

Presidential Encounters with American Constitutional Law (THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY. EDITED BY KEN GORMLEY, 2016. NEW YORK: NEW YORK UNIVERSITY PRESS 701 PP.)

Robert F. Blomquist
Valparaiso University

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Robert F. Blomquist, *Presidential Encounters with American Constitutional Law (THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY. EDITED BY KEN GORMLEY, 2016. NEW YORK: NEW YORK UNIVERSITY PRESS 701 PP.)*, 52 Val. U. L. Rev. 373 (2018).

Available at: <https://scholar.valpo.edu/vulr/vol52/iss2/5>

This Book Review is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



Book Review

PRESIDENTIAL ENCOUNTERS WITH AMERICAN CONSTITUTIONAL LAW

*THE PRESIDENTS AND THE CONSTITUTION: A
LIVING HISTORY*. EDITED BY KEN GORMLEY,
2016. NEW YORK: NEW YORK UNIVERSITY
PRESS 701 PP.

Robert F. Blomquist*

In *The Presidents and the Constitution*, a variety of experts in law, history, political science, and other subjects describe how each of the American presidents, from George Washington to Barack Obama, have dealt with constitutional issues affecting their presidencies. Gormley edits a book that provides a uniform template for each president—a biographical section followed by a constitutional exploration of his administration and a conclusion.

Gormley provides a useful introduction to the book, noting:

The presidency of the United States is the most powerful position in the American system of government, and perhaps in the world. As Woodrow Wilson once wrote, the [C]hief [E]xecutive “is the vital place of action in the system, whether he accepts it as such or not, and the office is the measure of the man—of his wisdom as well as his force.” Yet the Constitution dedicates surprisingly little space to defining the duties or powers of the president; instead, it leaves the contours of that high office to be sketched out in real time, as history plays itself out over distinctive eras in American life.¹

The Framers, according to Gormley, “put surprisingly little meat on the bones of this key figure”:² vesting the “‘executive [p]ower’ in the

* Seegers Distinguished Professor of Law, Valparaiso University Law School. B.S. 1973, University of Pennsylvania (Wharton School); J.D. 1977, Cornell Law School.

¹ Ken Gormley, *Introduction: An Unfinished Presidency in THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY 1* (Gormley ed., 2016) (footnote omitted) [hereinafter PRESIDENTS].

² *Id.* at 2.

president”;³ establishing the president’s status as ““Commander in Chief . . .” of the military;⁴ empowering the president to appoint ““with the [a]dvice and [c]onsent of the Senate”” federal judges, ambassadors, and other executive officials;⁵ granting the president power over ““[r]eprieves and [p]ardons””;⁶ crafting the veto power over legislation;⁷ among a few other provisions.

Gormley makes further interesting points about the presidency in his *Introduction*. First,

when the president goes too far or seeks to defy another branch of government, there is the looming presence of Article II, Section 4, which states that he or she “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors.”⁸

Second, linked to Alexander Hamilton’s thinking, the president was to be “a force of energy and action in the tripartite system of government.”⁹ Third, the Founders made a deliberate choice to have a unitary executive with one president instead of multiple presidents.¹⁰

Fourth, under the Three-Fifths Clause, the operation of the Electoral College (until slavery was ended by the Thirteenth Amendment) gave “slave owners—and slave-owning states—... a whopping over-vote . . .”¹¹ Fifth, “[m]ore than any other branch of government delineated in the first three articles of the Constitution, the executive branch was left intentionally incomplete.”¹² In this regard:

Some of the blanks would be filled in during the expected presidency of George Washington; he could guide the way through the fog for future occupants of that office. The rest of the blanks would be left to history itself. The new American presidency would be defined by the Constitution but also would be allowed to play itself out,

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *See id.* at 2 (describing the President’s power to veto any legislation he objects to).

⁸ *Id.* at 3.

⁹ *Id.* at 5.

¹⁰ *See id.* at 6 (explaining that James Wilson argued for one chief executive, which was ultimately agreed to by the delegates of the Constitutional Convention).

¹¹ *Id.* at 7.

¹² *Id.* at 8.

gradually giving definition to the sparse words of the written document.¹³

The Presidents and the Constitution – A Living History consists of forty-four substantive chapters (other than the additional Introduction and Conclusion)—one chapter for each presidency (with Grover Cleveland having two chapters because of his two non-consecutive terms). Gormley’s editorial intent was to assemble a group of authors who would have:

a challenge in each case . . . to create a short, readable chapter that created a colorful portrait of the president and shone a light on constitutional issues that confronted the president, helped to shape the president’s time in office, or gave birth to a piece of constitutional precedent during the president’s tenure in office. Chapters were then edited and rewritten countless times to weave an interconnected historical account.¹⁴

Part I of this Essay highlights key presidential constitutional encounters from George Washington to Barack Obama.¹⁵ Twenty-four constitutional vignettes are addressed, linked to twelve historical eras set forth in the book.¹⁶ Part II of the Essay discusses the strengths of the book; Part III of the Essay focuses on the weaknesses of the book.¹⁷

I. PRESIDENTIAL CONSTITUTIONAL ISSUES THROUGH TIME

A. *The Founding Era*

Six presidents constitute the Founding Era of the American presidency: George Washington, John Adams, Thomas Jefferson, James Madison, James Monroe, and John Quincy Adams.

While John Quincy Adams held fascinating views on the expansiveness of federal authority,¹⁸ the most important constitutional

¹³ *Id.*

¹⁴ *Id.* at 11.

¹⁵ See *infra* Part I (discussing the most important constitutional encounters for the presidents, ranging from George Washington to Barack Obama).

¹⁶ See *infra* Part I (using the precise language of the historical eras set forth in the book).

¹⁷ See *infra* Part II (indicating the strongest points of *PRESIDENTS*). See also *infra* Part III (criticizing the weaknesses of the book).

¹⁸ See Jonathan L. Entin, *John Quincy Adams* in *PRESIDENTS*, *supra* note 1, at 93 (indicating Adams’ stance on federal authority by demonstrating his proposals for internal improvements).

issue addressed by a president during this era was Thomas Jefferson's Louisiana Purchase.¹⁹ "Initially, Jefferson believed the deal [with Napoleon Bonaparte] could not be consummated without a constitutional amendment, because the U.S. Constitution did not explicitly give him this authority."²⁰ Notwithstanding his initial misgivings, "when it appeared that delay might endanger the deal, he urged Congress to approve the acquisition."²¹ Jefferson "[i]n this case, given the exigencies of the situation, endorsed a broad federal power (in complete contrast to his previous positions) even though that power was not explicitly enumerated in the Constitution."²² "The Louisiana Purchase turned out to be one of Jefferson's greatest accomplishments. It revealed a more pragmatic Jefferson—an executive who, without explicit constitutional authority, was willing to exercise broad presidential power to secure long-term benefits to the country."²³

B. *The Age of Jackson*

Five presidents—Andrew Jackson, Martin Van Buren, William Henry Harrison, John Tyler, and James K. Polk—comprised this historical era.

James Polk faced a vital constitutional issue in his declaration of war against Mexico without the approval of Congress.²⁴

Although absolute in his beliefs in the limited domestic powers that came with the office of president, Polk nevertheless led the country into war with Mexico, and as a result, he was criticized by some for usurping Congress's constitutional war-making powers.²⁵

This outlook was evident in his first State of the Union message to Congress, near his first year in the White House. Adams proposed a federal bankruptcy statute, a naval academy, a national university, a national astronomical observatory, a separate department of the interior, and a reformed patent law.

Id. (footnote omitted).

¹⁹ See Cliff Sloan, Louis Fisher & Monroe Spinowitz, *Thomas Jefferson*, in *PRESIDENTS*, *supra* note 1, at 51–52 (detailing Jefferson's decision to acquire the Louisiana Territory).

²⁰ *Id.* at 52.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See Frank J. Williams, *James K. Polk*, in *PRESIDENTS*, *supra* note 1, at 156 (describing the controversy behind Polk's declaration regarding whether it was authorized by the Constitution).

²⁵ *Id.* at 152.

While Congress “overwhelmingly approved the declaration of war”²⁶ sought by Polk, members of Congress took issue with the manner that Polk had used. For example:

Senator John Calhoun (D-S.C.) objected, asserting that simply because a president says there is a war, “there is no war according to my sense of the Constitution.” In his view, there was a distinction between hostilities and war. “The President is authorized to repel invasion without war, but it is *our* sacred duty to make war, and it is for *us* to determine whether war shall be declared or not.”²⁷

Andrew Jackson, however, encountered the most substantial constitutional issues as president during this era.²⁸ First, he was the first president to use the veto power “to make public policy,” rather to negate “legislation the president regarded as unconstitutional,” when he vetoed the Maysville Road Bill in 1830.²⁹ In this regard, “Jackson insisted the Constitution did not permit federal internal improvements if they had not been approved by the states in which those projects were located[.]”³⁰ Second, Jackson, in 1832, vetoed a bill that would have reauthorized the Bank of the United States:³¹

Proponents of the national bank insisted that the Supreme Court’s decision in *McCulloch v. Maryland* firmly established the constitutionality of that institution. Jackson disagreed. In his veto message, he insisted that precedent provided no support for the constitutional power to incorporate a national bank: “If the opinion of the Supreme Court covered the whole ground of this Act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution.”

Jackson then claimed that even if the Supreme Court’s opinion in *McCulloch* had some constitutional

²⁶ *Id.* at 153.

²⁷ *Id.* (footnote omitted).

²⁸ See Mark A. Graber, *Andrew Jackson*, in *PRESIDENTS*, *supra* note 1, at 106 (detailing one of President Jackson’s most important constitutional issues faced during his presidency: the veto of the Maysville Road Bill).

²⁹ *Id.*

³⁰ *Id.*

³¹ See *id.* at 107 (describing President Jackson’s view of federal powers, which was deemed to be narrow, based on his veto of the Bill Reauthorizing the Bank of the United States).

force, Congress had final say over the issue of whether a national bank was “necessary” within the meaning of the Constitution. *McCulloch*, he asserted, made clear that “the ‘degree of [the national bank’s] necessity,’ involving the details of a banking institution, is a question exclusively for the legislative consideration.”³²

Third, Jackson’s removal of the deposits from the national bank after the 1832 election created a constitutional furor with Congress.³³ Jackson contravened the advice of his cabinet and ordered the removal of all federal funds from the National Bank; moreover, he fired his own Secretary of the Treasury when he balked at presidential orders to effect the transfer.³⁴ In response, the Senate passed a resolution of censure against Jackson “for treating his cabinet as mere subordinates with no responsibility to Congress.”³⁵ In 1834, President Jackson conveyed:

[a] “Message to the Senate Protesting Censure Resolution” [whereby he] asserted exclusive presidential responsibility for control over his subordinates in the executive branch, including members of the cabinet. Responding to [Henry] Clay’s charge that the Secretary of the Treasury had independent duties that he owed to Congress, Jackson insisted otherwise[.]³⁶

Finally, Jackson’s proclamation of nullification, in response to “South Carolina’s attempt to declare federal protective tariffs null and void within that state”³⁷ constituted a resounding message of national power:

Each State, having expressly parted with so many powers as to constitute, jointly with the other States, a single nation, cannot, from that period, possess any right to secede, because such secession does not break a league, but destroys the unity of a nation; and any injury to that unity is not only a breach which would result from the

³² *Id.* (footnotes omitted).

³³ *See id.* at 108 (detailing President Jackson’s determination to remove all federal money from the national bank despite that decision being inconsistent with both Congress and the bank’s charter).

³⁴ *See id.* (indicating that President Jackson removed the secretary of the treasury from office for refusing to follow his direction).

³⁵ Mark A. Graber, *Andrew Jackson*, in *PRESIDENTS*, *supra* note 1, at 108.

³⁶ *Id.* at 109.

³⁷ *Id.* at 110.

contravention of a compact, but it is an offense against the whole union.³⁸

C. *The Pre-Civil War Era*

This era consists of four weak presidents: Zachary Taylor, Millard Fillmore, Franklin Pierce, and James Buchanan.

Franklin Pierce “is most remembered as the president who signed the Kansas-Nebraska Act, which set the stage for what came to be known as Bleeding Kansas.”³⁹ Pierce believed in popular sovereignty as a concept of “*constitutional self-government*,” however, “his administration did not actually support sovereignty or free elections.”⁴⁰ Indeed, the Pierce administration backed fraudulent election practices in Kansas, including: postponing elections to aid the pro-slavery residents, allowing a terroristic group called Border Ruffians to instill chaos in the voting process of the Kansas Territory by taking over polling places, fraudulently voting, preventing opponents from voting, and stuffing ballot boxes.⁴¹ “The new [territorial] legislature made it a capital offense to distribute antislavery literature and passed numerous other pro-slavery laws”⁴²—this in spite of “the First Amendment to the Constitution, which applied to all Federal Territories, guaranteed freedom of speech and freedom of the press.”⁴³

In the final analysis:

Pierce’s legacy would be Bleeding Kansas, his corruption of the democratic process and his obtuse pro-slavery positions. He also left [a constitutional] impact through his support of men like Jefferson Davis and John Campbell both of whom would later become traitors, making war on their own country. When President Lincoln would try to preserve the Union that Pierce had so undermined, the former president would openly denounce Lincoln. Pierce opposed the Union effort and emancipation.⁴⁴

³⁸ *Id.* at 111.

³⁹ Paul Finkelman, *Franklin Pierce*, in *PRESIDENTS*, *supra* note 1, at 189.

⁴⁰ *Id.* at 191 (emphasis added).

⁴¹ *See id.* (outlining the events during which the Pierce administration became involved in election fraud in Kansas).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 192.

James Buchanan also negatively encountered – like Franklin Pierce – the Constitution during his term in office.⁴⁵ Buchanan played down the president’s constitutional powers “in a time of national crisis.”⁴⁶

After Abraham Lincoln’s election as president in 1860, states from the deep South, spearheaded by South Carolina, began to secede and to take military action against the North.⁴⁷

Blaming northern antislavery agitation for the crisis, Buchanan called for constitutional amendments to protect slavery in the territories and in the South and for strict enforcement of fugitive-slave laws in the North. Despite his sympathy for the South, however, Buchanan drew the line at secession. Devoted to the Union, he refused to recognize the legality of secession, *yet he believed that the Constitution prevented him from stopping it*. As Buchanan read the Constitution, the president had no authority, apart from executing the laws, to change the relationship between the federal government and a seceding state. Any attempt on the part of the president to assume such responsibility, he declared, “would be a naked act of usurpation.”⁴⁸

D. Civil War and Reconstruction

This era is comprised of three presidents: Abraham Lincoln, Andrew Johnson, and Ulysses S. Grant.

Andrew Johnson’s impeachment and trial – the first impeachment of a president in American history – was a significant constitutional moment.⁴⁹ Members of Congress held different views on whether Johnson’s actions “to unilaterally enact a Reconstruction program and then to frustrate the Reconstruction program duly enacted by Congress” were impeachable offenses.⁵⁰ In the end, “[m]ost of the articles of impeachment related to Johnson’s effort to remove [Secretary of War]

⁴⁵ See Thomas A. Horrocks, *James Buchanan*, in *PRESIDENTS*, *supra* note 1, at 195 (providing a brief interpretation of President Buchanan’s failures which resulted from his narrow interpretation of the Constitution).

⁴⁶ *Id.*

⁴⁷ See *id.* at 202–03 (detailing the circumstances under which President Lincoln dealt with the Southern states attempting to secede from the rest of the country).

⁴⁸ *Id.* (emphasis added and footnote omitted).

⁴⁹ See Michael Les Benedict, *Andrew Johnson*, in *PRESIDENTS*, *supra* note 1, at 234–36 (detailing the impeachment of President Andrew Johnson).

⁵⁰ *Id.* at 234.

Stanton from office in violation of the Tenure of Office Act as part of a pattern of obstructing the Congress's Reconstruction program."⁵¹

The participants in Johnson's impeachment trial were cognizant of the constitutional undertones of the case.⁵² Counsel for Johnson "argued effectively that the Tenure of Office Act was in fact unconstitutional, that Johnson had violated the law only for the purpose of raising a court case to test that question," and that the law did not apply to members of the cabinet.⁵³ Another of Johnson's lawyers argued in the Senate chamber "that this was not just the trial of a chief executive, but that it is indeed the trial of the Constitution."⁵⁴ Most historians "disagree whether [Johnson's] intransigence justified impeachment, which might have had serious consequences for the future balance of executive and legislative power."⁵⁵

The Civil War acted as a crucible for testing the Constitution—one that has been unique in American history.⁵⁶ "Did the South have the right to secede? During the war, did Lincoln usurp the powers of Congress and the courts? Did he trample on the Bill of Rights and the rule of law?"⁵⁷ One perspective is as follows:

Perhaps more than any other American president before him, Lincoln was forced to come to grips with a paradox: Wartime required a set of overarching, governing laws at the same time that it produced such vast, unexpected dangers that the chief executive had to exercise enormous often-unplanned powers. Nowhere was Lincoln's understanding of this incongruity more evident than in his exercise of unwritten presidential authority to suspend the writ of habeas corpus and to establish a blockade of southern ports without a formal declaration of war by Congress.⁵⁸

⁵¹ *Id.* at 235.

⁵² *See id.* (indicating the importance of the Constitution and constitutional issues in the impeachment proceedings of President Johnson).

⁵³ *Id.*

⁵⁴ *Id.* (citation and internal quotation marks omitted).

⁵⁵ *Id.* at 236.

⁵⁶ *See* DANIEL FARBER, *LINCOLN'S CONSTITUTION* 1 (2003) (describing generally the pressure that the Civil War placed on the Constitution).

⁵⁷ *Id.*

⁵⁸ William D. Pederson, *Abraham Lincoln*, in *PRESIDENTS*, *supra* note 1, at 219.

Of particular interest is Lincoln's use of the Emancipation Proclamation as a war power.⁵⁹ In this regard, as president, "he became strongly influenced" by a solicitor in the War Department who "argued that as commander in chief, the president possessed the war power to emancipate the slaves because they [were] considered property that could be seized from the enemy."⁶⁰

E. *The Gilded Age*

Seven presidents are grouped within this heading: Rutherford B. Hayes, James A. Garfield, Chester A. Arthur, Grover Cleveland (First Term), Benjamin Harrison, Grover Cleveland (Second Term), and William McKinley.

Benjamin Harrison made a powerful contribution to constitutional exegesis in his interpretation of the Commerce Clause in Article I, Section 8 of the Constitution.⁶¹ Harrison "believed that [the Commerce Clause] implied the power to move against the growing threat of monopolies. The Harrison administration, working with Congress, produced the Sherman Anti-Trust Act of 1890."⁶²

In another policy area, Harrison was innovative in his constitutional analysis but ultimately unsuccessful in passing the legislation.⁶³ Harrison joined Senator Henry M. Blair of New Hampshire in proposing an educational funding bill—" [t]he bill sought to provide some \$77 million in federal aid for public education."⁶⁴ According to the bill, "[t]he aid received by each state would be based on the state's illiteracy rate for all those over ten years of age, as had been determined by the Census of 1880."⁶⁵ The Census reflected that "nearly 75 percent of all illiterate people lived in the South."⁶⁶ Because of the preponderance of African Americans in the South, "African Americans in the South stood to benefit most from the bill" and "Blair and Harrison believed that the General Welfare Clause

⁵⁹ See *id.* at 215 (explaining that one of the President's war powers included the ability to seize property from the enemy, which is what the Emancipation Proclamation sought to do in freeing the slaves).

⁶⁰ *Id.*

⁶¹ See Allan B. Spetter, *Benjamin Harrison*, in *PRESIDENTS*, *supra* note 1, at 301 (detailing President Harrison's beliefs about the Commerce Clause).

⁶² *Id.*

⁶³ See *id.* at 302 (indicating that President Harrison's attempts to pass the Blair Education Bill failed).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

in Article I, Section 8, of the Constitution permitted federal aid to education to assist the former slaves."⁶⁷

The most important presidential encounter with constitutional issues during the Gilded Age was Grover Cleveland's First Term efforts to repeal the Tenure of Office Act.⁶⁸

After an exchange of messages between Cleveland and a congressional committee, "Cleveland seemed intent on staying the course to protect what he regarded as the constitutional prerogatives of the people's office."⁶⁹ Congress finally acquiesced and passed legislation to repeal the Tenure of Office Act—an Act that had diminished presidents' power for decades in proscribing which executive officials the president could fire and that prescribed extensive documentation as well.⁷⁰ Due to Cleveland's effort, the president's Article II constitutional powers to run the executive branch were fortified.⁷¹

F. *The Progressive Era*

Theodore Roosevelt and William Howard Taft are the two presidents assigned to this historical era.

An important constitutional issue that President Taft grappled with during this era was the advancement of the Sixteenth Amendment to the Constitution authorizing the federal government to levy a federal tax against income.⁷² "For President Taft, the only appropriate course of action after the [1895] Supreme Court case in *Pollock v. Farmers' Loan and Trust Company* was to initiate the constitutional amendment process set forth in Article V, rather than simply" to wait on the Court to reverse itself on the constitutionality of an income tax.⁷³

The most important Progressive Era constitutional encounter by a president, however, was Theodore Roosevelt's argument on the power of the federal government and the presidency over conservation of the

⁶⁷ *Id.*

⁶⁸ See Donald Grier Stephenson, Jr., *Grover Cleveland, First Term*, in PRESIDENTS, *supra* note 1, at 292–93 (outlining generally the details of President Cleveland's involvement in repealing the Tenure of Office Act).

⁶⁹ *Id.* at 293 (internal quotation marks omitted) (footnote omitted).

⁷⁰ See *id.* (indicating that Congress passed the bill to repeal the Tenure of Office Act, which was formally repealed in March of 1887).

⁷¹ See *id.* at 292–93 (detailing the repeal of the Tenure of Office Act, which served to fortify the constitutional powers to run the executive branch).

⁷² See Francine Sanders Romeoro, *William Howard Taft*, in PRESIDENTS, *supra* note 1, at 347–48 (examining the details of President Taft's involvement in authorizing a federal income tax).

⁷³ *Id.* at 347 (citation omitted).

nation's natural resources.⁷⁴ William Badler in *The Presidents and the Constitution: A Living History* states:

Roosevelt is widely considered the first president to advance the conservation movement, firmly believing that it was the federal government's obligation to preserve and carefully manage the nation's resources. Deeply committed to the Progressive cause, he used his presidential powers to create national forests, national parks, and wildlife refuges, and he formed the U.S. Forestry Service In 1906, Roosevelt signed into law the Antiquities Act, which gave the president the authority to designate and set aside public areas as national monuments by executive order and eventually led to the creation of the National Park Service in 1916.⁷⁵

G. *World War I and the Great Depression*

Four presidents held office during this era: Woodrow Wilson, Warren G. Harding, Calvin Coolidge, and Herbert Hoover.

President Harding demonstrated constitutional leadership in the pardoning of Socialist Eugene Debs and other political prisoners (stemming from aggressive executive action during World War I).⁷⁶ "Specifically, his act[s] [were] a . . . contribution to the development of the pardon practice under Article II, Section 2 of the Constitution. These commutations served as a check on potential abuse by *both* coequal branches of government."⁷⁷ Indeed:

Harding's strategic use of the presidential pardon helped him undo the damage done by a war-frenzied Congress in enacting the Espionage and Sedition Acts, which had been compounded by the failure of the Supreme Court to defend the First Amendment of the Constitution. It was an impressive demonstration of constitutional authority by a president.⁷⁸

⁷⁴ See William D. Badler, *Theodore Roosevelt*, in PRESIDENTS, *supra* note 1, at 334 (mentioning President Roosevelt's commitment to the conservation of natural resources).

⁷⁵ *Id.*

⁷⁶ See James D. Robenalt, *Warren G. Harding*, in PRESIDENTS, *supra* note 1, at 381 (providing details as to the pardoning of political prisoners by President Harding).

⁷⁷ *Id.* (emphasis added).

⁷⁸ *Id.* (footnote omitted).

Woodrow Wilson's American foreign policy conduct in the years leading up to America's involvement in World War I deserves prime mention during this time frame.⁷⁹ With Germany's initiation of "unrestricted warfare against all shipping to Great Britain and its Allies in early 1917,"⁸⁰ President Wilson "was faced with what he would describe as the 'fearful' prospect of leading 'this great peaceful people into war.'"⁸¹ "In deciding to arm American vessels—a posture of 'armed neutrality'—Wilson recognized the belligerent nature of the move and the constitutional questions it invited."⁸²

Wilson's decision to effectively end neutrality was reminiscent of the first great foreign policy debate in America's history—the question of whether President George Washington's Proclamation of Neutrality in 1793, during the time of the great sea battles between Great Britain and France, was constitutional. Ultimately, Wilson's muscular foreign policy would win the day. By 1936, the U.S. Supreme Court would all but validate Wilson and other . . . presidential claims of exclusive authority when it came to foreign affairs. In [*United States*] *v. Curtiss-Wright Export Corporation*, the Court would acknowledge "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"—a power which does not require as a basis for its exercise an act of Congress.⁸³

H. *The New Deal and World War II*

Two presidents—Franklin Delano Roosevelt (FDR) and Harry S. Truman—held office during this era.

President Roosevelt, when compared to President Truman, was the subordinate of the two in the importance of constitutional issues faced during his administration.⁸⁴ First, from a positive perspective, Roosevelt was the Great Improviser through the pragmatic and innovative social

⁷⁹ Saladin M. Ambar, *Woodrow Wilson*, in *PRESIDENTS*, *supra* note 1, at 361.

⁸⁰ *Id.*

⁸¹ *Id.* (citation omitted).

⁸² *Id.*

⁸³ *Id.* at 362 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)). "In 2015, however, the [Court] jettisoned the sole-organ doctrine articulated in the *Curtiss-Wright* case." *Id.* at 369 n.20.

⁸⁴ James N. Giglio, *Harry S. Truman*, in *PRESIDENTS*, *supra* note 1, at 429–30.

programs that he launched during his presidency.⁸⁵ For example, three important bills that passed during FDR's tenure were the Social Security Act of 1935, the National Labor Relations Act, and the G.I. Bill of Rights (Servicemen's Readjustment Act of 1944).⁸⁶

Second, from a negative perspective, Roosevelt tried to use a "Court-packing plan"⁸⁷ to deal with the opposition of several Supreme Court Justices to his New Deal social programs.⁸⁸ "The plan was designed to add a new [J]ustice to the Court for each [J]ustice over the age of seventy, to overpower the obstinate bloc standing in the way of FDR's New Deal legislation."⁸⁹

Third, FDR "parted with the two-term tradition set by George Washington [and arguably implicit in Article II of the Constitution by virtue of this tradition] when he ran for and won reelection in 1940 [and 1944]."⁹⁰

Finally, in what is today viewed from a negative constitutional perspective but at the time was arguably necessary as a national security measure, FDR authorized curfews and camps for Japanese-American citizens on the West Coast of the United States.⁹¹

On February 19, 1942, FDR, as commander in chief, issued Executive Order 9066, which empowered military commanders to issue curfews and establish temporary "assembly centers" for Japanese American citizens on the West Coast, while permanent "relocation camps" were being built further inland. Military advisers feared an attack on American's mainland—an attack assisted by spies and saboteurs of Japanese descent. Within a half year, some 112,000 persons of Japanese descent (more than two-thirds of whom were American citizens) were effectively imprisoned.⁹²

Harry Truman's big constitutional moment came with the Steel Seizure Case during the Korean War.⁹³ The United States government, under the supervision of the Secretary of Commerce, was ordered by

⁸⁵ William D. Pedersen, *Franklin Delano Roosevelt*, in *PRESIDENTS*, *supra* note 1, at 412.

⁸⁶ *Id.* at 413 (footnotes omitted).

⁸⁷ *Id.* at 416 (footnote omitted).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 419 (footnote omitted).

⁹¹ *Franklin Delano Roosevelt*, in *PRESIDENTS*, *supra* note 1, at 420.

⁹² *Id.* (footnote omitted).

⁹³ James N. Giglio, *Harry S. Truman*, in *PRESIDENTS*, *supra* note 1, at 433.

Truman to take over the nation's steel mills for national security reasons of assuring the availability of steel for war armament production.⁹⁴

Following the steel industry's suit to regain its property, the case reached the Supreme Court as *Youngstown Sheet and Tube Co. v. Sawyer*. On June 2, the Court rendered its opinion on a six-to-three vote: It declared that the president's steel seizure constituted an unconstitutional usurpation of legislative power.⁹⁵

The most significant opinion in the *Youngstown* case was a concurring opinion by Justice Robert Jackson.⁹⁶ Jackson:

laid out three categories of presidential power that created a spectrum within America's constitutional system. In the first category, when the president acted pursuant to express or implied authorization of Congress, the executive's powers were strongest. Here, the president was acting according to whatever powers he possessed (inherently) in the Constitution, *plus* whatever power Congress was allowed to delegate him. In the second category, when the president acted where Congress had neither granted nor denied authority, he was in a middle ground. He had to rely on his own powers in the Constitution, but there was a "zone of twilight" in which he and Congress could comfortably coexist. In the third category, where the president acted in a manner incompatible with the express or implied will of Congress, his power was at the lowest ebb. He could only rely on his own powers, minus the Constitution's powers given to Congress.⁹⁷

I. *The Civil Rights Era*

Three presidents served during the Civil Rights Era of American constitutional law: Dwight D. Eisenhower, John F. Kennedy, and Lyndon B. Johnson.

President Kennedy exerted constitutional leadership in responding to the Alabama race riots in 1963 over the admission of two black students

⁹⁴ *Id.* at 433-34.

⁹⁵ *Id.* at 434.

⁹⁶ *Id.* at 435.

⁹⁷ *Id.*

to the University of Alabama.⁹⁸ In a television address to the nation, he announced “that he would send to Capitol Hill proposed legislation to, among other things, ban segregation in hotels, restaurants, theaters, stores, and other private businesses.”⁹⁹ Later, with the consultation of his solicitor general, Archibald Cox, Kennedy decided to use the Interstate Commerce Clause, in Article I, Section 8, to press for federal power to achieve the ends of the legislation.¹⁰⁰

President Lyndon Johnson, through his deft legislative skills and political leadership, “presided over the genesis of two of the nation’s most significant pieces of civil rights legislation [the Civil Rights Act of 1964 and the Voting Rights Act of 1965].”¹⁰¹ He “convinced white Southerners of the laws’ benefits to all the South’s people, and anticipated and defeated possible constitutional challenges to the legislation” while “fundamentally chang[ing] American political and social behavior.”¹⁰²

J. *The Watergate Era and Reform*

Presidents Richard M. Nixon, Gerald R. Ford, and Jimmy Carter presided over this era of American constitutional law and the presidency.

Gerald R. Ford’s actions, during his short presidency, had constitutional significance. One, he decided to pardon his predecessor, Richard M. Nixon, because “he feared that if Nixon was criminally prosecuted, the country might be dragged through years of turmoil.”¹⁰³ “Several constitutional scholars offered strong objections to the Nixon pardon”;¹⁰⁴ the most vociferous objection was that “the Constitution’s framers favored strict limits as to when the clemency power could be used before conviction and that the Nixon case—involving allegations of official misconduct—did not qualify”¹⁰⁵ under Article II, Section 2, Clause 1 of the Constitution.¹⁰⁶

Two, Ford deftly handled the then recent congressional enactment of the War Powers Resolution, which required the president to consult Congress on war-related decisions and to limit the president’s power to

⁹⁸ See Barbara A. Perry, *John F. Kennedy*, in *PRESIDENTS*, *supra* note 1, at 467–68 (discussing President Kennedy’s initial reluctance to step into the civil rights debate before announcing his bold and moral stance on the issue).

⁹⁹ *Id.* at 468.

¹⁰⁰ See *id.* (describing, briefly, the background of Attorney General Cox’s advice).

¹⁰¹ John L. Bullion, *Lyndon B. Johnson*, in *PRESIDENTS*, *supra* note 1, at 483.

¹⁰² *Id.*

¹⁰³ Jeffrey Crouch, *Gerald R. Ford*, in *PRESIDENTS*, *supra* note 1, at 511.

¹⁰⁴ *Id.* at 512.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 511–12.

commit the nation for long military adventures.¹⁰⁷ Despite his own misgivings about the constitutionality of the War Powers Resolution, Ford successfully parried Cambodia's aggressive actions regarding the capture of an American merchant vessel, while reporting his actions to Congress under the War Powers Resolution.¹⁰⁸

Richard M. Nixon had several important, albeit negative, encounters with the Constitution during his truncated presidency.¹⁰⁹ First, he escalated the modest custom of past presidents to impound defense appropriations in certain circumstances as well as an over-the-top claim of entitlement under the Constitution to impound funds that Congress had appropriated for domestic purposes.¹¹⁰

Second, "[i]n the summer of 1971, the *New York Times* and *Washington Post* began publication of the 'Pentagon Papers,' which contained embarrassing classified material, showing that the Kennedy, Johnson, and . . . Nixon administrations had misled Congress and the public about the nation's war effort."¹¹¹ However, "[t]he Court . . . rebuffed Nixon's attempt to restrain publication of the sensitive material, concluding that the First Amendment freedom of press protected the newspapers from such prior restraint."¹¹²

Finally, in a political death by a thousand cuts, Richard M. Nixon tried to endure the Watergate investigations involving congressional hearings, subpoenas, claims of executive privilege, and claims to recorded White House tapes.¹¹³

K. *New Conservatives, New Democrats, and Polarization*

Three presidents served during this era: Ronald Reagan, George H.W. Bush, and William (Bill) Jefferson Clinton.

Importantly, Reagan "issued an executive order that explicitly stated that the 'presumption of sovereignty should rest with the individual States' and that any ambiguities should be resolved in favor of the states without national regulation."¹¹⁴ Moreover, President Reagan invoked the Take Care Clause in Article II, Section 3 to order air traffic controllers back to work under a threat that they would forfeit their jobs if they did not return from a strike against the federal government.¹¹⁵ In addition,

¹⁰⁷ *Id.* at 514.

¹⁰⁸ *Id.* at 515.

¹⁰⁹ Stanley Kutler, *Richard M. Nixon*, in *PRESIDENTS*, *supra* note 1, at 494–96.

¹¹⁰ *Id.* at 494–95.

¹¹¹ *Id.* at 496–97 (footnote omitted).

¹¹² *Id.* at 497 (footnote omitted).

¹¹³ *See id.* at 500–02 (discussing the Watergate scandal that led to Nixon's resignation).

¹¹⁴ Kenneth W. Starr, *Ronald Reagan*, in *PRESIDENTS*, *supra* note 1, at 542.

¹¹⁵ *Id.* at 545.

Reagan was the first president to put signing statements—presidential input to a bill passed by a Congress to be enacted into law—to systematic use, wielding them as a presidential tool to assert executive authority in relation to Congress.”¹¹⁶

Bill Clinton, however, encountered the most remarkable constitutional issues during this era. First, in *Clinton v. Jones*,¹¹⁷ the Supreme Court ruled that the president was not immune from civil suit during his time in office; “merely because a case might burden the time and attention of the chief executive, this did not trump the federal court’s Article III power to conduct its judicial business.”¹¹⁸ In addition, “the Court found nothing in the Constitution that required courts to postpone civil proceedings until after a president left office, particularly when the civil suit was unconnected to the president’s official duties.”¹¹⁹

Second, Clinton “successfully pushed through the Line Item Veto Act that was designed to give the president power to strike from Congress’s spending bills any items that he deemed unnecessary or extravagant.”¹²⁰ But in *Clinton v. City of New York*,¹²¹ the Supreme Court rendered a constitutional ruling, striking down the Line Item Veto Act “as violating the Presentment Clause set forth in Article I, Section 7 of the Constitution” concluding “that the law allowed the president to, in effect, amend or repeal duly enacted laws without taking such measures through both Houses of Congress as envisioned by the framers.”¹²²

Third, President Clinton became the first modern-day chief executive, and only the second president in history, to be impeached by the House of Representatives and tried by the Senate (Andrew Johnson was the first).¹²³ Neither of the two articles of impeachment prevailed in the Senate and Clinton was acquitted.¹²⁴

L. National Security Era: Post 9/11

George W. Bush and Barack Obama fall under this era of presidential history.

President Obama faced an assortment of constitutional issues during his eight years in office. First, in *National Federation of Independent Business*

¹¹⁶ *Id.* at 546 (footnote omitted).

¹¹⁷ 520 U.S. 681, 709 (1997).

¹¹⁸ Ken Gormley, *William Jefferson Clinton*, in *PRESIDENTS*, *supra* note 1, at 574.

¹¹⁹ *Id.* (footnote omitted).

¹²⁰ *Id.* at 576 (footnote omitted).

¹²¹ 524 U.S. 417 (1998).

¹²² Ken Gormley, *William Jefferson Clinton*, in *PRESIDENTS*, *supra* note 1, at 576 (footnote omitted).

¹²³ *Id.* at 578–79.

¹²⁴ *Id.* at 579.

v. Sebelius,¹²⁵ the Supreme Court upheld his signature initiative, the Patient Protection and Affordable Care Act, pursuant to Congress' "power under the Taxing and Spending Clause,"¹²⁶ bypassing the Commerce Clause.¹²⁷

Second, Obama announced "that the federal government would no longer defend the constitutionality of the Defense of Marriage Act (DOMA)" — a "federal law [that] sought to define marriage as the legal union of a man and a woman and aimed to trump state laws permitting same-sex marriage."¹²⁸ "Because President Obama and his administration had gradually reached the conclusion that DOMA violated the equal protection component of the Fifth Amendment Due Process Clause, they felt justified in taking this action."¹²⁹

Third, President Obama "adopted an aggressive policy utilizing unmanned aircraft, commonly referred to as drones, to attack al Qaeda operatives in Pakistan, Yemen, and Somalia."¹³⁰ Interestingly, "[m]idway through Obama's presidency, these 'targeted killings' generated enormous controversy."¹³¹ Of particular concern was the killing of Americans in the field during these operations.¹³²

Attorney General Holder rejected the charge that the president lacked constitutional authority to order the killing of American terror suspects without involving Congress or the judiciary. He asserted that such operations were based on "imminent" threats posed by certain individuals, the infeasibility of capture, and the applicable law of war principles. Holder asserted that the presence of these circumstances together with a careful decision-making process within the executive branch satisfied the due-process requirement and that judicial oversight was neither appropriate nor necessary. Eventually, President Obama offered similar nonspecific assurances that the decision-making process had been thorough before targeted killings had taken place.¹³³

¹²⁵ 567 U.S. 519 (2012).

¹²⁶ Michael J. Gerhardt, *Barack Obama*, in *PRESIDENTS*, *supra* note 1, at 608.

¹²⁷ *Id.*

¹²⁸ *Id.* at 610 (footnote omitted).

¹²⁹ *Id.* (footnote omitted).

¹³⁰ *Id.* at 614.

¹³¹ *Id.*

¹³² *Id.* at 615.

¹³³ *Id.* (footnotes omitted).

President George W. Bush experienced the weightier of constitutional issues during his two terms—largely as a result of his prosecution of the War on Terror.¹³⁴

First, Bush was brought into the presidential office by the Supreme Court, which ruled that Florida's recount of votes "could not be conducted in compliance with the requirements of the federal Equal Protection Clause" because of different recount methods throughout the state.¹³⁵

Second, after the attacks of 9/11:

Within three days of the 9/11 attacks, with the collaboration of the Bush administration, Congress passed the Authorization for Use of Military Force (AUMF) Resolution, giving the president sweeping power "to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, and aided the terrorist attacks that occurred on September 11, 2001."¹³⁶

Third, Bush was faced with criticism for his administration's harsh interrogation techniques during its prosecution of the War on Terror.¹³⁷

Fourth, in the course of "four landmark decisions—*Hamdi*, *Rasul*, *Hamdan*, and *Boumediene*, all of which turned out to be major losses for the president,"¹³⁸ President Bush's execution of the War on Terror delivered major setbacks.¹³⁹

II. STRENGTHS

The *Presidents and the Constitution* is a remarkable academic achievement, bringing together in one volume the presidential interactions with the Constitution that characterized each president's time in office. Indeed, the sweep of the volume is encyclopedic in nature, drawing together in one place, for easy reference and comparison, all forty-four presidents and the constitutional issues they faced.

The scholarship and attention to detail is excellent. Moreover, it is handy for the reader to have access in the footnotes to case citations and historical materials.

¹³⁴ Benjamin A. Kleinerman, *George W. Bush*, in *PRESIDENTS*, *supra* note 1, at 590.

¹³⁵ *Id.* at 591 (footnote omitted). See *Bush v. Gore*, 531 U.S. 98 (2000) (holding that a recount of the votes in Florida could not take place because it would not comply with the Equal Protection Clause).

¹³⁶ Benjamin A. Kleinerman, *George W. Bush*, in *PRESIDENTS*, *supra* note 1, at 594.

¹³⁷ *Id.* at 598.

¹³⁸ *Id.* at 599 (citations omitted).

¹³⁹ *Id.* (citations omitted).

Perhaps the book's crowning glory is Ken Gormley's final chapter of his book, entitled *Conclusion: An Evolving American Presidency*.¹⁴⁰ Gormley claims that there are certain constitutional "connections" that "are important to highlight" with his conclusion constituting "a fresh look at issues that have linked the great array of American presidencies," allowing the reader "new areas of exploration and discovery."¹⁴¹ Gormley proceeds to demarcate the following list of connecting issues in presidential constitutional analysis, providing thorough and useful textual discussion:

Election and Succession:

- Contested Elections
- Death in Office
- Impeachment and Censure
- The Presidential Tool Kit

Basic Executive Functions:

- Overseeing the Executive Branch
- Appointment and Removal of Key Officials
- Reprieves and Pardons: A Sweeping Power
- Safeguarding President Powers: Executive Privilege
- Policy-Making Role: The Power of the Bully Pulpit
- Legislative Functions: The Chief Executive's Unusual Role
- Launching Legislative Initiatives
- Convening Special Sessions
- Veto Power: The President's Check
- Presentment Clause
- Signing Statements: An Executive Imprint?

Foreign Affairs and Military Command Powers

- Lead Role in Foreign Affairs
- Commander in Chief: Shared Wartime Powers
- Quelling Domestic Violence
- Connecting Threads

Race: A Haunting Theme

The Commerce Clause

National Security Versus Free Speech and Privacy

Gender: The Forgotten Struggle

Special Prosecutors: Policing Modern Presidents

Shaping the Supreme Court

*After the White House: Post-Presidential Roles*¹⁴²

¹⁴⁰ Ken Gormley, *Conclusion: An Evolving American Presidency*, in PRESIDENTS, *supra* note 1, at 623–54.

¹⁴¹ *Id.* at 624 (footnote omitted).

¹⁴² *Id.* at 623–53.

In closing, Gormley reflects on the “living history” of the American presidency – thoughts that Donald Trump would be wise to take to heart:

The American presidency as it interfaces with the Constitution – has not finished evolving Each time a new president takes office, he or she inherits a rich body of experience and precedent. He or she must draw upon that valuable storehouse in riding out unexpected gusts, gales, and tsunamis, keeping the ship of state steady and creating a fresh set of markers for future occupants of the office. At the same time, each president must wrestle with unplanned events in order to shape his or her own legacy. As the framers’ unfinished sketch of the American presidency continues to emerge through the energetic performance of the individuals thrust into this high office at specific moments in history, the story will continue to gain new layers of texture and sharp detail.¹⁴³

III. WEAKNESSES

The Presidents and the Constitution: A Living History, while on balance a superb book, has a handful of deficiencies.

First, it might have been better to concentrate on pronounced instances of presidential constitutionalism instead of treating *all* forty-four presidents up to the time of its publication in 2016.

Second, while the common editorial template of Introduction/Presidency/Conclusion works for the majority of presidents, for others (like Millard Fillmore and James Buchanan) the narrative flow lags because of their undistinguished biographies.

Third, it would have been useful to have the Constitution included as an Appendix in the book so that reference to these provisions could readily have been made while reading the textual citations to that document.

IV. CONCLUSION

The Presidents and the Constitution: A Living History is a lively, nuanced, and erudite study of the American presidency as it relates to the Constitution of the United States. The book makes a singular contribution to presidential studies and constitutional analysis.

¹⁴³ *Id.* at 653–54.