executive on his own terms”); SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP 1–47 (4th ed. 2007) (arguing that the mark of modern presidential leadership is in the tendency of presidents since Theodore Roosevelt to appeal directly to the American public); RICHARD E. NEUSTADT, PRESIDENTIAL POWER 29–35 (1960) (arguing that “presidential power is the power to persuade”).

²⁴ Moe, *supra* note 16, at 364.

the office with a seemingly innate order-shattering orientation.²⁵ He describes presidential leadership as “an effort to resolve the disruptive consequences of executive action in the reproduction of legitimate political order,” adding that the President’s efforts to break new ground within a given historical context links the “assertion of presidential control to the disruption of past patterns of control.”²⁶ Presidents cannot help but lead in new directions by discrediting the work of their predecessors.

The institutional capacities of the office certainly enable presidents to exercise political authority in the ways described by Moe and Skowronek respectively. The implicit assumption in their work is that presidents retain choice over their ends.²⁷ Although presidents inherit a national political infrastructure full of commitments from past administrations and coalitional entities, they retain enough autonomy to fill the available choice space with the priorities of their own administrations.²⁸ As a result, presidents provide the substantive meaning to the opportunities for leadership through their choices for the nation. This is consistent with the public regard for presidential accomplishments previously mentioned: Lincoln led the nation through the Civil War and ended slavery; FDR ushered in the New Deal and the modern administrative state. Moreover, as presidents are first-movers in initiating new and clear directions for the nation, rival institutional actors have to respond to their substantive political visions. Therefore, presidents are charged with the task of steering their substantive policy commitments and priorities through an array of obstacles—finding an appropriate means to do so is at the center of their leadership efforts.²⁹

This institutional orientation towards leadership tends to push presidents to seek ways of controlling their political environment.³⁰ This strategy serves as a means of

²⁵ SKOWRONEK, *supra* note 4, at 20.

²⁶ *Id.* at 19.

²⁷ Moe’s and Skowronek’s respective analyses further shifted presidential scholarship away from behavioral accounts (which were influenced by Richard Neustadt’s *Presidential Power*, *supra* note 23), as well as psychological profiles of the occupants in office (which made systematic assessments of the Presidency more burdensome and unwieldy).

²⁸ In the famous words of James K. Polk, who stated, “I intend myself to be President,” every occupant of the office—no matter how constrained by countervailing political forces—has sufficient institutional powers and incentives to make an impact on the political scene. See Robert W. Johannsen, *Who is James K. Polk? The Enigma of our Eleventh President*, RUTHERFORD B. HAYES PRESIDENTIAL CENTER (Feb. 14, 1999), <http://www.rbhayes.org/hayes/scholarworks/display.asp?id=502>.

²⁹ See, e.g., SIDNEY M. MILKIS & MICHAEL NELSON, *THE AMERICAN PRESIDENCY* (4th ed. 2003) (surveying the institutional history of the presidency from George Washington to George W. Bush); NEUSTADT, *supra* note 23, at 29–49 (discussing Truman’s dealing with the obstacles presented by the steel mill crisis, the dismissal of General Douglas MacArthur, and the implementation of the Marshall Plan); RICHARD M. PIOUS, *THE AMERICAN PRESIDENCY* 1–9 (1979) (discussing the advantages and disadvantages of taking political action in an office that is both deeply venerated and closely scrutinized).

³⁰ The insights derived from new institutionalism tend to show that the presidential incentives associated with the building of political structures can be extended to cover the

securing their historical legacy. Presidents, like other institutional actors in government, want to exercise public authority.³¹ They are better positioned in this struggle against institutional rivals, but they still have to contend with a high number of uncertainties in governing vis-à-vis these other players. Moe's analysis of the politics of structural choice provides a useful baseline on which to build the intuition for presidential forays into constitutional politics.³² The pluralistic nature of American politics invites rival interests to engage in a struggle to control and exercise political authority, as Moe elaborates,

The struggle arises because public authority does not belong to anyone and because whoever wins hold of it has the right to make law for everyone. The winners can legitimately promote their own interests through policies and structures of their own design, and the losers can be forced by law to accept outcomes that make them absolutely worse off. The power of public authority, then, is essentially coercive and redistributive. This is why political actors value it so much—and at the same time, fear it.

. . .

. . . Political structures belong to whoever happens to be in authority, and tomorrow some other group with opposing interests may gain control. They would then become the new “owners” and have the legal right to destroy or undermine what the first group had created (without paying any compensation whatever).³³

Presidents understand that political uncertainty provides an obstacle to their leadership efforts, but more importantly, it undermines their long-term ambitions towards constructing a historical legacy. If rival institutional players, such as Congress, the Supreme Court, or oppositional political interest groups, can undo their political commitments, then their efforts at constructing a lasting legacy can be severely compromised. Presidents seek to minimize these threats whenever possible with structures that can protect their most important political commitments from the designs of rival

even more ambitious project of constructing a constitutional regime. These insights are also consistent with the main currents of historical institutionalism within presidential studies and public law.

³¹ Moe, *supra* note 16, at 358–59.

³² *Id.*; see also Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 132–79 (1999) (arguing that the “notion of the personal presidency” needed to give way to a more formal basis for understanding presidential power).

³³ Moe, *supra* note 16, at 358–59; see also JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* 9 (2011) (noting a similar phenomenon within the context of constitutions).

interests. They want to constrain the political terrain of their opponents now and in the future to the greatest extent possible. However, because the fight for public authority is ongoing and inclusive of new entrants—much like E.E. Schattschneider once described in his 1960 classic *The Semisovereign People*³⁴—the task of building structures that securely insulate their agenda from political opponents is arduous, timely, and costly. Even the best political structures are subject to change over time as personalities and circumstances tear at their edges. But presidents will continue to engage in such ambitious political endeavors because it promises the best option for preserving their political commitments well into the future.

In fashioning structures that protect their programs from the uncertainties associated with public authority, presidents will reduce both their “enemies’ opportunities for future control” and their own, but Moe explains that “this is often a reasonable price to pay, given the alternative.”³⁵ For Moe, standard principal-agent models of delegation provide the types of trade-offs made between executive control and administrative expertise, rules, and discretion.³⁶ Therefore, he reinterprets this tactic as “really not giving up control,” but rather as exercising “a greater measure of it *ex ante*, through insulated structures that, once locked in, predispose the agency to do the right things.”³⁷ Although Moe discusses these actions through the President’s struggles over bureaucratic control, his insights are equally applicable to what occurs on the constitutional level.

II. THE PURSUIT AND CONSTRUCTION OF A CONSTITUTIONAL REGIME

The idea of “locking-in” political commitments over time has a range of implications when appropriated to the realm of constitutional politics. Political actors will want to protect their legacies or commitments whenever possible by the strongest means available. Presidents do this routinely by politicizing positions of power inside the federal bureaucracy with reliable ideological allies, while centralizing the centers of decision-making authority through trusted loyalists.³⁸ In other words, presidents build political structures designed to achieve a set of desired ends. The same principles apply to constitutional politics. The only difference here is that the President

³⁴ See generally E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE* (1960) (discussing the continual process of change in and dynamic nature of American politics).

³⁵ Moe, *supra* note 16, at 359.

³⁶ See, e.g., Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 758–61 (1984) (comparing the level of delegation possible with trash collection to the executive control necessary over policing); see also PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION AND MANAGEMENT* (1992); J. Bendor et al., *Theories of Delegation*, 4 ANN. REV. POL. SCI. 235 (2001) (applying game theory to legislative-executive and intra-institutional delegation).

³⁷ Moe, *supra* note 16, at 359–60.

³⁸ *Id.* at 379.

aims for the strongest form of security available in American politics: constitutional entrenchment. This means that the President's political ends will be secured through the Constitution by making them part of the nation's higher law, either through amendment (or a series of amendments), constitutional constructions, or judicial interpretations. Once political preferences gain constitutional recognition by institutional actors—especially constitutional protection by and from the judiciary—much of the *political* becomes *legal*. Therefore, the Constitution protects political preferences by recognizing them as something akin to *higher law*. These constitutional innovations may be subject to change at some future point, but the obstacles to changing such baselines are considerable. For this reason, these ambitious attempts to lock-in political commitments through constitutionalism are very rare, but once they are triggered and implemented, they become an entrenched part of the constitutional landscape.³⁹ The typical statute, code, or regulation passed by Congress does not achieve this degree of protection because it can be modified or even eradicated completely by the next set of governing officials. Neither does the lesser authority of a president's executive orders, which can be reversed by the next administration. And even the concept of a legislative “super-statute,” proposed by John Ferejohn and William Eskridge—requiring more than a mere majority to change certain laws—fails to provide the heightened level of protection that the constitutionalization strategy discussed herein offers.⁴⁰

Constitutionalization, then, should be understood as the institutionalization of political ends by incorporating them as part of the constitutional law and in certain cases, the construction of a new constitutional regime. If successfully constructed, constitutional regimes provide presidents with the ultimate way of “locking-in” political commitments from the designs of rival political actors, institutions, or future coalitions. Bruce Ackerman defines a constitutional regime as “the matrix of institutional relationships and fundamental values that are usually taken as the constitutional baseline in normal political life.”⁴¹ Likewise, Keith Whittington writes, “These webs of institutional, ideological, and partisan commitments form a basic context within which presidents operate, help structure their strategic options, and provide a first cut on the set of constraints and opportunities facing a given political leader.”⁴² John Ferejohn has applied this concept to a number of different contexts, recognizing its utility as

³⁹ Because the Constitution defines the political bounds of the American polity—a notion inherent in the very idea of constitutionalism—the newly formed constitutional baselines define and limit the operational norms of political life.

⁴⁰ For a thorough and insightful discussion of super-statutes, see William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001). In this law review article, Eskridge and Ferejohn characterize a super-statute as an ordinary statute whose effort “to establish a new normative or institutional framework . . . ‘stick[s]’ in the public culture” and has “a broad effect on the law.” *Id.* at 1216.

⁴¹ 1 ACKERMAN, *supra* note 1, at 59.

⁴² KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 22 (2007).

a background condition in describing judicial “interpretive regimes.”⁴³ Constitutional regimes realign constitutional baselines in much the same way that political party realignments rearrange partisan preferences, only on a much grander scale and at a deeper foundational level.⁴⁴ Once a constitutional regime is in place, it forms the dominant understanding of the Constitution—or its constitutional baseline—for a sustained period of time, constraining the policy options available to political players.⁴⁵ In other words, constitutional regimes form the playing field—the applicable dimensions, boundaries, and yardsticks—from which the game of American politics can be played.

Because the Constitution is susceptible to political interpretation in terms of its substantive meaning, emphasis, and points of inflection, presidents seeking to ensure their agenda for the foreseeable future—given the right set of circumstances—can attempt to manipulate it. Constitutional regimes are ambitious projects constructed by presidents, who by the nature of their office, attempt to politically define these constitutional boundaries with their policy priorities. In other words, a well-positioned president can best protect his political agenda by constitutionalizing it in whole or in part. Both the incentives and payoffs are higher for a president seeking to constitutionalize his political vision beyond the policy level associated with normal politics. Unlike bureaucratic structures, which tend to change gradually with every new administration, constitutional regimes provide far greater security for presidents in terms of durability and clarity.⁴⁶ Equally important, they speak to a president’s historical legacy in ways that no other structure in government can. This is why the idea of institutionalizing his political commitments through the Constitution tends to be too enticing for any president to resist. Once a president can equate his political vision with the constitutional regime itself, he has achieved the ultimate end available to him in

⁴³ See, e.g., John Ferejohn, *Law, Legislation, and Positive Political Theory*, in *MODERN POLITICAL ECONOMY* 191, 205–07 (Jeffrey S. Banks & Eric A. Hanushek eds., 1995); see also William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in *THE RULE OF LAW* 265, 268 (Ian Shapiro ed., 1994).

⁴⁴ Classic examples of this realignment subgenre include: DAVID W. BRADY, *CRITICAL ELECTIONS AND CONGRESSIONAL POLICY MAKING* (1988); WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 10 (1970); JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM* (1973); V. O. Key, Jr., *A Theory of Critical Elections*, 17 *J. POL.* 3 (1955). For a sustained critique of the realignment thesis, see DAVID R. MAYHEW, *ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE* (2002).

⁴⁵ Constitutional regimes are functionally synonymous in practice, for all intents and purposes, with the idea of constitutional baselines.

⁴⁶ One of the problems that all modern presidents confront is the possibility of having a bureaucracy that tends to reflect the political attitudes and preferences of the agencies they comprise rather than presidential directives. See Kenneth John Meier & Lloyd G. Nigro, *Representative Bureaucracy and Policy Preferences: A Study in the Attitudes of Federal Executives*, 36 *PUB. ADMIN. REV.* 458 (1976) (arguing that agency affiliation is stronger than social origins in predicting policy attitudes).

American politics: preserving his political vision well beyond his own presidency. At the same time, he will have constrained the political options available to his immediate successors and oppositional interests.⁴⁷

Unfortunately for most presidents, the construction of a constitutional regime comprises the most difficult—and therefore one of the most rare—achievements in American politics due to its extensive nature and its foundational impact. Presidents will attempt to constitutionalize a given set of political commitments only under the most fortuitous political conditions. Most presidents never get the opportunity to even consider the construction of a constitutional regime; the chances to equate substantive portions of their political agenda with constitutional law are few and far between. Presidents tend to think strategically about constitutional commitments, but will only do so in an authoritative manner when given an opportunity.

It should be noted that presidents have an array of powers available to them that they can employ within constitutional politics, yet these do not relate to the strategy of constitutionalization noted here. For example, presidents can lend their public support for proposed amendments to the Constitution. Presidents can appoint Justices to the Supreme Court and judges to the lower federal courts. They can veto legislation. They can issue presidential pardons. They can send American forces into battle in their role as Commander-in-Chief. Likewise, they can declare neutrality, executive privilege, and on occasion, can even exercise something approaching an effective prerogative power, particularly during times of crisis or national emergency.⁴⁸ Presidents can also take unilateral actions at their own discretion where the absence of legal directives enables them to proceed in ways that can significantly extend the reach of normal executive authority.⁴⁹ Certainly, these all count as presidential forays into constitutional politics because they involve the use of formal constitutional authority towards the attainment of political ends. They also gain notice and recognition from other political actors and institutions as constitutional maneuvers. Taken alone, however, they are not included in the idea of constitutionalization provided here other than as a set of formal powers available to the president in his hopes of institutionalizing his political agenda. The fact that the President employs formal authority—under

⁴⁷ It will also constrain the federal bureaucracy to some extent. However, there are difficulties here over the long run due to the administrative expertise, longevity, and political preferences and attitudes that civil servants tend to exercise. This is why most presidents tend to employ Terry Moe's dual strategy of politicizing and centralizing the bureaucracy as a means of reducing agency costs. *See Moe, supra* note 16, at 365–67 (comparing the organizational structures of the Presidency to those of Congress, which “minimize the transaction costs of political exchange”).

⁴⁸ *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* 3–21 (2008) (discussing the philosophical foundations of a unitary theory of executive power and its development over time, as well as other attendant powers that American presidents have wielded with regards to their role as executives).

⁴⁹ Moe, *supra* note 16, at 366 (referring here to the idea of a president's “residual decision rights” derived from economists Grossman and Hart in 1986).

Article II or otherwise—does not necessarily mean that he is constitutionalizing his political vision. The President can use formal, as well as informal powers, to constitutionalize his agenda. The President's ultimate ambitions and concerted actions towards constructing a distinctive constitutional regime matter more here than the specific means used to achieve them.

III. CONSTITUTIONAL TIME AND RECONSTRUCTIVE PRESIDENTS

One of the main functions of the U.S. Constitution is that it establishes a foundational baseline setting the rule of law in place, which simultaneously lowers the stakes of politics within the regime. Because constitutional baselines do not change frequently, this function of stability serves as one of its most attractive features. However, there are times when the Constitution adapts to historical exigencies that threaten its viability whether in fact or in popular perception. Therefore, the Constitution only invites change on an *as needed* basis.⁵⁰ Very few presidents find themselves even able to consider the construction of a constitutional regime. Most presidents encounter a normal constitutional baseline upon taking office in which the regime is fairly stable and any constitutional questions subside to the background as secondary preoccupations at best.⁵¹ Constitutional questions do not take center stage for most presidents, as the public tends to relate their performance to national policy goals associated with the economy, foreign affairs, and perhaps to a lesser extent, social welfare and cultural issues. These immediate political concerns are more manageable and more apparent to the public, even though the full impact of a president's handling of the economy or foreign policy may not be assessable until years later. Nevertheless, presidents get credit for their leadership skills and even the appearance of action in these policy areas may be an effective substitute for actual policy at times—the same way that members of Congress attempt to claim credit for simply taking a position on an issue regardless of its actual effects on policy outcomes.⁵² Presidents can adopt more focused strategies for these immediate political concerns than they can for the more ambitious undertakings associated with constitutional reconstructions. Presidents tend to be strategic calculators of interest even when they are ideologically committed to forging new directions for the nation. In other words, they will make strategic calculations that attempt to effectuate their long-term ambitions. However,

⁵⁰ Here, the term “as needed” refers to the public perception at the time, whether formed authentically or constructed by elected representatives, not necessarily in some ontological sense that the Constitution actually needs to be changed.

⁵¹ As a normative matter, this is a beneficial aspect of American constitutionalism because it speaks to the broad acceptance and operation of the rule of law. As foundational law, the U.S. Constitution provides a reliable marker that individuals can count on to order their future actions and assess prospective policies from lawmakers.

⁵² David Mayhew draws an explicit legislative parallel of this strategy by demonstrating the ability of members of Congress to take credit for simply taking a position on an issue, which may earn them political capital from their constituents—perhaps even as much as if they actually fixed the problems. See MAYHEW, *supra* note 21, at 61–73.

these tend to fall short of rearranging constitutional baselines. For example, Presidents Theodore Roosevelt and Lyndon Johnson, respectively, forged new directions within their time in office without ever seriously challenging the established constitutional regime they each inherited.⁵³ Although they both wielded the powers of the presidency in a strong (and often quite ideological) manner, neither one of them had the opportunity to construct a new constitutional regime different from the one that Abraham Lincoln constructed (for Theodore Roosevelt's time in office) nor that which Franklin Roosevelt constructed (for Lyndon Johnson's time in office). Aside from the fact that Lyndon Johnson (and perhaps Theodore Roosevelt) may not have had the sufficient inclination to change this direction, neither president would have had the authority to do so even if he had the requisite desire.⁵⁴

The difficulty associated with engaging in constitutional politics highlights the fact that while presidents have autonomy in office over policy and administrative decisions, there are contextual limits on their ability to govern in a truly transformative capacity. Standard rational choice incentives inform presidential objectives to the point that most would want to constitutionalize their political agenda if given the opportunity. Their historical legacy would gain the ultimate form of security available in American politics.⁵⁵ However, they are limited in discrete ways by their own historical circumstances, and therefore do not waste time or resources engaging in fruitless political endeavors.⁵⁶ It is not in their self-interest to do so, especially when more attainable goals are well within reach.

On rare occasion, the constitutional space will open sufficiently enough for the president to fill it with his substantive vision, but the circumstances have to be nearly ideal. The Constitution does not call upon presidents to rearrange its baselines arbitrarily; it only becomes contested under the most extraordinary of circumstances.⁵⁷

⁵³ See *infra* notes 211–16 and accompanying text.

⁵⁴ Theodore Roosevelt's case is certainly arguable and susceptible to interpretation here since his Progressive vision certainly clashed with Lincoln's classical liberalism on various levels. However, Stephen Skowronek treats him as an articulation president within his presidential typology of leadership types, which means that he would have been leading Lincoln's basic Republican commitments through new contexts and changing circumstances. The "articulation president" within Skowronek's model is described as the orthodox innovator who attempts to extend the policies of the reconstruction into the politics of the day. See SKOWRONEK, *supra* note 4, at 232. Because they do not retain the warrants for reconstructing the regime, they must operate within constrained political environments. Skowronek explicitly describes Theodore Roosevelt in this context and devotes a chapter of his book in doing so. See *id.* at 228–59. But see GEORGE THOMAS, *THE MADISONIAN CONSTITUTION* 65–93 (2008) (describing Roosevelt's draw on Lincoln's example as stemming from a more Hamiltonian view of the Constitution in line with John Marshall's "notion of 'inherent power'").

⁵⁵ See *supra* note 46 and accompanying text.

⁵⁶ The scarcity of political capital confines the actions of a unitary actor like the President.

⁵⁷ This has generally been considered a positive aspect of American constitutionalism, as unstable or dysfunctional constitutional regimes typically need to be changed more frequently than a properly functioning one.

It is constitutional time that leads presidents—and the public—to question the viability of the system in place. They view the constitutional baselines in place as inadequate for the times and in need of substantive reform. The threshold for reform, however, surpasses the call for mere legislation and instead shifts towards a more fundamental reconsideration of first principles. The questions presidents ask during such periods run along the following lines: Is the Constitution able to address the changed circumstances in the nation? Does the Constitution need to be changed or merely reinterpreted? What parts of the Constitution need to be emphasized or recovered at this stage? How do we save the Constitution from its subversion by our predecessors, future successors, and political opponents? How do we recover the true principles of the Constitution? These types of questions assume the inability of the constitutional regime in place to handle the newly changed contexts, and therefore implicate the need for some kind of foundational reform. These questions occur during constitutional time: at moments of unsettled understandings as the historical context opens new interstices for the possible construction of constitutional meaning. In other words, constitutional time offers an opportunity for an element of creativity in construing constitutional meaning.⁵⁸ As a result, the reforms presidents invoke often push against the outer boundaries of the Constitution or even exceed it, as the amendment process explicitly recognizes.⁵⁹

A. Constitutional Time and the New Order

In *The Politics Presidents Make*, Stephen Skowronek introduced the idea of political time through the concept of reconstructive authority, which matches presidential ambitions with ideal timing.⁶⁰ Presidential authority is construed from the interaction of formal power and historical context, meaning that it is not fixed but dependent on exogenous factors beyond a president's immediate control.⁶¹ Presidential leadership is influenced by a president's order within the political regime, favoring some presidents' political authority while limiting others.⁶² In other words, something

⁵⁸ See discussion *infra* Part III.A.

⁵⁹ Some legal scholars have posited that the Constitution offers other avenues apart from the Constitution's Article V process for amendment as possible alternatives. The argument here posits that Article V is not the exclusive means of amending the Constitution, as certain landmark Supreme Court cases can effectuate the same sorts of changes. Although this theory is controversial, it does have its share of supporters and may gain some empirical support from the New Deal example, where the Supreme Court's decisions marked a substantive change that affected the development of constitutional law significantly to the present. See, e.g., 1 ACKERMAN, *supra* note 1, at 47–52 (comparing the Supreme Court's shifting view of the Constitution during the New Deal to the more direct lawmaking that took place during Reconstruction).

⁶⁰ See SKOWRONEK, *supra* note 4, at 36.

⁶¹ See *id.*

⁶² See *id.* at 33–41 (identifying four political climates that tend to lend incoming presidents very different degrees of constraint).

analogous to the idea that “not all presidents take the same exam while in office” is at work. Presidents who are conveniently positioned to wield reconstructive authority come into office when the warrants for the prior regime are weak or collapsing due to some combination of newly changed political conditions or coalitional disintegration caused by a triggering event.⁶³

Reconstructive presidents amplify their power to its furthest reaches by accentuating their national policy commitments when the old regime’s vision has been discredited.⁶⁴ Under certain conditions, it is possible for presidents to shatter the remaining vestiges of the discredited political regime by “articulating the foundations of the new one.”⁶⁵ Since reconstructive presidents’ enhanced political authority comes at the expense of their predecessors in office, they maintain an inverse—and often adverse—relationship to the prior political regime. The legitimacy of the reconstructive stance is not necessarily due to the superiority of new presidents’ substantive vision, but rather is due to their oppositional relation to the status quo (as represented by the prior regime).⁶⁶ Therefore, presidents’ natural inclination to lead the nation in a new—and quite different—direction is significantly enhanced and broadened during such periods.

Reconstructive presidents are focused upon the task of establishing their own substantive vision of the constitutional order.⁶⁷ This is inherent in their leadership task carried out to its maximum aspirations. Reconstructive presidents equate their political vision with the higher law, and therefore *legalize* the *political* by promoting a substantive political interpretation of the Constitution. Presidents are institutionally advantaged in this endeavor by the nature and orientation of the office, especially when historical context provides them with the added institutional resources at the far edges of their authority, including the rarely invoked claims of departmentalism.⁶⁸ Alexis de Tocqueville made a somewhat analogous observation about this in the 1830s, noting, “There is almost no political question in the United States that is not resolved sooner or later into a judicial question. Hence the obligation under which the parties

⁶³ *Id.* at 36–39.

⁶⁴ Although Skowronek and many other presidential scholars proceed from the assumption that the modern presidency—especially under the stronger presidents—has drifted substantially from the Founders’ original intentions, I argue that the reconstructive stance was an intentional product of the constitutional design, not a random development that deviated from the modest origins of the presidency. See Richard Alexander Izquierdo, *The American Presidency and the Logic of Constitutional Renewal: Pricing in Institutions and Historical Context from the Beginning*, 28 J.L. & POL. 273, 273–74 (2013).

⁶⁵ WHITTINGTON, *supra* note 42, at 23.

⁶⁶ See, e.g., GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 20–47* (2007) (noting that President Jackson was antagonistic towards the Native tribes forcing them to move westward due to the confluence of his political interests and constitutional vision).

⁶⁷ WHITTINGTON, *supra* note 42, at 53.

⁶⁸ See discussion *infra* Part III.B.

find themselves in their daily polemics to borrow from the ideas and language of justice.”⁶⁹ Their quest to construct a lasting historical legacy against future successors and political rivals provides insight as to why presidents would even consider engaging in such ambitious, risky endeavors in the first place.⁷⁰

Presidents who were able to create and maintain the most extensive and durable regimes were the ones who faced the greatest threats to the regime while in office: the initial years following the American Founding, the American Civil War, and the Great Depression. These three periods arguably qualify as the most extraordinary times in American history, and therefore serve as the most far-reaching examples of extraordinary politics experienced by any president in office.⁷¹ The presidencies of George Washington, Abraham Lincoln, and Franklin Roosevelt—having presided over these three periods, respectively—constructed the most durable constitutional

⁶⁹ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 257–58 (Harvey C. Mansfield & Delba Winthrop eds., trans., 2000).

⁷⁰ Accounting for the purpose and incentive structure of the executive in relation to extraordinary historical triggers provides the necessary foundations for accessing the President’s role in constitutional change and renewal.

⁷¹ In his three-volume series, Bruce Ackerman treats the American Founding, Reconstruction, the Great Depression, and more recently, the Civil Rights Movement, as the only significant periods in American history where the nation experienced a constitutional moment signaling a deliberate shift in foundational priorities and higher lawmaking. 1 ACKERMAN, *supra* note 1, at 58–59; *see also* 2 ACKERMAN, *supra* note 8; 3 ACKERMAN, *supra* note 3. While Ackerman’s approach is useful, it is modified here in two ways. Firstly, two of the three constitutional moments he addresses are emphasized differently. Rather than dwelling on the politics of the Constitutional Convention and the possible illegalities of the original Constitution’s adoption, this Article focuses on the political entrenchment of the first constitutional regime by the Washington Administration. The move away from Madison and towards Washington here is consistent with the emphasis on the political dimensions of constitutional construction and the maintenance undertaken by reconstructive presidents throughout history. In discussing the American Civil War, Ackerman incorporates both Lincoln’s presidential leadership in pushing through the Thirteenth Amendment outlawing slavery, as well as the radical Republicans’ congressional push through questionable obedience—or more likely disobedience—of constitutional formalities in ratifying the Fourteenth Amendment amidst obstacles posed by a recalcitrant President Johnson and a hostile former Confederacy. 2 ACKERMAN, *supra* note 8, at 120–23. The focus here will be on Lincoln’s punctuation of a Republican constitutional vision that he considered a completion of the Founders’ original hopes for the Republic. The treatment of the constitutional moment during the Great Depression here will emphasize a similar series of historical events as Ackerman’s. Secondly, the analysis here will include those historical presidencies that Ackerman briefly addresses as “failed constitutional moments” or insufficient constitutional transformations such as the presidencies of Thomas Jefferson, Andrew Jackson, and Ronald Reagan. 1 ACKERMAN, *supra* note 1, at 108–13. It should be noted that Ackerman seems to reconsider some parts of Jefferson’s struggle in his book *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 224 (2005) (referencing “the Jeffersonian revolution in constitutional law”). The choice of historical events and triggers is very important to the level of analysis here because it contributes to the understanding of the continuum of constitutional politics.

regimes through historical opportunities that required their foundational imprint. The regimes they constructed were authentically theirs in that each of these presidents chose the substantive meaning of the constitutional moment they inherited. These presidents managed to secure their respective constitutional visions well into the future—and more securely than any other presidents in American history. However, their executions were aided considerably by constitutional time. If Presidents Washington, Lincoln, and Roosevelt were removed from their immediate political environment, the extent of their constitutional legacy would be diminished proportionally as well.

Once presidents establish a new political regime, the factious nature of American politics starts to weaken them over time, as changing events, demographics, and oppositional interests tear at its edges.⁷² For example, even the New Deal coalition, which dominated the twentieth century in American politics, showed signs of strain as early as the 1950s during the Eisenhower years when some parts of the “solid South” voted Republican at the presidential level for the first time in decades.⁷³ These pressures only intensified through the 1960s and 1970s as the pieces of the once dominant Democratic coalition began to disintegrate over the cultural and social struggles involving Civil Rights and the Vietnam War, which coincided with the nation’s growing dissatisfaction towards the perceived excesses of the welfare state.⁷⁴ By the time Jimmy Carter was able to cobble together a bare majority from the last remnants of what was left of the New Deal coalition, a confluence of economic and foreign policy events converged to end its long-heralded reign with the election of Ronald Reagan in 1980.⁷⁵ The New Deal coalition, which once included the broadest

⁷² See, SKOWRONEK, *supra* note 4, at 50 (“As a rule, successive regime affiliates will send ever more serious sectarian schisms through the ranks.”).

⁷³ See *Historical Presidential Elections*, 270 TO WIN, <http://www.27towin.com/historical-presidential-elections/> (last visited May 1, 2015) (showing that in the 1950s, Louisiana voted Republican for the first time in eighty years, and Kentucky, Tennessee, Texas, and Virginia voted Republican for the first time in about thirty years).

⁷⁴ SKOWRONEK, *supra* note 4, at 361.

⁷⁵ The demise of the New Deal coalition remains a debated topic among political scientists. There are some who claim that it ended in 1968 with the election of Richard Nixon. See, e.g., MILKIS & NELSON, *supra* note 29, at 326–29. However, Nixon’s victory only showed that a “safe” moderate Republican could be elected in a year when the Democrats were badly split and dispirited—and even then, with only a narrow victory in a three-way race. *Id.* at 326–27 (discussing Democratic presidential candidate Hubert Humphrey’s weakness). Nixon’s victory did not spillover to Congress as both the House and Senate remained in the firm control of the Democratic Party. *Id.* Moreover, the effects of Watergate gave the Democrats some additional “borrowed time” in the 1970s, as it enabled them to gain a narrow presidential victory in 1976 after their landslide defeat in 1972 (in which they managed to win only one state, Massachusetts). See *id.* at 333–41 (discussing the effects of Watergate, Gerald Ford’s tepid popularity, and Jimmy Carter’s presidency). It seems that 1980 signaled something different in character from 1968, albeit far less conclusively than Franklin Roosevelt’s sweeping realignment in the 1930s. When Ronald Reagan was elected president, he won a majority in a three-way race and an electoral landslide over an incumbent president. *Presidential Election 1980*, ROPER CENTER PUB.

collection of voters from racial segregationists in the South to committed socialists in the cities—and many working class and middle class voters in between—could not keep its structure intact as its conflicting constituencies drifted apart over time.⁷⁶ Ronald Reagan represented the rhetorical repudiation of the New Deal and consciously attempted to incorporate the style of Franklin Roosevelt towards Conservative political ends.⁷⁷ Yet Reagan's relation to constitutional politics bears a mixed and rather incomplete legacy, as some scholars have noted that his administration's "emphasis on presidential politics and executive administration relegated his administration to the task of managing—even reinforcing—the state apparatus it was committed to dismantling."⁷⁸ The reconstructive stance is a necessary but not sufficient condition for the construction of a new constitutional regime.

Constitutionalization is a political phenomenon even more rare than the cyclical appearance of a political realignment because it attempts to rearrange the foundational commitments of the regime rather than just the political direction of the nation.⁷⁹ The

OPINION ARCHIVES, http://www.ropercenter.uconn.edu/elections/presidential_election_1980.html (last visited May 1, 2015). Equally important, he carried the Senate for the Republicans for the first time in twenty-eight years and made considerable gains in the House of Representatives. 2 ACKERMAN, *supra* note 8, at 390. Unlike Nixon, however, Reagan challenged the foundations of the New Deal much the same way that Roosevelt challenged the foundations of the Republican regime in the 1930s. *Id.* at 389–90. As Stanford University political scientist David W. Brady would show, the Republicans most likely failed to carry the House of Representatives in Reagan's 1984 re-election with forty-nine states because of the Democrats' incumbency advantage. *See* BRADY, *supra* note 44, at 177–78. Yet the working ideological House majority that Reagan gained in 1980—in addition to the Republican Senate majority—enabled Reagan enough political space to change the nation's political terrain in a way that Nixon could not. It should be noted that Reagan inherited a political environment in which partisan affiliation was significantly weaker than it was earlier in the century, thus making partisan shifts more difficult than it may have been. *See* MILKIS & NELSON, *supra* note 29, at 327. Moreover, the triggering events that led to Reagan's election were milder than those that led to Roosevelt's. *See* 2 ACKERMAN, *supra* note 8, at 391. While the dispute to the ultimate political meaning of the 1980 presidential election will continue, the analysis here will treat it significantly different from the 1968 presidential election.

⁷⁶ *See generally* MICHAEL BARONE, *OUR COUNTRY: THE SHAPING OF AMERICA FROM ROOSEVELT TO REAGAN* 383–611 (1990) (discussing the cultural cleavages and tensions that began to tear apart the New Deal Coalition from the 1960s to the 1980s).

⁷⁷ Skowronek considers Reagan the most recent reconstructive president, who as a result of political time, shared more in common with presidents Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt than he did with Gerald Ford and Jimmy Carter before him, or George H.W. Bush and Bill Clinton after him. *See* SKOWRONEK, *supra* note 4, at 410–17.

⁷⁸ MARC LANDY & SIDNEY M. MILKIS, *PRESIDENTIAL GREATNESS* 225 (2000); *see also* 2 ACKERMAN, *supra* note 8, at 397–98 (arguing that the Supreme Court's inability to overrule *Roe* frustrated President Reagan's attempt to overturn the New Deal regime).

⁷⁹ Skowronek's book only focused on the President's leadership opportunities in terms of partisan coalition-building within new political regimes; his emphasis was on political regimes,

difference is a matter of degree, magnitude, and scope; therefore, constitutional time differs in degree, magnitude, and scope from Skowronek's political time.⁸⁰ Accounting for the purpose and incentive structure of the Executive in relation to extraordinary historical triggers provides the necessary foundations for accessing the President's role in constitutional change and renewal. It is necessary to note that reconstructive presidents are relatively rare in American politics, as only Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and Ronald Reagan are described as reconstructive presidents within Skowronek's typology.⁸¹ Some years later, political scientists Morris Fiorina and Paul Peterson would add George Washington to Skowronek's model of reconstructive presidents by juxtaposing Washington's presidency against the prior political regime under the Articles of Confederation.⁸²

B. Executing the Constitution

The Constitution is a dynamic document. Reconstructive presidents tend to view the Constitution this way, which explains why they attempt to construct enduring regimes that can speak to their legacy whenever given an opportunity.⁸³ They attempt to build constitutional regimes through a number of methods, including the controversial invocation of departmentalism, constitutional constructions, and creations. These elaborate, extend, or modify constitutional meaning. Either the executive or legislative

not constitutional regimes. See SKOWRONEK, *supra* note 4, at 3–4. Skowronek did not address the possible constitutional implications of his work except as a background condition for exploring reconstructive possibilities. See *generally id.* Yet the strongest presidential ambitions are foundational, and therefore, the Constitution must enter the picture as both a basic resource and a constraint. Skowronek's insights, like Moe's, are directly applicable for understanding some of the ways in which presidents interpret their own authority, especially the ones who do so under fortuitous historical conditions. Moreover, an extension of Skowronek's political time idea to the constitutional realm reestablishes the inextricable link between institutions and historical context imbedded in executive power, dating back to the Founders' creation of the Article II presidency.

⁸⁰ See, e.g., MAGLIOCCA, *supra* note 66, at 2–14 (arguing that “the evolution of constitutional attitudes” is largely determined by “regular clashes between ‘constitutional generations’”).

⁸¹ See SKOWRONEK, *supra* note 4, at 33.

⁸² See MORRIS P. FIORINA ET AL., *THE NEW AMERICAN DEMOCRACY* 381 (5th ed. 2007). In their chart of reconstructive and disjunctive leaders, Fiorina and Peterson had the option of replacing the Articles of Confederation as the “disjunctive leader” with any of the actual presidents under the Articles. The office was so weak that one of its more famous occupants, John Hancock, never even bothered to accept the position. Again, this tends to show the type of office that the new presidency under the 1787 Constitution was designed to effectuate, particularly considering the struggles of the 1780s.

⁸³ If Alexander Hamilton's expectation in *Federalist* 78 that judges would merely find the law and apply it to cases seems insufficient as an empirical explanation, it is because American constitutionalism has been given content by political actors. See *THE FEDERALIST* NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

branches can engage in these actions, but it is usually presidents who tend to initiate them with an eye towards the new regime.⁸⁴ Collectively, they enable scholars to get beyond the idea of the Constitution as constitutional law, and to instead acknowledge that specific constitutional meaning emerges through a synthesis of legal doctrines, institutional practices, normative sensibilities, and political context.⁸⁵

1. Departmentalism

The theory and practice of departmentalism or coordinate review refers to the idea that each branch can independently interpret the Constitution for itself, and cannot be bound by the interpretations of a rival branch, including the judiciary.⁸⁶ This theory of interpretative plurality allows the natural tension between the branches to play out, opposing the notion of judicial supremacy, understood as the idea that the judicial branch has the final, binding determination on matters requiring constitutional interpretation. As a result, presidents making departmentalist claims have asserted the authority to ignore the Supreme Court's constitutional reasoning and have acted upon their own independent judgments.⁸⁷ These reconstructive leaders have been able to challenge the Court's substantive vision of the Constitution, tending to support the notion that the presidential invocation of departmentalism is implicit in the reconstructive stance: it functions as a means available to achieve constitutional ends.⁸⁸

⁸⁴ The obvious exception would be the Republican Congress's support for the Fourteenth Amendment in 1868 over Democratic president Andrew Johnson's objections to it. However, the substantive provisions of the amendment were thoroughly consistent with Lincoln's constitutional vision. See THOMAS, *supra* note 54, at 39–44.

⁸⁵ See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 2–3 (1999).

⁸⁶ See ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 23–51 (1971) (examining the executive-judicial conflicts arising under Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt); Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1422 (1999) (arguing that the “essence of the Departmentalist position” is that the Constitution does not give “either the Courts or any other branch of the federal government the power to enforce or interpret the Constitution”); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 905–06 (1989–90) (examining the constitutionality and scope of the executive branch's power to interpret the law); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 83 (1993) (arguing that the “premises of executive branch interpretive autonomy and of judicial supremacy are . . . irreconcilable” and that they may both represent a “pure legal-realist concession made on grounds of pragmatism”); see also SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 9–53 (1988) (surveying the range of reverential attitudes toward the Constitution among several Founders).

⁸⁷ The list of presidents who have adopted such a stance is a familiar one, and includes Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt. SCIGLIANO, *supra* note 86, at 23.

⁸⁸ In fact, all reconstructive presidents have been departmentalists, as the foundational nature of the changes they have sought required extraordinary means to effectuate them. See

In constructing a particular Madisonian approach to the Constitution, George Thomas argues that conflicting interpretations foster the nation's positive constitutional commitments and "are thus fundamental in bringing the Constitution to life and are different, in kind, from the Court's."⁸⁹

During constitutional time, constitutional space becomes available to new interpretations that reflect the changed political conditions that political actors must address. The judiciary's skills at technical interpretations of the law, which involve routine, incremental extensions of logic, seem outdated and inappropriate during such periods.⁹⁰ Keith Whittington argues that the Court's claims to exclusive interpretive authority seem misplaced when the national focus turns to the "'constitutional baseline' itself," as judicial supremacy becomes more tenuous whenever political actors can make strong claims to read the Constitution for themselves.⁹¹ Reconstructive presidents battle the Court for constitutional space, and in these special instances, they tend to prevail. During these extraordinary periods, the President displaces the Court as the nation's dominant constitutional actor.⁹² Thus, there exists an inverse institutional relationship between the executive and judicial branches. The Court's authority to settle disputed constitutional meaning wanes as the President's authority to reconstruct the inherited constitutional order heightens.⁹³

Reconstructive presidents do not seek to challenge the Supreme Court or any other institution per se during constitutional time. The dynamics at work between the presidency and judiciary go beyond the given institutional conflicts imbedded in the notion that ambition will counteract ambition in *Federalist 51*.⁹⁴ Instead, presidents seek to occupy the available constitutional space because they want to ensure that their preferred constitutional vision sustains itself well past their time in office as their enduring legacy. Presidents tend to politicize constitutional meaning and challenge the Supreme Court's authority to determine what the law is by promoting a contested view of the Constitution.⁹⁵ Whittington discusses this phenomenon in some detail by noting,

Whereas the judiciary usually emphasizes the constitutional constraints on government power, reconstructive presidents draw inspiration from the Constitution for their positive vision of how

WHITTINGTON, *supra* note 42, at 53 ("Departmentalism is implicit in the reconstructive posture . . .").

⁸⁹ THOMAS, *supra* note 54, at 21.

⁹⁰ Similarly, Whittington notes that the "assertion of 'judicial omniscience in the interpretation of the Constitution' will itself seem quite arrogant and shocking to political leaders who sought and gained power in order to advance radically different constitutional understandings."

WHITTINGTON, *supra* note 42, at 52.

⁹¹ *Id.* at 22.

⁹² *Id.* at 15–17.

⁹³ *Id.* at 18–21.

⁹⁴ THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

⁹⁵ WHITTINGTON, *supra* note 42, at 76–81.

political power should be used. In presidential hands, the Constitution becomes an ideal to be realized in political practice rather than a set of rules that hamper political action. The symbol of the Constitution is employed to legitimate presidential actions. The policies of the administration are portrayed as not merely consistent with but as *products of* the Constitution. As architects of fundamental political change, reconstructive presidents appeal to the Constitution to help legitimate their enterprise. The substantive vision of the Constitution that these presidents offer is explicitly different from the interpretations and practices of their immediate predecessors, but these presidents insist that theirs is an effort to save the Constitution from the mishandling of their immediate predecessors and the Court itself.⁹⁶

Presidents maintain their focus on the success of their substantive constitutional vision. The rare opportunity to *constitutionalize* substantive political ends explains much more of the dynamics at work during these transitional periods than any rival institutional hostility or distrust.⁹⁷ Presidents will want to pursue their opportunities for constitutionalizing their political agenda given a particular set of circumstances, and so the political opening or constitutional space provided by the circumstances ultimately dictates constitutional success.⁹⁸ When faced with the task of constructing a new

⁹⁶ *Id.* at 54.

⁹⁷ *Id.* (arguing that Thomas Jefferson was motivated primarily by the fear that “the Constitution was being strangled in its cradle,” not by political rivalry).

⁹⁸ Institutional scholars should not be surprised that constitutional success has more to do with constitutional time than it does with presidential skill. The structure and design of the Constitution link and situate presidents this way. Presidents are naturally drawn to the lure of the constitutional endeavor by the nature of the office—its incentives but also its structural design within the separation of powers. Presidents want to *constitutionalize* their priorities and some fortunate presidents—aided by history—actually get the opportunity to do so. What is perhaps counterintuitive involves the other half of this equation. While the constitutional space opened by historical events crowds out the space for autonomous action by reconstructive presidents, the reverse is true for presidents with a more limited constitutional opening. Presidents constrained by contextual factors must exercise more extensive leadership skills in attempting any efforts to influence constitutional meaning. Presidents do not come to office labeled reconstructive or non-reconstructive in their warrants for political authority—as the constitutional time concept to be employed here is always “backward-looking” to some degree. Yet presidents desire to secure some portion of their legacy beyond that of their successors and potential rivals. Because nonreconstructive presidents’ openings are smaller, their efforts have to be much more exacting and tactical—even though their payoffs are irredeemably smaller than those of reconstructive presidents. However, this contextually constrained group illustrates that all presidents tend to think constitutionally when given a chance—as well as when not really given a fair chance. Therefore, nonreconstructive presidents provide the elegance to the model of constitutional construction in that they show how presidential forays into constitutional politics exist within a continuum. Presidential leadership is more institutionally creative and, by

constitutional regime, the actions of reconstructive presidents have been sufficiently similar: each would capitalize on a given opportunity—to the extent reasonable—in order to secure a lasting legacy.

2. Constitutional Constructions

Constitutional constructions refer here to the efforts by political actors—but particularly presidents with regards to new constitutional regimes—to engage in the “political melding of the document with external interests and principles.”⁹⁹ In his book *Constitutional Construction*, Keith Whittington describes the “defining features of constitutional constructions” as resolving “textual indeterminacies” and addressing “constitutional subject matter.”¹⁰⁰ These constructions fill in the gaps within the interstices of the text and help “transform constitutional theory into constitutional practice.”¹⁰¹ The need for such constructions arises from the generality associated with various broad, vague, or amorphous phrases, such as “liberty” in the Due Process Clause¹⁰² or “the executive power” in the Vesting Clause.¹⁰³ As a result, political actors must ground these abstract notions within actual rules of law.¹⁰⁴

necessity, more entrepreneurial, at the narrowest openings of constitutional space, while it is least in display—because less necessary—at the level of reconstructive politics where the constitutional space is broadest. Lastly, it suggests that the very idea of presidential leadership at the level of constitutional construction must be further divided into substantive and strategic dimensions. At the level of constitutional politics, reconstructive presidents exercise autonomy over the substantive content of the new regime being constructed. They decide what the new constitutional regime will represent at the level of foundations, partisan commitments, and ideological tendencies. These choices will, in turn, constrain the available choices of policy-makers and the judiciary within the new regime. However, these same reconstructive presidents can get away with less tactical skill and strategy in fixing their place in constitutional history, as they have available to them the opportunities that nonreconstructive actors must, by necessity, try to create for themselves.

⁹⁹ WHITTINGTON, *supra* note 85, at 1. Constitutional constructions have been given substance and clarification by Keith Whittington’s book by the same title, while some rival scholars have elaborated and modified the thesis since then. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 118–30 (2004) (“Though the process of constitutional construction fills the gaps within original meaning, I do not share Whittington’s characterization of the process of construction as ‘political.’”); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458 (2013) (“[T]he actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction for their application to concrete constitutional cases.”).

¹⁰⁰ WHITTINGTON, *supra* note 85, at 9.

¹⁰¹ *Id.* at 8.

¹⁰² U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

¹⁰³ U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

¹⁰⁴ *See* BARNETT, *supra* note 99, at 122–23.

President George Washington established the precedent for constitutional constructions through his Proclamation of Neutrality in 1793.¹⁰⁵ Washington read his formal authority in foreign affairs broadly and effectively precluded Congress from declaring war amidst the mounting hostilities between Britain and France across the Atlantic.¹⁰⁶ Less dramatically, President Thomas Jefferson would decide to deliver his State of the Union through a written message to Congress—a construction followed until President Woodrow Wilson revived the practice of personally delivering the national address over a century later.¹⁰⁷ President Abraham Lincoln read the Constitution in a way that refused to recognize the Southern Confederacy's claims to secession.¹⁰⁸ Both Jefferson and Wilson, respectively, fulfilled their constitutional requirements through legitimate constitutional constructions; and most scholars believe that Lincoln's actions were not only constitutionally permissible and appropriate, but perhaps required to maintain the regime through an extraordinary crisis.¹⁰⁹ Lincoln's consistent defense of the constitutionality of his actions speaks to the fact that constitutional constructions are not so open-ended that they permit arbitrary actions.¹¹⁰ The notion of limits is inherent in the concept of constitutionalism—even within a constitution that is dynamic and responsive to constitutional time. The most extraordinary of circumstances do not authorize lawless behavior unrestrained from constitutionality; they merely open the space available for more substantive constitutional input from the political branches, particularly the Presidency.¹¹¹

Constructions exist within a range.¹¹² The broad constructions by Washington and Lincoln above were of much greater constitutional significance than the more specific constructions by Jefferson and Wilson pertaining to the State of the Union.¹¹³

¹⁰⁵ See Morton J. Frisch, *The Significance of the Pacificus-Helvidius Debates: Toward the Completion of the American Founding*, Introduction to ALEXANDER HAMILTON & JAMES MADISON, *THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794*, vii, vii–viii (Morton J. Frisch ed., 2007).

¹⁰⁶ But see JOHN YOO, *CRISIS AND COMMAND* 88–90 (2009) (summarizing Madison's argument that President Washington's statement did not actually preclude Congress in the manner commonly cited by scholars).

¹⁰⁷ See WHITTINGTON, *supra* note 85, at 13.

¹⁰⁸ See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 7–25 (2003).

¹⁰⁹ See Joseph M. Bessette & Jeffrey Tulis, *The Constitution, Politics, and the Presidency*, in *THE PRESIDENCY IN THE CONSTITUTIONAL ORDER* 3, 19–22 (Joseph M. Bessette & Jeffrey Tulis eds., 1981).

¹¹⁰ HARRY V. JAFFA, *A NEW BIRTH OF FREEDOM* 357–402 (2000) (describing Lincoln's defense of his actions).

¹¹¹ See, e.g., BARNETT, *supra* note 99, at 118–30 (arguing that even the process of constitutional construction should “adher[e] to the formalities governing amendments”); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution,”* 72 *IOWA L. REV.* 1177, 1264–65 (1987) (discussing the differences between “extra-constitutional” and “contraconstitutional” constitutional constructions and interpretations).

¹¹² WHITTINGTON, *supra* note 85, at 16.

¹¹³ See *id.* at 13.

The types of constructions that affect the construction of constitutional regimes are generally broad constructions. “A broad construction not only addresses a substantive constitutional issue, resolving a particular question of textual meaning, but also is productive of additional constructions across other issues[,]” writes Whittington, adding that “[b]road constructions may be expected to spark more popular interest and more explicitly constitutional deliberations, while establishing firmer and more encompassing boundaries for future political debate.”¹¹⁴ Whittington provides an example of this in the way the *Lochner* era is known for a single case, “not because a great deal hinged on whether the due process clause allowed state legislatures to limit the number of hours bakers might work, but because it was exemplary of an approach to several constitutional issues.”¹¹⁵ While “[s]ubstantive characteristics may be affected as well by a construction’s breadth, as a given construction ‘leaks’ across substantive categories and reorients our understanding of multiple constitutional issues[,]” it should be noted that “[o]nly a few constructions rise above such concerns to reshape the constitutional framework in a substantial way.”¹¹⁶

When the constitutional space opens, presidents will tend to lock-in as much of their substantive vision as possible, especially since not all of it will become part of the new constitutional regime. For example, important parts of Franklin Roosevelt’s constitutional agenda were struck down during his first term, as the Supreme Court held firm amidst the political juggernaut that the activist New Deal legislation represented to the constitutional norms in place.¹¹⁷ Therefore, the fact that historical openings are relatively short-lived adds to the various dimensions of uncertainty that presidents confront during constitutional time. These threats to their legacy include: the strength of the future coalitions that eventually rise against their newly entrenched constitutional vision, the competency and willingness of the judiciary to consolidate it through case law, the persistent existence of state governments hostile to the new regime, and the constant threat of unforeseen events and new circumstances. For example, the constitutional legacy of Lincoln and the congressional Republican Party was incomplete, as the Supreme Court in the 1870s *Slaughter-House Cases*¹¹⁸ arguably

¹¹⁴ *Id.* at 11–13.

¹¹⁵ *Id.* at 13. For a new account of the *Lochner* era rulings that challenges some of the conventional wisdom about its role within American constitutional law, see DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* (2011).

¹¹⁶ WHITTINGTON, *supra* note 85, at 13. Whittington notes that “some of the most significant constructions in [American] history [include] Lincoln’s rejection of the right of secession, the federal government’s acceptance of responsibility for the country’s macroeconomic performance, or the American rise to the status of a global superpower.” *Id.* at 16. Although Whittington does not discuss these instances in depth, each “substantially shaped American constitutional and political development.” *Id.*

¹¹⁷ See generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 45–106 (1998); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 101–74 (1993); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 26–81 (1995).

¹¹⁸ 83 U.S. (16 Wall.) 36 (1872), *abrogated by statute*.

read the provisions of the privileges and immunities clause much more narrowly than the drafters of the Fourteenth Amendment might have preferred.¹¹⁹ For this reason, the types of constructions that collectively comprise the new constitutional regime tend to be broad, as presidents tend to take what they can get—and ensure it against as many contingencies as possible.

3. Creations

Sometimes, the broad constructions that reconstructive presidents prefer may not be available to them. While constructions can often display an element of creativity, they are not limitless, and some constitutional arguments may therefore be located beyond the bounds of constitutionality. The Constitution itself reflects this possibility by allowing for amendment through a set of formal features outlined under Article V.¹²⁰ Therefore, constructions are complemented by the possibility of constitutional creations, which simply involve the addition of new text to the old, integrating the new supplemental language as part of the Constitution.¹²¹ In this way, the radical Republicans in Congress, who drafted the Civil War amendments, stand in the same authoritative position with regard to the Fourteenth Amendment as did James Madison and the leading Framers of the Constitution in 1787.¹²² Whittington notes that sometimes “[c]reations may begin as constitutional constructions . . . as the momentum of a political movement carries it beyond the plausible meaning of the inherited text.”¹²³ This is, in part, what occurred during the Civil War as President Lincoln issued the Emancipation Proclamation—a construction of his executive powers—that formed the foundational basis for extending such principles to the states through the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.¹²⁴ Moreover, construction and creation may complement other tactics that presidents can employ within their general strategy of constitutional regime construction, such as selecting particular

¹¹⁹ See THOMAS, *supra* note 54, at 40 (noting that the Court interpreted the Fourteenth Amendment in light of antebellum strands of constitutional meaning, thereby thwarting the foundational commitments that the Republican Congress sought to achieve in drafting it); see also MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* 171–76 (1986) (arguing that Justice Samuel Miller’s opinion “turned the plan for the Fourteenth Amendment on its head”); RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES* 166–78 (abridged ed. 2005) (noting that Justice Miller found that the Fourteenth Amendment protected only the rights of national, not state, citizenship, and that the Equal Protection Clause only applied to blacks).

¹²⁰ See U.S. CONST. art. V.

¹²¹ WHITTINGTON, *supra* note 85, at 4. Whittington also notes that the “potential synchronicity of constitutional interpretation, construction, and creation highlights the difficulty in distinguishing among them.” *Id.* at 14.

¹²² See *id.* at 4 (“[T]he founders who draft the *new* text stand in a unique position in the history of the polity, as their decisions are authoritative.”).

¹²³ *Id.* at 14.

¹²⁴ See THOMAS, *supra* note 54, at 39–62.

nominees to the Supreme Court or choosing to support certain constitutional arguments before the Court through the Solicitor General.¹²⁵

When assessed collectively, constructions and creations involve the most forthright exposition of a substantive constitutional vision. Yet only historical perspective can determine the relative success of such actions, as well as clarify the contours of its contributions to the new constitutional baseline.¹²⁶ When presidents resort to these constructions and creations, they are acting consistently with the institutional designs of the office and the incentive structure built within it. Once the new constitutional settlement is solidified, the terms and authority of the new baseline are still subject to political contestation. However, such struggles will favor the newly established regime unless historical context opens sufficient space for new changes, as constitutional space only opens within periods of historical exigency and political uncertainty. The logic of constitutional renewal centers on the presidency and its ability to absorb contextual necessity within pools of institutional discretion.

IV. CASES IN CONSTITUTIONAL TIME

The idea that constitutional time matters in the construction of constitutional meaning is best seen through two presidencies that do not get the same amount of attention from scholars for their constitutional achievements as Presidents Lincoln and Franklin Roosevelt have. Presidents Washington and Theodore Roosevelt maintain a relatively minor place in discussions about constitutional legacy. For Washington this is an oversight, while for Theodore Roosevelt it is not—but for precisely the reasons provided in Parts I, II, and III. Washington certainly used less authority than he had available as President, yet his placement in constitutional time afforded him enough space to construct a Federalist Constitution with an orientation towards national government. Likewise, Theodore Roosevelt should have constructed an enduring legacy, as he had clear constitutional ambitions and policy preferences on commerce, judicial deference, and executive power. The fact that he did not is worth noting after Washington's in order to emphasize the importance of constitutional time in framing constitutional meaning.

A. President Washington, First in Constitutional Time

The founding of any nation qualifies as a traumatic event, especially within the generation that experiences it—a period full of risk and uncertainty, as the new order establishes itself on the vestiges of the old. The importance of this period in the United States was further magnified because the nation had established its second constitutional government within a decade.¹²⁷ Therefore, the Founding opened up the

¹²⁵ See generally FARBER, *supra* note 108.

¹²⁶ WHITTINGTON, *supra* note 85, at 14.

¹²⁷ I DE TOCQUEVILLE, *supra* note 69, at 105–07.

most space for constitutional construction because it was situated upon a blank slate with two decades worth of historical crises: the Revolutionary War against the world's strongest power in the late 1770s; a crisis in constitutional government triggered by the failures and limitations of the Articles of Confederation throughout the 1780s; and the high degree of uncertainty associated with the formation of a new government under the U.S. Constitution during the late 1780s and throughout the 1790s.¹²⁸

The Articles of Confederation, which lasted from 1781 to 1787, provided the baseline of political deficiencies that the new Constitution would need to address. The thirteen states had formed only a faint semblance of a national government with which to bring order to the nation under the Articles, creating a “league of friendship” that could not levy taxes or regulate commerce.¹²⁹ Nine of thirteen votes were required

¹²⁸ *See id.* The American Founding was a continuous process that spanned the period beginning with the Revolutionary War for Independence and the Declaration of Independence in the 1770s, included the Articles of Confederation from 1781 to 1787, the subsequent Constitutional Convention in Philadelphia, and the struggles for ratification in the states, and concluded with the swearing in of George Washington as the first U.S. President in New York City in 1789. *See id.*

¹²⁹ ARTICLES OF CONFEDERATION OF 1778, art. III. The lack of national unity and purpose was evident in the practice of some states “in restricting the commercial intercourse with other states” for the benefit of local manufacturers and merchants, as James Madison wrote in 1787, adding that such restrictions tend “to beget retaliating regulations, not less expensive and vexatious in themselves than they are destructive of the general harmony.” 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 321 (1865). He was referring to the practice of New York, Maryland, and his home state of Virginia to impose restrictions in favor of vessels belonging to their own citizens at the expense of the national interest. *See id.* For example, in retaliation to New York’s commercial restrictions, New Jersey and Connecticut boycotted their imports—and New Jersey even refused to comply with the confederated Congress’s requests for contributions until New York had reduced its tariff. JEROME HUYLER, *LOCKE IN AMERICA* 254 (1995). Sensing the urgency of the situation, Alexander Hamilton warned, “[w]e may reasonably expect from the gradual conflicts of State regulations that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.” THE FEDERALIST NO. 22, at 145 (Alexander Hamilton) (Clinton Rossiter ed., 1961). He predicted that “[t]he infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars.” THE FEDERALIST NO. 7, at 63 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In his typical disdain for the actions of state legislatures, Madison wrote to President Washington urging a national veto as

a negative *in all cases whatsoever* on the legislative acts of the States, as heretofore exercised by the Kingly prerogative, appears . . . absolutely necessary, and . . . the least possible encroachment on the State jurisdictions. Without this defensive power, every positive power that can be given on paper will be evaded & defeated.

Letter from James Madison to George Washington (Apr. 16, 1787), in 24 LETTERS OF DELEGATES TO CONGRESS 1774–1789, at 228, 229 (Paul H. Smith & Ronald M. Gephart eds., 1996); *see* JACK N. RAKOVE, *ORIGINAL MEANINGS* 51 (1996) (noting that Madison believed that “so drastic a power could be vested safely in the Union . . . because the national government would act with a neutrality or disinterestedness that the states could rarely if ever attain”).

to pass any measure and the delegates who cast these votes were selected and paid for by the state legislatures.¹³⁰ Each state retained its sovereignty and independence, and each state had one vote in Congress regardless of size.¹³¹ In fact, many state legislatures actually augmented their popular appeal during the 1780s by enacting all varieties of legislation that benefitted the narrow, local interests of their constituents at the expense of the national interest.¹³² Gordon Wood notes: “The economic and social instability engineered by the Revolution was finding political expression in the state legislatures at the very time they were larger, more representative, and more

¹³⁰ See ARTICLES OF CONFEDERATION OF 1778, arts. IX–XI.

¹³¹ In addition, there was no national judicial system to settle these or other claims among the states, and the presence of a national government was minuscule. JAMES Q. WILSON & JOHN J. DI IULIO, JR., *AMERICAN GOVERNMENT* 21 (11th ed. 2008).

¹³² James Madison, having served as a state legislator in Virginia, believed that the need to provide more effective protections for private economic rights was even a stronger impetus for the Constitutional Convention than correcting the deficiencies within the Articles of Confederation, as he wrote to Thomas Jefferson in October 1787:

The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects. A reform, therefore, which does not make provision for private rights, must be materially defective.

1 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 129, at 350. Madison believed that the representative assemblies in the states were not only corrupting the law by infringing on individual rights, but also “drawing all power into its impetuous vortex.” THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961). Thomas Jefferson joined his fellow Virginian when he warned that all the functions of government—legislative, executive, and judicial—were being unduly exercised by the legislatures of the various states. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 407 (1969). An example was the state legislature of Vermont:

The legislature, charged the Vermont Council of Census, was reaching for “uncontrollable dominion” in the administration of justice: becoming a court of chancery in all cases over £4,000, interfering in causes between parties, reversing court judgments, staying executions after judgments, and even prohibiting court actions in matters pertaining to land titles or private contracts involving bonds or debts, consequently stopping nine-tenths of all causes in the state. In their assumption of judicial power the legislators had determined every cause, said the Council, guided by no rules of law but only by their crude notions of equity.

Id. at 407. It was not so much the aristocratic grab for power by a powerful executive that resonated during the 1780s, but rather the democratic excesses against individual property rights in the statehouses that motivated the drive for national reform by political elites. *Id.* at 407–09.

powerful than ever before in American history.”¹³³ It was the perceived inequities at the state level that accelerated the convening of the Constitutional Convention in Philadelphia, as the states infringed on the foundation of rights that had formed the consensus ideology leading up to the Revolution.¹³⁴

The structural limitations of the Articles as a national governing arrangement gave form to the Critical Period of the 1780s, when the United States struggled with an array of crises that raised concerns about its viability.¹³⁵ Gordon Wood elaborates:

The evidence is overwhelming from every source—newspapers, sermons, and correspondence—that in the minds of many Americans the course of the Revolution had arrived at a crucial juncture.

With the problems of war and reconstruction it is unquestionable that the period was unsettled—a time of financial confusion and social flux, of great expansion and contraction when fortunes were made and lost. New governments had to be erected and made secure; new economic patterns outside of the empire had to be found; and the void left by the emigration of thousands of Tories, many in high political and economic positions, had to be filled—all resulting in political, social, and economic dislocations that have never been adequately measured.¹³⁶

From a constitutional perspective, the Critical Period of the 1780s contained the seeds of disorder and disunion that would eventually be resolved within the Federalist regime of the 1790s: the excesses of legislative power in the states, the related risks associated with democratic despotism, and the pervasive feeling that the practice of republicanism had been severely corrupted.¹³⁷ These problems within the states became national in scope and would open the constitutional space for the construction

¹³³ *Id.* at 405.

¹³⁴ These included legislative infringements on property rights, including the enactment of laws that inhibited trade and commerce, changing the terms of contracts between creditors and debtors, and using majoritarian processes to diminish the rights of individuals. For a thorough discussion of how the foundations and ideological orientation of the American Founding conflicted with much of the historical context, see generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); Bernard Bailyn, *Common Sense, in FUNDAMENTAL TESTAMENTS OF THE AMERICAN REVOLUTION* 7, 7–22 (1973). *But cf.* LEE WARD, *THE POLITICS OF LIBERTY IN ENGLAND AND REVOLUTIONARY AMERICA* 11–18 (2004) (arguing that the same intellectual developments shaping American revolutionary thought were also “radically alter[ing] the constitutional landscape of late-seventeenth-century England”).

¹³⁵ See 1 DE TOCQUEVILLE, *supra* note 69, at 106 (highlighting the “impotence” of the Articles of Confederation).

¹³⁶ WOOD, *supra* note 132, at 394.

¹³⁷ *Id.* at 393–429.

of a new regime. The collective experiences of this revolutionary generation would provide clues to the construction of the Federalist Party's surprisingly durable constitutional regime during the 1790s. As Forrest McDonald concludes, "[v]arious circumstances and events" of the period "had eroded Americans' localism a great deal by 1789" as the "trauma of the Revolution itself, especially among those who had actively participated in it" provided the galvanizing event for understanding political necessities in the 1790s.¹³⁸

In the process, the Critical Period also led to the cautious, ambivalent realization by 1787 that perhaps a strong executive might be needed to bring order and national direction during a critical period like the one that Americans were experiencing. In analyzing the context in which the American Presidency originated, James Ceaser notes:

Executive power, associated by many Whig theorists with monarchism no matter under what form it appeared, was distrusted and jealously circumscribed. . . . [T]hose who took the lead in calling for the Constitutional Convention had rejected this view and adopted a decidedly more favorable attitude toward executive power. Moreover, they saw the unfettered ascendancy of the popular assembly as a symptom of yet a deeper problem: a reliance on popular authority. It was not just that the legislatures were supreme; it was that they based their power on a claim to immediate representation of the popular will. . . .

It was the ascendancy of these unanticipated popular doctrines with their prejudice against merit and their theories of unchecked legislative predominance that led many of the Founders to seek a new form of government.¹³⁹

Among the leading Founders, there had been a concerted shift from the 1770s to the 1780s on executive power and its relation to the regime, especially because the Articles

¹³⁸ FORREST McDONALD, *THE PRESIDENCY OF GEORGE WASHINGTON* 6 (1974). McDonald writes:

Men who fought and bled together as comrades in the Continental Army were generally apt to be transformed into nationalists by the experience, and many who served the Continental Congress in civilian capacities had likewise shed their provincialism in the doing. So, too, was it with inhabitants of those parts of the United States that were militarily most vulnerable: such ports as Newport, New York, Norfolk, Charleston, and Savannah, occupied or virtually destroyed during the war, and the farm country of New Jersey and that of the Virginia and Carolina tidewater, the main battle areas after 1776.

Id.

¹³⁹ JAMES W. CEASER, *PRESIDENTIAL SELECTION* 48–49 (1979).

of Confederation lacked an executive.¹⁴⁰ The Presidency would be essential for understanding the actual functioning of the new constitutional order.

1. Filling the Constitutional Space with Substantive Meaning

Coming onto the national scene after the American Revolution, the Critical Period, and the ratification of the new Constitution, George Washington's placement in constitutional time (as well as normal chronological time) as the first president gave him the broadest mandate for establishing a durable regime in line with his substantive constitutional vision. The futility associated with the Articles of Confederation and the corresponding mischief in the states opened up enormous constitutional space, evident in James Madison's keen ability to substitute his Virginia Plan as the new baseline structure at the Constitutional Convention in Philadelphia—rather than amending the Articles.¹⁴¹ As the first president, the constitutional slate was uniquely clean for Washington in a way that it never would be for any of his successors.¹⁴² He was the ultimate reconstructive president.¹⁴³ When he was inaugurated in New York City in 1789, the survival of the new Constitution and its reconstructed federal government was anything but assured, particularly because the nation's most recent experience with the Articles of Confederation ended every bit as poorly as the historical record might have predicted.¹⁴⁴ Yet for the purposes of

¹⁴⁰ See, e.g., GLENN A. PHELPS, *GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM* 124–26 (1993) (illustrating Washington's shifting views on executive power).

¹⁴¹ See Wood, *supra* note 132, at 472. It is worth noting that in order to amend the Articles, all thirteen states had to agree, so there remains some debate as to whether the Constitution was illegally established. See ARTICLES OF CONFEDERATION OF 1778, art. XIII. However, whether or not this new Constitution was formally illegal, it was created and ratified under conditions of crisis recognized by the majority of Americans who lived through this period. See 1 DE TOCQUEVILLE, *supra* note 69, at 107 & n.5.

¹⁴² PHELPS, *supra* note 140, at 122.

¹⁴³ George Washington was completely overlooked by Stephen Skowronek as a reconstructive president, as Thomas Jefferson leads the reconstructive leadership analysis in opposition to the Federalist political regime headed by John Adams. See *supra* note 82 and accompanying text. Again, this completely overlooks the reconstructive contributions of George Washington, who wielded a reconstructive stance against the backdrop provided by the former national government under the Articles of Confederation. Likewise, Bruce Ackerman overlooks Washington's indispensable contribution by beginning the analysis with James Madison in Philadelphia—as if the drafting and ratification of the U.S. Constitution was sufficient to establish a constitutional regime. See *supra* note 71. This is even more perplexing as Ackerman chooses to give sufficient credit to Abraham Lincoln and Franklin Roosevelt during their respective constitutional moments. These examples are worth noting because the analysis here seeks to establish what many constitutional law and political science scholars have overlooked: that President Washington successfully constructed a durable constitutional regime in his image due to his unique, commanding position within constitutional time.

¹⁴⁴ Madison faced the bleak prospect offered by past republican regimes in history—ranging from ancient Greece and Rome to the more modern examples from the United Netherlands,

setting up a constitutional order, the opportunity to lock in a new—and in significant respects, oppositional—constitutional regime could hardly be more fortuitous.¹⁴⁵ Indeed, Glenn Phelps provides a useful analogy for assessing Washington’s position within the given historical context:

If we imagine our constitutional tradition as a great river we can easily see the important advantage that being first confers. The first rivulets from the constitutional spring can be made to flow in almost any direction. Those interested in moving the course of the stream can steer it as easily one way as another, for there is little weight behind the water. But later, as the stream continues it gathers more water, deepening the original channel. Those wishing to change the flow further downstream find that it requires extraordinary efforts to counter the weight that the river now carries.¹⁴⁶

Washington’s rhetoric and actions tend to show that he clearly understood his position in constitutional time. He knew that his choices as president would affect the meaning of the Constitution for future generations, as he expressed in a letter to several of his advisors in the spring of 1789 just after taking office: ““Many things which appear of little importance in themselves and at the beginning, may have great and durable consequences from their having been established at the commencement of a new General government.””¹⁴⁷ On yet another occasion, Washington reiterated to James Madison, ““As the first of everything, in *our situation* will serve to establish a Precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles.””¹⁴⁸ Such statements reflect an early recognition that contemporary constitutional practices can be said to derive from the persistence of original forms.¹⁴⁹

Switzerland, and Poland—while drafting the Constitution. *See* WOOD, *supra* note 132, at 472. Madison would come to the sobering conclusion, which he later placed in one of the *Federalist* papers, that history consists only of beacon lights “which give warning of the course to be shunned, without pointing out that which ought to be pursued.” THE FEDERALIST NO. 37, at 226 (James Madison) (Clinton Rossiter ed., 1961).

¹⁴⁵ The United States Constitution of 1787 would abandon its predecessor as irredeemably flawed and so the new government could not simply build upon the old baseline. Yet while the new constitution supplanted the Articles of Confederation, its substantive nature retained much of the basic commitment to its British common law inheritance. *See* WHITTINGTON, *supra* note 85, at 3–4.

¹⁴⁶ PHELPS, *supra* note 140, at 122–23.

¹⁴⁷ *Id.* at 122 (quoting Washington’s letter).

¹⁴⁸ *Id.* at 124 (quoting Washington).

¹⁴⁹ This is true even though not all of the forms that Washington offered became a permanent part of the constitutional regime. For example, many scholars have noted that no other

The Constitution depended on institutional forms that sought to refine and shape popular opinion, tempering its vices, in order to maintain constitutional government rather than relying on the notion of the “people themselves.”¹⁵⁰ Moreover, as Glenn Phelps notes, “Founding was a continuous and open process in which customs, practices, and institutions unmentioned in the Constitution would add specific meaning to the outline of 1787,” and so Washington “shared with many others of the founding generation the view that a constitution draws its life not merely from the words of the written document, but also from the deeds and understandings of those responsible for acting under its commands.”¹⁵¹ Because the constitutional text contained ambiguity, Washington viewed his leadership function as one of explicating the text in a way that would entrench the Federalist vision of the Constitution.¹⁵²

The events and national developments from the Critical Period would define the sorts of decisions that would be addressed in the 1790s, as the disintegration of the union formed an imminent threat for the first administration.¹⁵³ In this respect, Washington’s constitutional leadership was reactionary. The President did not—because he could not—decide to *initiate* the construction of a constitutional regime; the opportunity was already presented for him upon taking office. Instead of making constitutional politics through personal skills, he implemented a constitutional vision through a historical opening so wide that no other president would share the same opportunity—not even Lincoln or FDR. There can be little question that Washington had a constitutional vision. It is clear from the first days of his administration that he had an agenda predicated in large part upon establishing a national government and presidency independent of and superior to the power of the states.¹⁵⁴ As a result, Washington’s constitutional priorities included: ensuring the supremacy

president—not even Andrew Jackson—would lead his troops personally into battle as Washington did during the Whiskey Rebellion. *See id.* at 123. And some constitutional practices lasted some time after he initiated them, such as his preference to limit the use of the presidential veto to constitutional—as opposed to policy—objections, but have not made it to the present, as Andrew Jackson changed course for future presidents on the veto power. 1 ACKERMAN, *supra* note 1, at 68.

¹⁵⁰ THOMAS, *supra* note 54, at 17.

¹⁵¹ PHELPS, *supra* note 140, at 122.

¹⁵² To systematically study the constitutional regime that George Washington constructed during his presidency and place it within similarly situated presidents requires: first, an assessment of the historical context that he inherited, as detailed above, and second, an examination of the way that he acted with regards to constitutional issues. For Washington, the most important issues of his presidency were constitutional in nature: the powers of his office, the role of the federal government, and the clarification of constitutional principles as applied to the newly formed regime.

¹⁵³ *See* PHELPS, *supra* note 140, at 125.

¹⁵⁴ Washington’s unique experience as commander-in-chief during the Revolutionary War had solidified his views towards the Federalists of the 1780s in Philadelphia, as well as the actual party by the same name during the 1790s. *See id.* at 123–27.

of the national government; clarifying and strengthening the office of the executive, especially in foreign affairs; exercising limits on power as an indispensable part of constitutionalism and principled republicanism; and implementing a stable federal structure for the promotion of a strong national economy, which was a task his Treasury Secretary Hamilton seemed destined to carry out.¹⁵⁵ Washington understood that the office he inherited, while limited—something he himself insisted repeatedly as president—was institutionally able to handle the historical crises at hand with resolve and direction.¹⁵⁶ Yet his presidential actions reveal the dual tendencies of reaction (a product of context) and assertiveness (a product of institutional design) in the reconstructive stance. And therein lies the paradox to such seemingly powerful reconstructive presidents like Washington: they react to the inherited historical context by addressing the problems of the moment—issues presidents are forced to confront because of their importance during times of national crisis—yet these same presidents decide the direction that the nation will take during such moments, always in line with their constitutional preferences. The directional or substantive choices presidents make during these critical moments will have a lasting impact on the nation's future because constitutional politics raise the stakes for all the players involved. This differs from the situation during more normal periods when constitutional baselines are stable and perform their usual function of lowering the stakes in politics.

2. Executing a National Constitutional Vision

President Washington's actions in office highlight the institutional orientation of the office in general, as well as its specific approach to regime construction and maintenance. His actions include a mix of political constructions and invocations of departmentalism, both of which were instrumental and directed towards a larger substantive constitutional vision.¹⁵⁷ Because everything was effectuated upon a blank slate in the 1790s, many instances of departmentalism were also constitutional constructions.

President Washington agreed to Hamilton's general program for the federal assumption of debts, which was signed into law on August 4, 1790.¹⁵⁸ This policy

¹⁵⁵ Other important positions that the Federalist Party advanced were the support for a strong, independent federal judiciary, a more commercial urbanized economy, and a belief in maintaining stronger ties to Britain than France. For an excellent account of the Federalist Party during this period, see STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* (1993).

¹⁵⁶ PHELPS, *supra* note 140, at 126. While far less enamored about the use of executive power to entrench Federalist commitments than Hamilton, Washington also understood that the office had an inherent Hamiltonian dimension priced into his authority during such times. *See id.* at 122.

¹⁵⁷ *See* WHITTINGTON, *supra* note 42, at 76–78 (“The presidents with the authority to involve the departmentalist logic are also particularly well positioned to foster the political consensus needed to restructure constitutional meaning.”).

¹⁵⁸ MCDONALD, *supra* note 138, at 75.

achievement was part of a broader constitutional vision of national supremacy and economic development that would necessitate the use of federal powers far beyond that imagined during the 1780s.¹⁵⁹ However, the frame of the 1790s was designed to cure the defects of the previous decade. On the establishment of a national bank, Hamilton defended its constitutionality against James Madison's protestations and convinced Washington—who harbored reservations about the plan—to proceed with its implementation.¹⁶⁰ Hamilton argued on Federalist grounds that the Constitution defined only in general terms the broad powers for which the national government was created, as it was not feasible to specify powers in minute detail.¹⁶¹ Hamilton argued:

If Congress determined to achieve an end authorized by the Constitution, it was empowered by the final clause in Article I, Section 8 (“Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers”), to use any means that were not prohibited by the Constitution.¹⁶²

Federalist Chief Justice John Marshall would consolidate this Federalist construction with his 1819 decision in *M'Culloch v. Maryland*.¹⁶³ The foundations that made such an interpretation feasible, however, were established within Washington's broad constructions in the 1790s. As Forrest McDonald notes:

Hamilton's financial system bound the nation with economic ties that ensured the perdurance of the national government, no matter how powerful the centrifugal forces in the country as a whole. The strength of the system lay not so much (as historians have been wont to suggest) in binding the interests of the wealthy and more influential members of society to the fate of the national government as it did in making energetic national government *convenient* to the society it served and the absence of such government indescribably inconvenient. A uniform and elastic currency, based upon a monetized public debt and a national bank, facilitated the ordinary activities of everyone, from the lowliest farmer to the greatest international merchant, and to dismantle the system would have occasioned dislocations of nightmarish complexity. That was the system. President Washington's role in

¹⁵⁹ See *supra* note 155 and accompanying text.

¹⁶⁰ MCDONALD, *supra* note 138, at 77.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ 17 U.S. (4 Wheat.) 316 (1819).

creating it, apart from giving his implied blessing, was nothing at all—except when he very nearly prevented its creation by proposing to veto the charter of the bank.¹⁶⁴

McDonald's last observation is telling, because it describes the leadership stance of the nation's strongest reconstructive president.¹⁶⁵ Washington had sufficient constitutional space to implement nearly any vision—within reasonable limits—that he wanted because of his position within constitutional time.¹⁶⁶ Yet his strategic role in planning the policy and persuading others of its merits was extremely limited.¹⁶⁷ Hamilton understood that the Federalist vision would become constitutionalized because of the inherent first-mover advantage within the President's position.¹⁶⁸ Washington filled in the available space with many of Hamilton's substantive priorities, which also carried into the realm of foreign policy, especially because the Hamiltonian system depended on the continuation of commercial relations with Britain.¹⁶⁹ Therefore, the Treasury Secretary, whose department had nominal ties to foreign relations in comparison to State or War, implemented a detailed blueprint for announcing and following a course of neutrality.¹⁷⁰

¹⁶⁴ MCDONALD, *supra* note 138, at 185.

¹⁶⁵ See *supra* notes 141–43 and accompanying text.

¹⁶⁶ See *supra* notes 145–48 and accompanying text.

¹⁶⁷ See MCDONALD, *supra* note 138, at 186 (“Washington had done little in his own right, had often opposed the best measures of his subordinates, and had taken credit for achievements that he had no share in bringing about.”).

¹⁶⁸ See generally PHELPS, *supra* note 140, at 118–23 (discussing Washington's determination to advance the Federalist vision).

¹⁶⁹ See MCDONALD, *supra* note 138, at 120.

¹⁷⁰ *Id.* at 125. This included a draft of a proclamation drawn up by John Jay. *Id.* The Washington administration carefully steered a course of neutrality beginning with the Neutrality Proclamation of 1793 and culminating in the Jay Treaty with Britain, which prevented a potentially devastating war with the mother country—and in spite of the Franco-American alliance of 1778. *Id.* at 185. Moreover, the Washington Administration's opening of the Mississippi River through Pinckney's Treaty provided the necessary first steps toward the future territorial expansion of the United States, while defusing a set of conditions out west that could have led to war. *Id.* at 186. Scholars tend to include in the same category the Washington Administration's removal of the threat posed to the nation and its western settlers by the native tribes and the assortment of colonial powers (Britain, Spain, and France) on the continent. See, e.g., *id.* In taking these actions and attempting to enforce them, the Washington Administration set an important legal and constitutional precedent for the constitutional regime that still holds to the present day: the dominant role of the executive branch in the conduct of foreign relations. Washington grounded his actions upon the Constitution's provision of the President as commander-in-chief under Article II. *Cf. id.* at 126. His foreign policy decisions—because of their placement in constitutional time as the first institutional ordering of such powers within the executive branch—actually had an effect on the constitutional regime in ways that it would not for subsequent presidents.

Fewer scholars have noticed Washington's invocation of departmentalism than have noticed the more famous instances by Presidents Jefferson, Jackson, Lincoln, and Franklin Roosevelt. In part, this is because Washington's departmentalism seems far less aggressive by modern standards and has become part of the normal functioning of the Presidency. Yet when Washington invoked departmentalist logic, Congress viewed it skeptically because his constructions were relatively new and, as a result, vigorously debated. When Washington asserted the authority of his office to interpret the Constitution, it was not the Court that posed the greatest obstacle, but rather Congress. This was particularly true in the years before Chief Justice John Marshall established his indelible imprint on the Court, which included the public pronouncement of judicial review in the 1803 decision *Marbury v. Madison*¹⁷¹ and a series of landmark cases asserting national authority over the next three decades.¹⁷² During the 1790s, the federal judiciary assumed its anticipated role as Hamilton's least dangerous branch capable of exercising "neither FORCE nor WILL but merely judgment."¹⁷³ Indeed, far from directly challenging the authority of the Court, President Washington and the Federalists believed strongly in promoting the prestige and independence of the federal judiciary,¹⁷⁴ which was a more difficult task than some commentators tend to acknowledge. Many of his appointees politely rejected offers to serve on the Supreme Court for other opportunities in government at the state level, including one of his first appointees to be an associate justice, John Rutledge, who resigned from the bench in 1791 before the Court actually heard any cases in order to assume the role of Chief Justice of South Carolina—a post that he regarded as being more significant.¹⁷⁵ Washington's departmentalism assumed the role of "Chief Magistrate"—a term that he deliberately used most often when referring to his own presidency—in controlling "the meaning and application of the Constitution for the people, the states, and other branches of the federal government."¹⁷⁶

Because Congress was considered the most legitimate interpreter of the Constitution, a more explicit example of Washington's departmentalism was his Neutrality Proclamation of 1793.¹⁷⁷ As hostilities were escalating between Britain and France, the President relied on Hamilton's logic for staying neutral towards the pending conflict, which could have debilitated the crisis-ridden, war-weary republic at a critical period.¹⁷⁸ Washington outflanked Congress in this area because the legislative

¹⁷¹ 5 U.S. (1 Cranch) 137, 177–78 (1803).

¹⁷² See *infra* notes 192–202 and accompanying text.

¹⁷³ THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁷⁴ See Henry J. Abraham & Barbara A. Perry, *The Father of Our Country as Court-Packer-in-Chief: George Washington and the Supreme Court*, in GEORGE WASHINGTON AND THE ORIGINS OF THE AMERICAN PRESIDENCY 135, 136, 143 (Mark J. Rozell et al. eds., 2000).

¹⁷⁵ *Id.* at 137.

¹⁷⁶ PHELPS, *supra* note 140, at 141–42.

¹⁷⁷ See *id.* at 172.

¹⁷⁸ See McDONALD, *supra* note 138, at 125–27.

branch had the power to declare war under Article I, Section 8 of the Constitution.¹⁷⁹ However, the President claimed his constitutional authority as Commander-in-Chief under Article II to effectively preclude Congress's authority in this area.¹⁸⁰ Although Washington was officially restating the status quo—the fact that the United States was neutral—his declaration made it nearly impossible for Congress to go in a different direction, especially because Washington was a reconstructive leader invoking a departmentalist argument to achieve a more important substantive task: safeguarding the new republic against further crises and risks that could undermine it.¹⁸¹ Often this episode is cited as an instance of the executive branch's dominance in the area of foreign affairs and national security, which it was, but it equally qualifies as an instance of departmentalism where the President asserted his interpretation on the extent of executive authority at the expense of Congress. To the extent that Washington sought an equal claim to interpret the Constitution as Congress, he did so for limited purposes consistent with the needs of a nation attempting to withstand a period of crisis.¹⁸²

In terms of construction, Washington believed that he had the independent right to decide a bill's constitutionality, which he executed by different methods: he vetoed laws that he thought clearly violated the Constitution; he signed bills that he thought passed that test, usually without regards to their ultimate merits on policy; and he implemented the laws on the books.¹⁸³ Indeed, both Washington's constitutional constructions and departmentalism were tempered by the fact that he was a constitutional literalist in areas where he viewed the document's text and meaning to be clear.¹⁸⁴ He limited his own authority in many instances because he thought the Constitution called for such limitations either in law or spirit.¹⁸⁵ For example, as previously noted, he was often particularly deferential to Congress in the area of domestic legislation.¹⁸⁶ He would suggest items that Congress should address without advocating his own positions, even on various issues on which he had strong views.¹⁸⁷ Phelps observed:

Constitutionally, [Washington] could argue that this power derived from his authority “to take care that the laws . . . be faithfully executed.” But the claim would be credible only if Washington could show ample evidence of his willingness to be bound by

¹⁷⁹ See U.S. CONST. art. I, § 8, cl. 11 (Congress shall have power “[t]o declare war”).

¹⁸⁰ Cf. PHELPS, *supra* note 140, at 177.

¹⁸¹ For arguments on both sides of this issue, see generally HAMILTON & MADISON, *supra* note 105.

¹⁸² PHELPS, *supra* note 140, at 193–94.

¹⁸³ See Yoo, *supra* note 106, at 65, 96.

¹⁸⁴ See PHELPS, *supra* note 140, at 136–39.

¹⁸⁵ See *id.*

¹⁸⁶ *Id.* at 139–42.

¹⁸⁷ *Id.* at 139–40.

the text of the Constitution, even, *and especially*, when the matter at hand affected the nominal power of the presidency.¹⁸⁸

Washington's self-imposed limitations on his own authority should not be confused with a lack of an interpretation or a weak presidency. Instead, his assertion of presidential limits was instrumental towards his broader reconstructive vision of establishing a strong legitimate national government in the eyes of the American public. So while not as outwardly aggressive as Lincoln or FDR, he was most effective in implementing his substantive constitutional vision. Phelps argues that "[a]n appropriate (and highly visible) deference to the Constitution and to the other branches of the federal government was actually part of a strategy for establishing a strong presidency."¹⁸⁹ And this is the other side of establishing a unitary presidency as the first in time: knowing where to draw appropriate boundaries on presidential authority even if the available constitutional space is ample and discretionary. Washington was a rare reconstructive president because he did not assert the full extent of his authority when he clearly had the opportunity to do so. However, this was part of his constitutional vision, which was essential to the ultimate success and durability of his constitutional regime.

3. The New Federalist Baseline

Washington constructed a constitutional regime through a series of decisions on major issues that established the nation on firm Federalist foundations with regards to the supremacy and legitimacy of the national government.¹⁹⁰ Yet Washington's constitutional regime was not built in a day; the space that was opened for him as first president afforded him broad discretion to implement his preferred set of commitments. Decision by decision, he gave the Federalist constitutional regime form and substance. Washington may have been a skilled national leader; however, it was the breadth and depth of the available constitutional space that determined the viability and sustainability of his constitutional regime.

The result of Washington's assertion of his substantive constitutional vision is that the dominant interpretation of the Constitution would favor the supremacy of the national law, with state law having to give way. Moreover, the Federalist vision afforded the Supreme Court the institutional authority to decide what the Constitution meant, as judicial review still needed a defense as a legitimate constitutional construction

¹⁸⁸ *Id.* at 141–42.

¹⁸⁹ *Id.* at 138.

¹⁹⁰ In addition, the Federalist constitutional vision included the necessity of strength and independence of the executive office and somewhat paradoxically, the notion of limits on political power as an essential part of American constitutionalism. *See id.* at 126–27. In reality, these were instrumental towards the vision of a competent national government, but all fundamentally changed the nature of the constitutional regime in fundamental ways.

in the 1790s.¹⁹¹ On March 8, 1796 in the Supreme Court's decision in *Hylton v. United States*,¹⁹² it ruled that a carriage tax levied in 1794 at the suggestion of Treasury Secretary Hamilton was not a direct tax but an excise.¹⁹³ McDonald writes:

The constitutional significance of the case was that in it the Court ruled for the first time on the constitutionality of an act of Congress. The political significance was that in upholding the tax, which fell mainly upon Virginia and South Carolina aristocrats to whom elegant carriages were a way of life, the Supreme Court convinced Southern Republicans that it was futile to appeal to the federal courts to support their constitutional theories.¹⁹⁴

After the presidencies of Washington and Adams, the two most famous Marshall decisions, *Marbury v. Madison*¹⁹⁵ in 1803 and *M'Culloch v. Maryland*¹⁹⁶ in 1819, further consolidated Washington's vision, completing the process of constitutionalization until the next set of historical triggers opened up enough constitutional space to revisit the issue.¹⁹⁷ Other landmark Marshall decisions that entrenched the Federalist constitutional vision reaffirmed the supremacy of the federal government, like his ruling in *Martin v. Hunter's Lessee*¹⁹⁸ in 1816, where he rejected Virginia's claim that the Supreme Court could not review the decisions of state courts.¹⁹⁹ More importantly,

¹⁹¹ See generally Gordon S. Wood, *Judicial Review in the Era of the Founding*, in *IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION?* 153 (Robert A. Licht ed., 1993) (discussing the evolution of the concept of judicial review from the 1760s through the early 1800s).

¹⁹² 3 U.S. (3 Dall.) 171 (1796).

¹⁹³ *Id.* at 180 ("A tax on carriages . . . of course is not a direct tax.").

¹⁹⁴ McDONALD, *supra* note 138, at 175. McDonald notes that this landmark decision was reached without a sitting Supreme Court Justice, "since Rutledge had been rejected by the Senate and his successor, Oliver Ellsworth, did not take his seat until after the arguments had been heard." *Id.*

¹⁹⁵ 5 U.S. (1 Cranch) 137 (1803).

¹⁹⁶ 17 U.S. (4 Wheat.) 316 (1819).

¹⁹⁷ In *Marbury v. Madison*, Chief Justice Marshall ruled that the Supreme Court could declare an act of Congress unconstitutional. 5 U.S. at 177–78. In *M'Culloch v. Maryland*, Marshall ruled that the power granted by the Constitution to the federal government originates from the people rather than the states, and thus should be generously construed to allow any federal laws that are "necessary and proper" to the attainment of legitimate constitutional ends. 17 U.S. at 323–24. In addition, Marshall wrote that federal law is supreme over state law, and therefore, a state institution could not tax a federal institution because the power to tax was equivalent to the power to destroy. *Id.* at 391–92.

¹⁹⁸ 14 U.S. (1 Wheat.) 304 (1816).

¹⁹⁹ In *Martin v. Hunter's Lessee*, Virginia courts were ready to acknowledge the supremacy of the U.S. Constitution but believed that they had as much right as the Supreme Court to decide what the Constitution meant. 14 U.S. at 305–06. The Supreme Court felt otherwise, and asserted its own broad powers to review any state court ruling if that decision seemed to violate federal law or the federal Constitution. *Id.* at 315; see also *Cohens v. Virginia*, 19 U.S. (6

Marshall consolidated the power of the Federal Government to regulate commerce among the states in the famous *Gibbons v. Ogden*²⁰⁰ case, privileging federal law over state law when the two conflicted.²⁰¹ Marshall's decision in *Gibbons* would be influential over a century later, as there were relatively few important rulings on the commerce power until the era of antitrust legislation in the late nineteenth and early twentieth centuries.²⁰² While the concept of national supremacy may sound rather obvious today, it was far more controversial at the time, and was only consolidated through a Federalist Chief Justice appointed by Federalist President John Adams in the late 1790s. The important point is that constitutional regimes take time to consolidate, which is the main task of the judiciary within the separation of powers. However, the judiciary operates in a space that has initially been carved out by a reconstructive president's historical opportunity.

4. President Jefferson as a Suggestive Counterfactual

If Thomas Jefferson had been the first president instead of George Washington, his placement within constitutional time would have led to a very different regime than the one created by the first Federalist president and his vice president, John Adams, who became his successor in office, extending and completing that Federalist constitutional vision. There was enough constitutional space available in the 1790s that President Jefferson would have been a formidable president because of his coherent constitutional vision. His constitutional imprint would have been even more far-reaching and durable than the one he had an opportunity to build during the first decade of the nineteenth century.

Aside from the agrarian states' rights policy orientation of the Jeffersonian Administration, which would have pushed a different set of preferences during the 1790s, the influence of John Marshall—and perhaps the prominence and prestige of the Supreme Court itself—would have been a nullity. Thomas Jefferson's choice for Chief Justice would likely have been Spencer Roane, and his task of consolidating the Republicans' constitutional commitments would have been very different from Marshall's.²⁰³ Jefferson maintained his doubts about the new national government

Wheat.) 264, 310 (1821) (reaffirming the Supreme Court's appellate jurisdiction over state court decisions).

²⁰⁰ 22 U.S. (9 Wheat.) 1 (1824).

²⁰¹ In *Gibbons v. Ogden*, Robert Fulton, the inventor of the steamboat, received a monopoly right from New York State to operate his steamboat on the Hudson River. 22 U.S. at 2–3. However, the Marshall Court overturned the license because the river connected New York and New Jersey and was therefore considered *interstate* commerce rather than *intrastate* commerce. *Id.* at 64–66. Therefore, the federal law in the conflict was supreme, which stamped the national government's authority in an area that would be its most important in the future, especially the twentieth century. See GERALD GUNTHER, CONSTITUTIONAL LAW 97–98 (12th ed. 1991).

²⁰² See GUNTHER, *supra* note 201, at 97–100.

²⁰³ For an excellent analysis of Jefferson's constitutional preferences for the Supreme Court during his presidency, see generally ACKERMAN, *supra* note 71.

and its potential usurpation of state autonomy by the executive branch and the federal judiciary. A Jefferson Administration during the 1790s would not have been as pronounced in its differences with the confederated national government of the 1780s, notwithstanding the ratification of a written constitution.²⁰⁴ Hamilton's domestic plan for the national economy would not have institutionalized a national banking system and the assumption of debts in the manner it did, and relations with Great Britain and France would have been quite different.²⁰⁵ While Washington and Jefferson both shared a similar belief in natural rights as a political foundation, the means in which such first principles of constitutionalism applied differed greatly between them, as the partisan divide between Federalist and Democratic Republicans became more apparent as new issues came on to the national scene.²⁰⁶

It is worth noting here that the seeds of the opposition to a constitutional regime construction like Washington's are always present within the American politics through

²⁰⁴ See generally *id.*; JOHN FERLING, ADAMS VS. JEFFERSON (2004).

²⁰⁵ Suggestive evidence of this is provided by Jefferson's antagonistic stance towards Hamilton's foreign policy views during the Washington Administration in the 1790s. See FERLING, *supra* note 204.

²⁰⁶ James Ceaser notes some of these differences as applied to the economic and political foundations:

[T]he wisdom of the Jeffersonian legislator consists in establishing laws and norms that remove impediments to the spontaneous operation of nature. The famous expression that captured this strategy, a term which has been attributed to the Physiocrats, is *laissez faire*, meaning "allow to do," or, embellishing a bit, "allow nature to follow its course." The version of this doctrine that is better known to us today was formulated by Adam Smith, a disciple of the Physiocrats, under the label "the system of natural liberty" or, more simply, "the invisible hand."

Followers of this understanding of nature among the Jeffersonian-republicans applied it to a broad range of political policies. One of the earliest and most important was in the area of economic policy, where Hamilton's plans for political and economic development became the central domestic issue around which the political parties formed. . . .

For Federalists, the concept of nature in relation to political life remained anchored in the science of politicized psychology. There was no reason to think that the laws of spontaneous order that governed physical matters also governed human matters in the political realm. In fact, experience showed the opposite. In the political realm, chaos and force were often the prevailing facts of reality, requiring constant superintendence. . . . The "laws" that often seemed to apply to one area (economics) did not govern in another (politics). The attempt to impute a general rule of spontaneous order to political affairs represented an unwarranted extension of the natural sciences into the political realm.

James W. Ceaser, *Foundational Concepts and American Political Development*, in JAMES W. CEASER, NATURE AND HISTORY IN AMERICAN POLITICAL DEVELOPMENT 1, 31–32 (2006) (footnote omitted).

the party system and the structure of federalism, which provide pockets of dissent that enable challenges to the dominant constitutional order at a more opportune time. The areas that the partisan opposition choose to challenge tend to be those that are most vulnerable politically. However, their success in overturning that regime when given a historical opening depends on the presence of constitutional time.

B. Theodore Roosevelt and the Frustrations of Constitutional Time

By historical standards, Theodore Roosevelt achieved a robust political legacy, implementing a nationalist Republican version of the Progressive agenda in economic regulation, antitrust, foreign policy, conservation, public administration, governmental corruption, and the broadening of the executive branch in American politics.²⁰⁷ His popularity in office afforded him ample political capital to pursue his preferred policy commitments, suggesting the possibility of a reconstructive presidency.²⁰⁸ While Roosevelt inherited opportunities for change that were more politically auspicious than those that await most presidents—with the Progressive movement building momentum²⁰⁹—ultimately, he did not govern during an extraordinary national crisis.²¹⁰ The absence of constitutional time would limit his constitutional legacy. As a result, his presidency illustrates the salience of constitutional time in constructing constitutional meaning.

1. A President with Progressive Constitutional Ambitions

Theodore Roosevelt viewed his moment as reconstructive in nature. He assumed the classic reconstructive posture of invoking tradition and precedent while at the same time breaking with it. As Thomas notes, “In his 1905 inaugural address, Roosevelt invoked Lincoln as the great preserver of the republic, suggesting that, while the specific

²⁰⁷ See generally SIDNEY M. MILKIS, *THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* (2009); SKOWRONEK, *supra* note 4, at 228–59; JEAN M. YARBROUGH, *THEODORE ROOSEVELT AND THE AMERICAN POLITICAL TRADITION* (2012).

²⁰⁸ See, e.g., MILKIS, *supra* note 207 (discussing how Roosevelt and the Progressive party rose to popularity); YARBROUGH, *supra* note 207, at 169–78 (noting that the conservation movement afforded Roosevelt a popular issue with which “to shift policymaking away from Congress”). It is worth reiterating that in his book, Stephen Skowronek does not consider Theodore Roosevelt a reconstructive president, but rather an articulation president or orthodox innovator within the established Republican Party political regime. See SKOWRONEK, *supra* note 4, at 230–33.

²⁰⁹ The Progressive movement would only achieve national dominance from 1913–1918. See Ceaser, *supra* note 206, at 60.

²¹⁰ This speaks to the truly rarified company that presidents who construct constitutional regimes tend to keep compared to the policy achievements that most presidents are able to achieve. The Progressive movement was one of the more sweeping in American history, affecting both major parties in significant ways. Yet its failure to produce a lasting constitutional regime provides some indication of the extent of historical context needed to effectuate more significant constitutional change.

tasks before [the nation] where [sic] unknown to the past, ‘the spirit in which these tasks must be undertaken . . . remains essentially unchanged.’²¹¹ This tactic preserved space for Roosevelt to distance himself from the classical liberalism that emphasized constitutional forms and limits, and instead focus on the potential for positive government.²¹² He framed his substantive constitutional vision within the Federalist tradition of stronger national authority associated with Alexander Hamilton and John Marshall, while at the same time moving away from the foundational premises of natural rights that informed these same leading Federalists.²¹³ He called for a national “debate over the content of [the nation’s] most fundamental commitments,”²¹⁴ in which democracy would replace liberalism as the chief foundational element in the regime.²¹⁵ In other words, Roosevelt’s Progressive vision sought to reconstruct constitutional meaning to fit the needs of the day with a mixture of pure democracy, government activism, and presidential leadership.²¹⁶ The Progressive intellectual Herbert Croly described “[t]he whole tendency of his programme” as giving “a democratic meaning and purpose to the Hamiltonian tradition and method”—effectively governing as a “Hamiltonian with a difference.”²¹⁷ While Roosevelt did not insist on

²¹¹ THOMAS, *supra* note 54, at 73 (omission in original).

²¹² See YARBROUGH, *supra* note 207, at 78. In a comprehensive account of Theodore Roosevelt’s political thought, Jean Yarbrough writes:

Roosevelt’s treatment of the founding in his histories is at best equivocal. Although he admired the work of the Framers (at least the more national-minded of them) and at this point in his political career, warmly supported the Constitution, there is no evidence that Roosevelt had ever read John Locke or given much thought to the philosophical underpinnings of classical liberalism. . . .

Even more telling was that, in contrast to Lincoln, Roosevelt never invoked the principles of the Declaration to condemn slavery. To be sure, Roosevelt denounced slavery as a “moral evil” but he did so by calling it an offense against “the true standards of humanity and Christianity,” not a violation of natural right. This was because, unlike his heroes, Roosevelt did not see nature as a source of moral principle. His understanding of nature was derived from science, not philosophy.

Id. at 78, 79 (footnote omitted).

²¹³ See generally Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the “Living Constitution” in the Course of American State-Building*, 11 *STUDS. AM. POL. DEV.* 191 (1997); Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 *POL. RES. Q.* 623 (1994) (discussing the general shift from nineteenth-century views of “constructing general protections for liberty broadly defined” to “the question of which discrete liberties were most fundamental”).

²¹⁴ THOMAS, *supra* note 54, at 68.

²¹⁵ *Id.* at 67.

²¹⁶ *Id.*; see also Ceaser, *supra* note 206, at 59–66 (“A new and bolder course of action was required, in which government would have more authority and discretion to arrange or rationalize social processes.”).

²¹⁷ HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 169 (1909).

overthrowing the entire constitutional order, as some of the leading Progressives did,²¹⁸ he preferred the notion of breaking with some of its key inherited meanings. In practice, this meant expanding Congress's power to regulate, significantly narrowing economic due process and property rights, and elevating presidential authority (seen as a tribune for the people) against the judiciary (seen as a symbol of constitutional forms and limitations).²¹⁹

Roosevelt was cognizant and rather straightforward about his reconstructive ambitions, writing in his autobiography that he had been prepared to act under "the Jackson-Lincoln theory of the Presidency [because] occasionally great national crises arise which call for immediate and vigorous executive action."²²⁰ By contrast, he would accuse his presidential successor, William Howard Taft, of subscribing to the James Buchanan theory of the presidency because of Taft's refusal to follow his stewardship theory.²²¹ Consistent with his reconstructive vision, Roosevelt conducted his own administration in an authoritative manner, expanding the scope of presidential power beyond what anyone had previously imagined during normal times.²²² In line with mainstream Progressive thinking, he believed that "the executive branch was the dominant, not merely a coordinate, branch of the federal government."²²³ This was most evident in his rhetoric and his stewardship theory of presidential power, which claimed that any executive powers not explicitly prohibited under the Constitution, or by statute, were available to the President as the steward of the American people.²²⁴ Consequently, as a central feature of his program for judicial reform, Roosevelt sought to minimize the influence of the federal courts. He framed the issue as concentrating "too much power in the bench," requiring a commensurate response

²¹⁸ This sentiment was held by many leading Progressives and took a variety of forms. For example, the Progressive intellectual historian Vernon Parrington would write: "Considered historically perhaps the chief contribution of the Progressive movement to American political thought was its discovery of the essentially undemocratic nature of the federal Constitution." Caesar, *supra* note 206, at 62 (quoting Vernon Parrington, *Introduction* to J. ALLEN SMITH, *GROWTH AND DECADENCE OF CONSTITUTIONAL GOVERNMENT*, at xi (1930)). Similarly, Herbert Croly, the founder and editor of *The New Republic* would write: "The Law in the shape of the Federal Constitution really came to be a monarchy of the Word." *Id.* at 62 (quoting HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 77 (1998)).

²¹⁹ And while the notion of a "living constitution" would gain traction later in the century, its foundational premises were first advocated during this period. Caesar, *supra* note 206, at 66.

²²⁰ THEODORE ROOSEVELT, *AN AUTOBIOGRAPHY* 464 (1926). Roosevelt would argue in the same autobiography, "I did not usurp power, but I did greatly broaden the use of executive power." *Id.* at 357.

²²¹ CALABRESI & YOO, *supra* note 48, at 240. That Roosevelt viewed Lincoln and Jackson as presidential models is telling, as it signaled a particularized reading of the office's powers as contingent on personal traits—the occupant affirmatively choosing to follow the Jackson-Lincoln theory of the presidency—rather than acknowledging the contextual circumstances necessary for heightened authority.

²²² *See id.* at 240–41.

²²³ *Id.* at 239.

²²⁴ *Id.* at 245.

from the executive branch.²²⁵ Yet this still fell short of the departmentalist claims invoked by nineteenth century presidents like Jefferson, Jackson, and Lincoln.²²⁶ He understood how negatively the public might react to the image of a president usurping judicial authority,²²⁷ and tried hard to avoid a direct confrontation with the Court like President Jackson had after Chief Justice Marshall's ruling in *Worcester v. Georgia*.²²⁸

2. The Constraints of Constitutional Time

Theodore Roosevelt's presidency provides the most interesting case for analysis within the frame of constitutional time because of its intersection of political saliency with constitutional futility. Roosevelt had a clear understanding of the constitutional vision that he wanted to entrench. He was certainly more aggressive about his ambitions than President Washington was, displaying a range of bold presidential actions that went beyond anything the first president would have endorsed. However, the confluence of formal power and historical context—as great as it was for policy-level achievements—could not come close to realigning constitutional baselines. On the major constitutional questions of his time, Roosevelt encountered major frustrations.

The decision in *Lochner v. New York*²²⁹ was issued in 1905 following a sweeping re-election victory and a range of policy-level achievements.²³⁰ The case itself, which

²²⁵ WHITTINGTON, *supra* note 42, at 261–63.

²²⁶ See SCIGLIANO, *supra* note 86, at 23–44 (discussing the relationships Jefferson, Jackson, and Lincoln had with the Court).

²²⁷ However, as Whittington observed, after Roosevelt left office and announced his intention to run for president in the election of 1912, he displayed the full extent of his disdain for the judiciary by declaring “that [its] rulings invalidating laws on constitutional grounds ‘should be subject to revision by the people themselves’ through a ‘right to recall’ individual [rulings].” WHITTINGTON, *supra* note 42, at 262.

²²⁸ 31 U.S. (6 Pet.) 515, 561 (1832) (holding that the Cherokee nation is a “distinct community occupying its own territory . . . in which the laws of Georgia can have no force” and that “[t]he whole intercourse between the United States and this nation, is . . . vested in the [federal] government”). *Worcester* is perhaps more famous for President Jackson's apocryphal response to Chief Justice Marshall's decision: “John Marshall has made his decision, now let him enforce it!” WHITTINGTON, *supra* note 42, at 33–34 (noting that although Jackson never made that specific declaration, the aftermath of the case provides an excellent example of tensions between the executive and judicial branches).

²²⁹ 198 U.S. 45 (1905). In *Lochner*, the Supreme Court ruled that New York State's Bakeshop Act of 1895, which set limits on maximum hours, was an unconstitutional deprivation of the employer and employee's due process rights to “life, liberty, and property” under the Fourteenth Amendment. *Id.* at 53, 64. Justice Peckham framed the issue around whether the maximum hours regulation was a “fair, reasonable and appropriate exercise of the police power of the State” or “an unreasonable, unnecessary and arbitrary interference” with the parties' liberty of contract. *Id.* at 56. Writing for a 5–4 majority, Peckham ruled that the maximum hours provision fell within the latter category and was therefore unconstitutional, noting that the “mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid.” *Id.* at 57.

²³⁰ Thomas, *supra* note 54, at 187–89.

overturned the maximum hours provision of the New York State Bakeshop Act of 1895, was more important for its symbolic significance as an era than what it had ruled—or has been perceived to represent.²³¹ Roosevelt understood this and vigorously opposed the majority decision preserving Fourteenth Amendment economic due process protections for liberty of contract, arguing that the Court had favored property rights over human rights, and invoking Lincoln’s preference for human rights over property, which, of itself, could have no rights or vote.²³² He even singled out *Lochner* in *The New Nationalism* as indicative of the “ill-defined limits in which neither the nation nor any state should be able to exercise effective control, especially over big corporations.”²³³ Roosevelt expressed his conviction to one of the dissenting justices in *Lochner* that “if the ‘spirit’ of that decision became pervasive in the judiciary, then ‘we should not only have a revolution, but it would be necessary to have a revolution.’”²³⁴ Yet Roosevelt would be incapable of cashing in on his revolutionary ambitions even if he had a serious inclination to do so. Constitutional baselines only realign significantly when prompted by an exogenous shock, necessitating presidential action to redirect the regime. Roosevelt could not challenge the Court’s authority because there was no need to do so. While *Lochner* has become part of Jack Balkin’s anticanonical cases in constitutional law, opinion was divided at the time.²³⁵ Moreover, Roosevelt himself was the leader of a faction of the majority party at the time. The more Conservative Republican faction could not be counted upon to support a challenge to judicial authority.²³⁶ Because Roosevelt was not aligned with constitutional time, any invocation of departmentalism was unavailable to him.

Similarly, Roosevelt insisted that Congress’s power to regulate interstate commerce was “an absolute and unqualified grant, and without limitations other than those prescribed by the Constitution . . . [and that] this power has not been exhausted by

²³¹ See generally BERNSTEIN, *supra* note 115 (arguing that much of the conventional narrative regarding the *Lochner* era is historically inaccurate).

²³² THOMAS, *supra* note 54, at 85. In one sense, this argument seems ironic since Lincoln himself believed deeply in the free labor ideas of the Republican Party of the 1850s and 1860s, which were an important part of the arguments against slavery and the foundational core of the Civil War amendments. The basic idea was that the individual owned the right to her own labor and to take it without compensation was synonymous with theft, as the term “man-theft” was used by abolitionists to refer to slavery.

²³³ *Id.*

²³⁴ WHITTINGTON, *supra* note 42, at 261 (quoting Letter from Theodore Roosevelt to William Rufus Day (Jan. 11, 1908), in THE LETTERS OF THEODORE ROOSEVELT 903, 904 (Elting E. Morison & John M. Blum eds., 1952)).

²³⁵ See BERNSTEIN, *supra* note 115, at 116–18 (noting that Gerald Gunther’s constitutional law textbook of the 1970s was the first to devote a substantial amount of space to the substantive due process decisions of the *Lochner* era and suggesting that the anticanonical narrative might be anachronistic).

²³⁶ WHITTINGTON, *supra* note 42, at 262.

any legislation now on the statute books.”²³⁷ In discussing Roosevelt’s attempt at Progressive Reconstruction, George Thomas writes:

Roosevelt did not reference the Court’s opinions. And while nothing he said explicitly contradicted them—in fact, some of the language, “directly upon such commerce,” for example, seemed consistent with them—he rejected the notion that the Sherman Act simply embraced the common law. Such an understanding suggested that the act broke with traditional regulation, potentially calling forth far more expansive national administration.²³⁸

This description suggests the peculiar bind that Theodore Roosevelt found himself in as a result of constitutional time. He was careful and strategic in his actions, taking what the context would allow in order to further his constitutional vision. When compared with the blank slate of President Washington or the bold departmentalist logic of Lincoln, Roosevelt seems measured and restrained. This is not by temperament or will but rather by built-in constraints from historical context. He could not challenge the Court’s view on commerce because he did not have the warrants to do so. Therefore, despite the Court’s ruling in *Swift & Co. v. United States*²³⁹ that same year extending Congress’s power to regulate via a stream of commerce theory,²⁴⁰ the era of dual federalism in commerce clause jurisprudence continued unimpeded by Roosevelt’s protestations in favor of a more expansive reading of Congress’s power. The difference between changes to the higher law versus normal politics at the policy level is considerable—and beyond the autonomous desires of individual presidents.

As a result of the limited historical context available for realigning constitutional baselines, Roosevelt was a constrained president. Unlike reconstructive presidents such as Washington, Jefferson, Jackson, and Lincoln before him, Roosevelt would brush against the limits of his authority at the policy level. Presidents do not get the opportunity to choose the context in which they take office and they do not come into office with a label like “reconstructive president.” As a result, they are reactive to the environment while showing initiative as well, coming into contact with the political context through their actions and rhetoric. Roosevelt was a strong president but due to the lack of constitutional time, he could not replace the Supreme Court as the dominant interpreter of the Constitution. Roosevelt encountered a normal baseline, where the best he could do was lay the groundwork for changes that would manifest during a more opportune period. This would occur during the Great Depression when

²³⁷ THOMAS, *supra* note 54, at 72–73.

²³⁸ *Id.* at 73.

²³⁹ 196 U.S. 375 (1905).

²⁴⁰ *Id.* at 396–98 (ruling that Congress could prohibit local business activity in an effort to regulate interstate commerce because when the activity was combined together, it would form a stream of commerce between the states).

his distant cousin Franklin Delano Roosevelt would inherit sufficient space to entrench a new and quite different constitutional regime.²⁴¹

Where available, Theodore Roosevelt would seek to influence the direction of the Court in the future time by galvanizing the political movement he inherited, setting substantive goals for future administrations and legislators, and making key appointments to the Supreme Court. For example, Roosevelt's nomination of Oliver Wendell Holmes to the Supreme Court in 1902 would influence the direction of the Court in the 1930s and 1940s by adopting a Holmesian jurisprudence of judicial deference and evolving standards of social justice during the New Deal.²⁴² Holmes's famous dissent in *Lochner* would provide a judicial standard for the New Deal Court. Yet the fact that the first President Roosevelt could not construct a constitutional regime congruent with his political commitments speaks to the dominant role that constitutional time plays in influencing and structuring constitutional meaning.

CONCLUSION

In *Constitutional Redemption*, Jack Balkin offers a description of constitutional law as a narrative where social movements, political influences, principles, and historical timing all contribute to the way in which Americans approach and understand the Constitution. In one memorable passage, he writes:

The idea that Constitutions serve primarily to secure liberty by constraining the future is a hopeful illusion. Good constitutions enable as much as they constrain. They create channels for politics, both good and bad. At best they create flexible frameworks in which others will build fruitfully, meeting the challenges of the future; at worst they create problems and obstacles to overcome, sometimes leading to blind alleys and dead ends, sometimes to the replacement of old constitutions with new ones. France has gone through Four Republics and is now on its Fifth; we are still officially on our first. This is not because our Constitution is so fixed but because it has proved so flexible.²⁴³

While some of Balkin's focus on a narrative or story differs in significant respects from the one presented here, his emphasis on flexibility, constitutional baselines ("channels for politics"²⁴⁴), and a holistic approach to constitutional law lie at the core

²⁴¹ See Thomas, *supra* note 54, at 94–97.

²⁴² See, e.g., *id.* at 87 (discussing the impact of Holmes's *Lochner* dissent on later constitutional debate).

²⁴³ BALKIN, *supra* note 33, at 9.

²⁴⁴ *Id.*

of this discussion. In some ways, it seems that he might be alluding to constitutional renewal as much as redemption.

The need for constitutional renewal placed constitutional time at such a prominent place in American constitutionalism. Constitutional time has provided a channel for renewal without the need for a revolution, and ultimately, has played a crucial role in understanding constitutional law and structuring constitutional meaning. Time was institutionalized into the constitutional structure just as much as the separation of powers or federalism because it was essential to the maintenance and regeneration of the regime. In other words, time has been imbedded into the architecture of the Constitution, and in this way, foundational law can be considered self-correcting in its design and function. It would enable different generations of Americans to benefit from the stabilizing features of the rule of law and normal politics without hindering their ability to overcome historical crises that had previously undone republican regimes.

In yet another passage within *Constitutional Redemption*, Balkin comments that “[c]onstitutions in practice produce winners and losers. The winners proclaim its goodness; the losers are marginalized, demonized, or forgotten. For these losers, constitutions remain agreements with hell.”²⁴⁵ It is here that Balkin reveals an implicit insight about constitutional law: that it provides incentive structures and always has. The very idea that a constitution provides security by locking in rights or process—whether a real constraint to future action or a “hopeful illusion”²⁴⁶—may be shared by political players and judicial actors. And if they believe that this Constitution promises such security, then they will act in ways that reveal this belief, which is largely what the struggle to define and structure constitutional meaning has shown. They want to avoid “agreements with hell”²⁴⁷ to the greatest extent possible and correspondingly, display actions that reveal a strong intention to win.

In particular, presidents are incentivized by the lure of a historical legacy to lock in their preferred constitutional vision by the most secure means available. The promise of a constitutional regime provides the type of protection they seek against an uncertain future: one where successive presidents, the partisan opposition, the rival political branches, and the bureaucracy can be counted upon to provide a different set of preferences. Yet presidents themselves cannot affirmatively choose to construct a constitutional regime or realign a constitutional baseline. If they did, every president would have done so. Chester Arthur did not have the same set of options available to him as Lincoln or FDR. Formal Article II power has never defined the full extent of presidential authority—historical context has. As a result, constitutional time provides the opportunity for the full extension of executive authority within a regenerative constitutional cycle. The bold new directions that a regime incorporates during constitutional time reflect this.

²⁴⁵ *Id.* at 11.

²⁴⁶ *Id.* at 9.

²⁴⁷ *Id.* at 11.

Constitutional baselines rarely change. When they do, it is as a result of historical crises that credibly threaten to destabilize the established order: the presence of constitutional time. Historical exigencies cause constitutional baselines to become contested and fluid. Then, space opens for presidents to substitute their preferred constitutional vision within the existing Constitution. The clearest instances of this occurred within the midst of the greatest threats to the Republic: the period of heightened uncertainty following the American Founding, the Civil War and its aftermath, and the Great Depression. Since presidents are at the furthest reaches of their power during such periods, they are able to successfully challenge the judiciary's interpretation of law through a range of strategies, including the invocation of departmentalism, the execution of broad constructions, or the introduction of new amendments. This arduous process can be tumultuous and loaded with risk, but presidents engage in them because of the promise of safeguarding their foundational principles and partisan commitments for the foreseeable future. Presidents understand that constitutions produce winners and losers, and as a result, presidents attempt to construct regimes that constrain the available choice of legislators and the judiciary.

The presidencies of George Washington and Theodore Roosevelt reveal the importance of constitutional time in constructing and structuring constitutional meaning. By all accounts, Roosevelt was the more forceful president in office, offering a stewardship theory of executive power that had been unheard of in terms of its authority—and never followed since his tenure. Roosevelt's constitutional ambitions were clear and bold, desiring a new direction for the nation consistent with his Progressive political commitments. Washington, by contrast, was deferential in office, reading constitutional limits on his power quite literally and ceding ground to Congress on an array of domestic matters. Washington's constitutionalism was centered on the Federalist vision of a competent, supreme national government that established a more durable set of political foundations than those under the failed Articles of Confederation. If the energy and boldness of executive action alone were the deciding factors in establishing a lasting constitutional regime, then Roosevelt would have provided the more durable legacy. However, the presence of constitutional time rigged the comparison in favor of the first president because of the constitutional opening that he inherited. President Washington had the sort of space available to him that ensured his commitments and vision would endure the test of time, including an immediate challenge from President Jefferson. By contrast, the first President Roosevelt would have to await the presidency of a second President Roosevelt to have his Progressive vision ensconced as part of the new constitutional baseline. Theodore Roosevelt presided during important times as president. However, they were not extraordinary times, and therein lies the difference between his constitutional legacy and Washington's.

There is little direct evidence that the leading American Founders used the word "constitutional time," and even less so during the actual Convention in Philadelphia.

However, the challenges of creating a republic that could endure the types of circumstances and historical exigencies that prior republics failed to withstand ensured that constitutional time would be accounted for in the institutions they created. The most innovative of those institutions, the American presidency, would play a central role in the orientation of the regime and its ability to withstand threats to the Republic. It would be competent and incentivized to maintain and renew the regime in ways that have played out repeatedly since Washington's presidency in 1789. Constitutional theory has not grasped the full implications of this process, although the renewed scholarly interest in holistic approaches to constitutional law has suggested a way to do so. This discussion provides an initial foray into assessing the ways constitutional time has influenced the structure and meaning of constitutional law to the present.