

**Executive Orders and Historical Order:**  
**Implications of the Evolution of U.S. Executive Orders for Political Science and Politics.**

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*Abstract:* This paper sketches several implications of my recently completed study of the development of U.S. presidential executive orders for broader debates in scholarship on the American presidency, American political development, and American politics in general. I suggest that an understanding of the evolution of executive orders indicates that (1) the true roots of presidential power are legal and constitutional rather than personal, (2) the modern presidency should be seen as starting with Theodore rather than Franklin Roosevelt, (3) the same political phenomenon can have different developmental trajectories in different institutional settings, (4) our constitutional understandings have changed significantly but are not a radical departure from the original constitutional order, and (5) individual agency can be a primary engine of political development.

*NB: This paper is very much a work in progress.  
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- **Introduction:**

This paper examines some of the implications of my recently completed dissertation on the development of presidential executive orders for broader debates in scholarship on the presidency, American political development, and American politics in general. Thus, this paper is an attempt to step back from the detailed analytical work that has occupied me for the last several years and to tease out some of its relevance for larger matters that might be of interest to a larger community of scholars. Before considering the broader implications of my research, it may be useful here to briefly describe what executive orders are and how I conceive of their development.

A. Background.

Executive orders are one among two dozen different types of unilateral presidential directives, another of which is proclamations, which are legally identical to executive orders.<sup>1</sup> In terms of an official definition of executive orders, there is no law -- or even an executive order -- that defines what an executive order is.<sup>2</sup> A 1957 report by the U.S. House of Representatives provisionally defined them as follows: "Executive orders are written documents denominated as such... Executive orders are generally directed to, and govern actions by, government officials and agencies."<sup>3</sup> This definition certainly captures part of what executive orders are, but it is inadequate, as its authors realized: "Essentially an Executive order is a written document issued by the President and titled as such by him or at his discretion. Because of this, a precise and uniformly applicable differentiation between executive orders and proclamations is impossible."<sup>4</sup> The following informal definition by a legal librarian may be more helpful: "Executive orders are the formal means through which the President of the United States prescribes the conduct of business in the executive branch. Executive orders are presidential directives issued to federal government agencies or officials. An executive order is basically a document the President issues and designates as such."<sup>5</sup>

Just as the definition of what constitutes an executive order is unclear, the exact number of executive orders issued is also unclear. The official governmental accounting of executive orders is quite poor. Thousands of early executive orders have simply fallen through the cracks, and even the National Archives' more or less official listing of executive orders from Franklin Roosevelt to the present is not complete, in part because of difficulties in accounting for many classified executive orders.<sup>6</sup> Furthermore, insofar as the Supreme Court has ruled that executive orders and proclamations are legally equivalent, and presidents have often used them interchangeably, the neglect of the latter in the accounting of the former is problematic. A third shortcoming of numerical lists of executive orders is that not all executive orders are significant; executive orders can be enormously important, but they can also reflect only minor administrative matters of little consequence or controversy.<sup>7</sup> In short, the raw numbers of executive orders are questionable in terms of both accuracy and significance.<sup>8</sup>

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<sup>1</sup> Wolsey v. Chapman, 101 U.S. 755 (1880).

<sup>2</sup> Blake, p293.

<sup>3</sup> Quoted in Cooper (1986), p238.

<sup>4</sup> 1957, p. vii.

<sup>5</sup> Woodward, p125.

<sup>6</sup> A 1942 project by the Works Progress Administration (WPA) found 1,500 executive orders before that had been omitted from governmental lists, but the estimates of other orders that remain misplaced and unaccounted for range to 50,000 (1974 Summary, p2). [http://www.archives.gov/federal\\_register/executive\\_orders/disposition\\_tables.html](http://www.archives.gov/federal_register/executive_orders/disposition_tables.html)

<sup>7</sup> For example, consider Lyndon Johnson's executive order 11,377, which authorized the U.S. Tariff Commission "to monitor the annual consumption of whisk brooms in America, noting the types, numbers, and uses made of these brooms." It seems safe to say that "Johnson signed, but undoubtedly did not ponder, the whisk broom order" (King and Ragsdale, p107-8).

<sup>8</sup> This is one reason that my research is mainly qualitative, not quantitative. See appended histogram of the chronology of the average number of executive orders issued by each president.

## B. Development:

Recent years have produced a small but growing scholarly literature on executive orders, but the topic remains understudied.<sup>9</sup> My own research focuses on how executive orders developed and their place in American political development.<sup>10</sup> Executive orders are not in the Constitution but have come to be essentially read into it, even they are arguably in tension with its premises of separation of powers and checks and balances.<sup>11</sup> Like judicial review, executive orders have made a transition from a starting point of constitutional silence, through a brief period of constitutional contestation, to an enduring consensus of constitutional consonance. I analyze the development of executive orders in terms of two developmental preconditions and four developmental stages.

The first precondition of the later development of executive orders is constitutional ambiguity. Since the Constitution does not specifically mention executive orders per se, their constitutional status is largely bound up with the broader question of the nature and scope of executive power. However, the Constitution's treatment of the executive is highly ambiguous. Some clauses may support wide presidential powers, perhaps including executive orders, but other clauses appear to envision a highly limited executive, and executive orders seem to be in tension with the overall architecture of separation of powers and checks and balances. Related resources in political theory and English and early American history and law do not decisively settle the issue, as there is simply a persistent plurality of plausible competing conceptions of presidential power. Which conception prevails is determined in the political realm, specifically in terms of the interbranch struggle over constitutional politics.

The second precondition of the development of executive orders is judicial sanction. The Supreme Court and lesser courts endorsed the constitutional legitimacy of executive orders in a series of otherwise obscure maritime cases in the early nineteenth century, especially *Little v. Barreme* (1804) and *The Orono* (1812). In the first case, Chief Justice John Marshall acknowledged the propriety of executive orders in general but struck down the particular order because it contradicted a policy that Congress had previously set. In *The Orono*, the judiciary again affirmed the propriety of executive orders in general but struck down the particular order for violating a specific constitutional clause. Thus, courts had established the legitimacy of executive orders, subject to constitutional and congressional restrictions, by the time the nation was only 23 years old, fully 140 years before the Court famously reiterated those same principles in striking down Harry Truman's executive order seizing the steel industry in *Youngstown Sheet & Tube Co. v. Sawyer* (1952). The Court's endorsement of executive orders continued after the early 1800s, such that by *Lapeyre v. U.S.* (1873) and *Wolsey v. Chapman* (1880), it had explicitly acknowledged that executive orders were being used to make binding law.

Textual ambiguity and judicial acceptance permitted but did not ensure the development of executive orders. I discern four stages of their development, the first of which runs from the Founding to

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<sup>9</sup> The small but growing literature on executive orders includes (chronologically): Hart (1925), Lord (1943), House Committee on Government Operations (1957), Schubert (1957), Cash (1963), Neighbors (1964), Morgan (1970), Hebe (1972), Senate Special Committee on National Emergencies (three in 1974), Fleishman and Aufses (1976), Noyes (1981), Bruff (1982), Chemerinsky (1983), Tulskey (1985), Cooper (1986), Ostrow (1987), Schoenbrod et al (1990), Light (1991), Gleiber and Shull (1992), Fisher (1993), Moe and Wilson (1994), Contrubis (1995), Wigton (1996), Cooper (1997), Fisher (1997), Krause and Cohen (1997), Utter and Cooper (1997), Relyea (1998), Deering and Maltzman (1999), Liang (1999), Mayer (1999), Moe and Howell (two in 1999), Olson and Woll (1999), Schull (1999), Krause and Cohen (2000), Sterling (2000), Cooper (2001), Gaziano (2001), Mayer (2001), Branum (2002), Cooper (2002), Mayer and Price (2002), and Howell (2003).

<sup>10</sup> In their 1999 article in *Presidential Studies Quarterly* on unilateral presidential action, Terry Moe and William Howell note that institutional approaches to the presidency other than rational choice, such as that of Skowronek, "take a much broader view of the foundations and exercise of presidential power" and could potentially generate a more powerful account than theirs (p869, n1): I agree.

<sup>11</sup> Executive orders appear to be contrary to a strict separation of powers, as they enable the executive to legislate unilaterally, and they also appear to violate checks and balances, as Congress and the courts are usually either unable or unwilling to reverse them (i.e., executive orders are rarely overturned by the other two branches).

the twentieth century.<sup>12</sup> Notwithstanding the early judicial acceptance of executive orders, presidents did not much use this new policymaking tool for quite some time. Aside from a few noteworthy exceptions (e.g., George Washington's Neutrality Proclamation, Thomas Jefferson's Louisiana Purchase, and Abraham Lincoln's Emancipation Proclamation), executive orders before the twentieth century were seldom used for what were considered major policy purposes. Presidents issued several hundred executive orders during this time, but most concerned the management of federal personnel, Indian reservations, and land management. Because these policy areas were largely regarded at the time as minor and mundane, the presidential use of executive orders in them was not particularly controversial. Yet the use of executive orders in these areas served to politically solidify the legitimacy of the device, setting the stage for much wider usage later. Thus, the first stage in the development of executive orders was in a sense a nondevelopmental stage.

The second stage in the development of executive orders was the presidency of Theodore Roosevelt. The number and the nature of executive order usage changed dramatically with TR, who issued almost as many executive order in is seven and a half years as president as all of his predecessors combined. In executive orders, TR found the perfect means by which to implement his "stewardship" theory of presidential leadership. TR used executive orders in far greater numbers and for greater purposes than any previous president, often in the face of congressional opposition. Although TR did not turn to executive orders to enact progressive reforms of trusts and tariffs, and his uses of the device to advance new coinage and phonetic spelling were eventually reversed by Congress, he successfully utilized executive orders to create dozens of national monuments and wildlife refuges, feats of environmental conservation that were unprecedented in scope and number. TR also used executive orders to change eligibility requirements for federal appointments, to regulate the work conditions of government employees, to create the precursor to the modern FBI after Congress failed to do so, and he used the mere threat of an executive order to resolve the crippling 1902 Pennsylvania coal strike.

The third stage in the development of executive orders runs from William Howard Taft through Franklin Roosevelt. After TR established the practice of regularly using executive orders for major policy purposes, Taft articulated a more reserved approach to executive authority and leadership, yet Taft issued executive orders at roughly the same rate as his predecessor. Woodrow Wilson used executive orders in greater numbers and for more significant purposes during World War I, often with legislative sanction via the Lever and Overman Acts. The presidential use of executive orders continued to rise under the three Republican presidents who succeeded Wilson, and it rose to new heights with Franklin Roosevelt. During his dozen years in office, FDR issued 3,522 executive orders, far more than any president before or since. His more famous executive orders included creating the powerful Executive Office of the President, creating a plethora of federal agencies to fight the Depression, and interning 120,000 Japanese-Americans during World War II. FDR's barrage of executive orders was the impetus for the Federal Register Act and the regular governmental accounting of executive orders and proclamations.

The fourth and final stage of the development of executive orders runs from the postwar era to the present. Despite the Court's dramatic rejection of Truman's executive order seizing the steel industry in *Youngstown*, postwar presidents have continued to use executive orders to further their political and policy goals; presidents have turned to executive orders to create the Peace Corps, to enact affirmative action, to limit governmental regulation, to create new executive agencies, and to advance particular positions about abortion, organized labor, and environmental conservation. In many cases, these uses followed precedents and patterns first established by TR. In the postwar era, as in the early twentieth century, executive orders gave presidents the means to be the dominant force in American politics and policymaking. Even with new and changing issue areas and rare reversals by Congress or the courts, it is

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<sup>12</sup> These may be seen in the appended histogram. Even though the numbers of executive orders issued are problematic (for the reasons noted earlier), the apparent statistical breaks may serve at least as the starting point for further analysis, and I find that the four more or less clear statistical stages in fact are driven by distinct developmental dynamics.

likely that executive orders will continue to afford presidents a powerful means of enacting their own policy preferences.

## **PART I: Executive Orders and Political Science:**

There is undoubtedly much in my account of the development of executive orders that is controversial. However, my main aim in this paper is not so much to argue for understanding the evolution of executive orders along the lines sketched above; rather it is to consider some of the implications of the above conception of their development for broader debates in political science.<sup>13</sup> In the following pages, I suggest that my analysis of the evolution of executive orders indicates that (1) the fundamental roots of presidential power are legal and constitutional rather than personal, (2) the modern presidency should be seen as starting with Theodore rather than Franklin Roosevelt, (3) the same political phenomenon can have different developmental trajectories in different institutional settings, (4) our constitutional understandings have changed significantly but not radically, and (5) individual agency can be a primary engine of political development.

### **1. The Roots of Presidential Power.**

From George Washington to George W. Bush, every president has used executive orders, with the sole exception of William Henry Harrison, who died after just one month in office. Moreover, executive orders have figured in many of the most important and controversial points in American political history. Even the most cursory analysis of the history of executive order use indicates how very important they can be in interbranch struggles and in the policymaking process. Regardless of the changing status of the relationship of the presidency to political parties, the people, the other branches of government, and the media, executive orders have given presidents a powerful and attractive means of enacting their own policy preferences. According to a recent law review, “Historically speaking, executive orders have always been considered an indispensable tool of the executive.”<sup>14</sup> They can serve to preclude congressional action, to prompt it, or to circumvent a recalcitrant Congress.

By way of appreciating the central role that executive orders play in presidential power, it may be useful to briefly consider the implications of executive orders for two of the most prominent accounts of the presidency in political science, namely Richard Neustadt’s *Presidential Power* and Stephen Skowronek’s *The Politics Presidents Make*. Neustadt claims that the president’s constitutional powers are severely limited, such that presidential power is essentially just the power to persuade.<sup>15</sup> In contrast, Skowronek contends that presidential success depends largely on the vagaries of historical chance, as determined by the strength of existing political commitments and a president’s affiliation with or opposition to them. Executive orders suggest that both accounts may misstate the nature and amount of presidential power. Put simply (if a bit hyperbolically), even an unpersuasive president or a president situated in a disadvantageous place in political time can still accomplish much of what he or she wants with executive orders.

For example, our two most recent presidents clearly benefited from the considerable unilateral power afforded by executive orders. Two years after the historic 1994 Republican congressional victories and the ascendancy of Speaker Newt Gingrich, Bill Clinton remarked, “One of the things that I have

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<sup>13</sup> Of course, to the extent that my account of the development of executive orders is problematic, the following implications may well also be problematic, though not necessarily for that reason.

<sup>14</sup> Branum, p21-2.

<sup>15</sup> Writing in 2002, Neustadt noted that scholars over the years had neither explicitly accepted nor rejected his book’s “pervasive distinction between ‘power’ (as personal influence) and ‘powers’ (as authority in the Constitution, laws, or customs).” However, some scholars have criticized Neustadt’s exclusive focus on the former at the expense of the latter. For example, Terry Eastland writes: “Obscured in his [i.e., Neustadt’s] treatment of the presidency is the office itself, its powers and duties and structure, and how it might be executed from a constitutional perspective” (Eastland, p7). See also Mayer, 2001, p12-4.

learned in the last two years is that the President can do an awful lot of things by executive orders.”<sup>16</sup> Paul Begala, Communications Counsel in Clinton’s White House, was even more blunt in characterizing the power of executive orders: “Stroke of the pen, law of the land. Kind of cool.”<sup>17</sup> Similarly, despite his unclear political mandate from the disputed 2000 election and a narrowly divided Congress in his first term, George W. Bush has been able to use executive orders to reverse many of his predecessor’s policies and to enact many of his own, even when they were politically or constitutionally controversial.

Of course, executive orders are not without limits, but those limits may be less stringent than is commonly thought. For example, per Justice Jackson’s famous opinion in *Youngstown*, executive orders must be rooted in constitutional or statutory authority. However, one-third of Clinton’s executive orders cited no statutory authority whatsoever and invoked only vague constitutional warrants, and courts have at times taken it upon themselves to find sources of authority to support executive orders that referenced none, rather than taking the lack of a clear warrant as a reason for overturning them.<sup>18</sup> Indeed, while courts and Congress can overturn executive orders, they seldom do so. According to Kenneth Mayer, “between 1789 and 1956, state and federal courts overturned only 16 executive orders.”<sup>19</sup> The number overturned in more recent years has been correspondingly small: according to Terry Moe and William Howell, of the roughly 4,000 executive orders issued between 1942 and 1996, only 86 were challenged in court, and presidents won in 86% of those few cases. The rare occasions when courts do overturn executive orders may be dramatic, but they are very much the exception rather than the rule.<sup>20</sup> By some accounts, even the Court’s decision in *Youngstown* was more of a fluke than a broad, principled curtailment of unilateral presidential action.<sup>21</sup> Similarly, congressional attempts to reverse particular executive orders are seldom successful. According to Neil Kinopf, special assistant to the Office of Legal Counsel at the Department of Justice under Clinton, “In the 25 years from January 1973 through the end of 1997, legislation to overturn an executive order was introduced on 37 occasions.”<sup>22</sup> Moe and Howell report only three of those thirty-seven attempts were successful.<sup>23</sup> These figures suggest that executive orders give presidents a means of unilateral policymaking that may be largely immune from the checks of the other two branches.

The imbalance with Congress is particularly acute when one considers executive orders in comparison to the legislative veto. Executive orders are in a sense the converse of the legislative veto: executive orders enable the executive to intrude upon the sphere of the legislature, while the legislative veto enables Congress to intrude upon the sphere of the executive.<sup>24</sup> However, insofar as the legislative veto is no longer available after *INS v Chadha* (1983), presidents’ continued use of executive orders may further skew the constitutional balance in favor of the executive at the expense of the legislature.

The above considerations all suggest that executive orders give presidents a powerful means of enacting their own policy preferences. However, until recently, few political scientists have been attentive to this crucial aspect of presidential power. As a result, most political scientists have underestimated the amount of power at the disposal of the presidency. Many scholars have regarded the presidency as a relatively weak, constrained institution that can meet neither its own aspirations nor

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<sup>16</sup> Quoted in Ragsdale and Rusk, in Shull, 1999, p126.

<sup>17</sup> Bennett, James. “Back from China, Clinton Focuses on Domestic Policy Events to Remind Voters of His Desire to Fix Problems Here at Home.” New York Times. July 5, 1998.

<sup>18</sup> Kmiec, p49; Noyes, p844.

<sup>19</sup> Mayer (1999), p448.

<sup>20</sup> Moe and Howell, JLEO, p175. Of course, there is the possibility that the importance of judicial reversals of executive orders may be greater than the small number of reversals suggests, in that such reactions may be anticipated and avoided in advance.

<sup>21</sup> Maeva Marcus suggests that *Youngstown* was an unusual case in this regard, rather than the product of a principled assault on executive power (Marcus, p260). See also Louis Fisher’s foreword to the 1994 Duke edition of Marcus’s book.

<sup>22</sup> Quoted in Edwards, 12/12/99.

<sup>23</sup> Public law 93-549, 1973; public law 103-3, 1993; and public law 104-107, 1995. Moe and Howell. Journal of Law, Economics, and Organization. p165-7. Many of the attempts that Moe and Howell count are essentially merely a means position-taking for individual members of Congress, so their overall count likely inflates the true degree of congressional hostility to presidential policymaking via EOs.

<sup>24</sup> See generally: Korn, Jessica. The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto. Princeton, 1996.

voters' expectations. These scholars arguably include Woodward (1825), Tocqueville (1835), Wilson (1885), Neustadt (1960), Rossiter (1960), Finer (1960), Koenig (1964), Reedy (1970), Young (1978), Cronin (1980), Hodgson (1980), Davis (1980), Hecllo and Salamon (1981), Barger (1984), Lowi (1985), Moe (1985), Grover (1989), Crovitz and Rabkin (1989), Wildavsky (1991), Skowronek (1993), Jones (1994), Rose (1997), Stuckey (1997), Campbell (1998), Brady and Volden (1998), Bennett (2000), and Beschloss (2000). Again, insofar as executive orders significantly enhance the power of the president, inattention to them may result in a significant understatement of the amount of presidential power.

An awareness of the importance of executive orders has implications for conceptions of the nature -- as well as the amount -- of presidential power. Executive orders indicate that presidential power is best understood in terms of its constitutional and legal bases, rather than in terms of character, leadership style, or Weberian charisma. As Richard Pious aptly put it a quarter century ago, "...the fundamental and irreducible core of presidential power rests not on influence, persuasion, public opinion, elections, or party, but rather on the successful assertion of constitutional authority to resolve crises and significant domestic issues."<sup>25</sup> The fact that so few scholars (one might include Edward Corwin and Robert Spitzer, among others) have recognized this truth may be indicative of a longstanding methodological bias in political science, namely behaviorism.<sup>26</sup> Recent work on executive orders and other unilateral presidential directives suggests that many scholars are reevaluating the ways in which presidential power is understood; executive orders suggest that presidential power can best be understood in terms of its institutional, legal, and constitutional bases.

In sum, inattention to executive orders causes us both to misunderstand and to underestimate the power of presidency.<sup>27</sup>

## **2. The Modern Presidency.**

As one of the earliest studies of executive orders aptly noted, "The history of executive orders is, to a large extent, a narrative of the evolution of presidential power."<sup>28</sup> Insofar as the regular use of executive orders for significant and controversial purposes was a major change (in my view, a true political "development"), it also has implications for how we understand the evolution of the presidency as an institution. Political scientists and historians are very much divided about whether there have been major historical or "secular" changes in the institution of the presidency and, if so, when and why they occurred and how best to characterize these changes. The concept of the "modern" presidency is perhaps the central debate in this regard.

The literature on the modern presidency is extensive, but Fred Greenstein is the most frequently cited authority on the concept.<sup>29</sup> According to Greenstein, the presidency underwent a fundamental change under FDR, such that all postwar or "modern" presidents occupied an office that differed markedly from the "traditional" one inhabited from Washington through Hoover. Greenstein contends that while the office underwent periodic shifts in the 144 years before FDR, during FDR's administration it was radically transformed. Greenstein identifies four respects in which the modern office differs from its traditional antecedent: (1) the president has a regular role in the legislative process, (2) the president often utilizes unilateral powers such as executive orders, (3) the presidential staff is considerably larger, and (4) the president is very much in the public eye and is the symbol of the government.<sup>30</sup>

Greenstein's view of the modern presidency is widely accepted among scholars of the presidency, and it is certainly difficult to overstate the importance of FDR's four terms as president. However, some

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<sup>25</sup> Pious, 1979, p17.

<sup>26</sup> Mayer, 2001, p12-4.

<sup>27</sup> Cf. George W. Bush's statement a day before the 2000 presidential election: "They underestimated me." ([www.abcnews.com](http://www.abcnews.com)).

<sup>28</sup> Cash, p55.

<sup>29</sup> Greenstein was not the first scholar to speak of a modern presidency. That honor arguably belongs to Woodrow Wilson.

<sup>30</sup> Greenstein, 1978, p45-6.

scholars do contest FDR's status as the first modern president. For example, Jeffrey Tulis argues that Woodrow Wilson was essentially the first modern president, while Robert Remini, Arthur Schlesinger, and Alfred DeGrazia make a case for Andrew Jackson. Lewis Gould alternately terms McKinley the first modern president and claims that George Cortelyou might properly be said to be the father of the modern presidency. Peri Arnold discerns a Progressive presidency in the early-twentieth century that straddles the traditional-modern divide, while Ryan Barilleaux and Gary Rose maintain that the modern presidency has been supplanted by a postmodern presidency.

Other scholars disparage the entire concept of a modern presidency. For example, David Nichols calls the modern presidency a "myth" and criticizes it for wrongly supposing that the changes in the institution required a constitutional transformation.<sup>31</sup> Stephen Skowronek faults the modern presidency concept for caricaturing presidents: "When we consign the pre-Roosevelt presidents to an imaginary age of clerkship, we miss developmental dynamics on both sides of the modern/traditional divide. When we treat the modern presidency as an institution so different that it consigns all prior experience to irrelevance, we obscure more than we clarify."<sup>32</sup> Skowronek suggests that the history of the presidential office is simply too complex to admit of facile bipartite classifications: "the number of important twists and turns in American politics have thus far exceeded the analytic capacity of any single historical construct to accommodate."<sup>33</sup>

There is some truth in each of the above points. The presidential office certainly underwent significant changes under FDR, but it is also the case that many of the traits that Greenstein associates with the modern presidency predated FDR's tenure. In my view, the modern presidency thesis is neither so persuasive that it should be accepted uncritically nor so flawed that it should be rejected altogether. Like all classificatory schemes, it provides some explanatory value, but at the cost of not capturing some variation. My analysis of executive orders suggests that the modern presidency thesis should be modified. Specifically, insofar as the regular presidential use of executive orders for major policy purposes constitutes perhaps the single most important development in the institution of the presidency, and TR played the pivotal role in establishing and institutionalizing that usage, TR should be seen as the founder of the modern presidency.

This modified version of the modern presidency is not as radical as it may seem. Recall that executive orders and other unilateral presidential directives are one of the four characteristics that Greenstein associates with the modern presidency. As Greenstein explains, "From a presidency that normally exercised few unilateral powers, there has been a shift to one that is provided – via statutes, court decisions, and informal precedents – with many more occasions for direct policy making through executive orders and other actions not normally ratified by Congress."<sup>34</sup> The version of the modern thesis that I have suggested merely accords this one criterion a decisive weight.<sup>35</sup> In the previous section of this chapter I have adduced some reasons for why such a weight is appropriate, but other scholars appear to concur: Terry Moe and William Howell suggest that unilateral presidential action "virtually defines what is distinctively modern about the modern presidency."<sup>36</sup> Moreover, some scholars already regard TR as the first modern president. Scholars who in some fashion see TR as the first modern president include Beale, Blum, Burton, Chessman, Dalton, Gould, Graff, Harbaugh, Kentleton, Mowry, Tourtelott, and arguably Rossiter. An emphasis on the importance of executive orders and TR's role in their development simply adds to the reasons they adduce for regarding TR as the first modern.

The main risk in accepting the modified version of the modern presidency thesis proposed here is that it may appear to understate the importance of FDR's momentous four terms as president. As an early

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<sup>31</sup> Nichols, p6.

<sup>32</sup> Skowronek, 1992, p324.

<sup>33</sup> Skowronek, 2002, p747.

<sup>34</sup> Greenstein, in King, p46.

<sup>35</sup> TR also fares well on Greenstein's other three criteria. He assumed a more activist role with regard to Congress than was the norm, and he elevated the presidency to a level of public visibility that contrasted dramatically with his predecessors. With regard to the size of the presidential staff and bureaucracy, however, FDR presided over much more growth than did TR.

<sup>36</sup> Moe and Howell, abstract to 1999 PSQ article.

account of the modern presidency aptly puts it, “The successors of Franklin Roosevelt have all been in his shadow.”<sup>37</sup> However, in some respects, that shadow was cast by FDR’s distant uncle, TR. According to David Burton, “Historians speak of the long shadow cast by the multiple, history-laden administrations of Franklin Roosevelt. In important ways that shadow owed much of its appeal to the first Roosevelt.”<sup>38</sup> As an undergraduate at Harvard, FDR heard TR speak and was so impressed and inspired that he vowed to go into public service himself.<sup>39</sup> FDR then emulated many of the qualities of his political hero, especially TR’s folksiness.<sup>40</sup> And the New Deal built upon many of the Square Deal’s accomplishments.<sup>41</sup>

However, even if one accepts that FDR was significantly influenced by the first Roosevelt’s presidency, there is also the possibility that FDR’s executive orders were simply more important than TR’s, as some scholars maintain.<sup>42</sup> I contend that this view seriously mischaracterizes TR’s many remarkable executive orders, but there are several other reasons for resisting this view. For example, FDR issued almost three times as many executive orders as TR (3,522 to 1,262), but FDR’s presidency lasted much longer than that of TR. Furthermore, FDR presided during a time of economic and military crisis demanding exigent executive action, while TR did not. Had TR been president during more trying times, or had he defeated Wilson and won another term, he likely would have issued even more executive orders, and even more important ones, than he did.<sup>43</sup> Most important, FDR’s executive orders largely fit the modes established by TR and built upon his precedents. FDR may have enhanced an already-established means of presidential power and further consolidated the practice that TR had instituted, but the crucial developmental point in the institution of the presidency was the establishment of that power under TR, not its further development under his fifth cousin.

Again, insofar as the regular presidential use of executive orders for significant policy purposes marks the most important development in the presidency and TR was the main figure in that development, TR should be seen as the father of the modern presidency.

### **3. Differential Development in Different Institutions.**

Whereas the first two implications discussed above concern how we (should) understand the presidency, other implications pertain to how we conceive of development more generally and more abstractly. For example, the development of executive orders may be a prime example of a developmental condition that Karen Orren and Stephen Skowronek have described. In writing about the capacity of political institutions to divide, to structure, and to change political space and time, Orren and Skowronek have suggested that the same political phenomenon can have different developmental trajectories in different institutional settings:

The very tendency of institutions to persist means that at any moment in time several different sets of rules and norms are likely to be operating simultaneously. To the extent that the idea of order presumes institutions synchronized with one another, entailing their creation all at once, something unlikely to be accomplished by even the most radical revolution. [sic] These insights take on special significance in the case of political institutions outside their own sphere. As a consequence, different institutional rules and norms will abut and grate as a normal state of affairs.<sup>44</sup>

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<sup>37</sup> McConnell, p13.

<sup>38</sup> Burton, p157.

<sup>39</sup> Morris, E., p697.

<sup>40</sup> Burton, p149; Dalton, p521.

<sup>41</sup> Burton, p157.

<sup>42</sup> Scholars who claim that FDR institutionalized the regular use of executive orders for major policy purposes include King and Ragsdale (p123), Fleischman and Aufses (p7), and Cash (p145).

<sup>43</sup> “James MacGregor Burns has noted that ‘for a man with Theodore Roosevelt’s need for personal fulfillment it was a sort of tragedy that he had no war -- not even a Whiskey Rebellion’” (Hutchins, in Cronin and Tugwell, p140, quoting Burns, Presidential Government. Houghton Mifflin, 1965, p66).

<sup>44</sup> Orren and Skowronek, 1996, p112.

This view seems to be based on several lesser claims, which might be disaggregated as follows. First, political institutions (assuming they are well-founded or effective) necessarily partition political space. Second, within a given institutional space, the flow of political time is altered. Third, no one institution can order all space and time, nor can any set of institutions -- however complete or systematic -- perfectly synchronize its operations. Fourth, any political order will therefore have different institutionally-driven temporal conditions at any given time.<sup>45</sup> Therefore, Orren and Skowronek suggest that it may be fruitful for the historical study of political institutions to be attuned to how different institutions structure political time and the “intercurrence” of opposing temporal orderings.<sup>46</sup>

The evolution of executive orders appears to accord with Orren and Skowronek’s view that the same political phenomenon can have different institutional trajectories in different institutions. This may be easily seen with regard to two of the three branches of the federal government: the judicial and executive branches. Recall that while the judiciary largely accepted executive orders as constitutional in the early-to-mid nineteenth century, presidents did not much use this newly-sanctioned device until the early twentieth century; the lag between the judicial endorsement of executive orders and their widespread use by presidents was at least several decades.

There are several factors that might explain this gap. First, the judicial acceptance of executive orders was initially indirect and limited; only later did it become more direct and wide-ranging. The earliest cases concerned seizures of vessels in the late eighteenth and early nineteenth centuries, and Justices Marshall and Storey both seem to have vacillated about the constitutionality of executive orders. However, maritime cases stemming from the War of 1812 were less equivocal, and after subsequent cases addressed executive orders in the Civil War and in the presidential management of public lands, courts came to directly accept the regular presidential use of executive orders in a variety of policy areas, often without specific constitutional or legislative warrants.<sup>47</sup> Since the judicial acceptance of executive orders was not at first clear and direct, it may be understandable that presidents did not immediately seize on the early judicial sanction of executive orders. But even if one moves the date of judicial acceptance back to the mid-nineteenth century, it was still several decades before presidents used executive orders with any frequency.

It is likely that nineteenth century presidents generally chose not to use their newly-approved policymaking tool because to do so would have been politically unthinkable. In other words, even if the use of executive orders for significant purposes was judicially (and constitutionally) acceptable, the presidency was operating under a set of political constraints that was largely different and that precluded such a practice. Lincoln’s use of executive orders and proclamations in the Civil War occasioned much outcry, and most of his nineteenth century successors seemed disinclined to issue many controversial orders. In short, the presidency simply was not ready to use the tool that the judiciary had given it. While Franklin Roosevelt later berated the Court for relegating the nation to the “horse and buggy” era for adhering to an antiquated constitutional view, in this regard it seems that the judicial branch accepted an important political development before the executive did.<sup>48</sup>

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<sup>45</sup> As Orren and Skowronek phrase it, “the passage of time is filled with contentious interactions among different ordering arrangements” (Orren and Skowronek, 1996, p112) because there are “dissonances inherent in the institutional organization of political space” (Orren and Skowronek, 1996, p113).

<sup>46</sup> Orren and Skowronek, 2004, p17. Cf. Pierson, 2004, p13-4.

<sup>47</sup> See my paper from the 2004 annual conference of the Midwestern Political Science Association. According to Glendon Schubert, the judicial acceptance of executive orders and proclamations as legally binding in a variety of policy areas was universal by the end of world War II (Schubert, p310), though I claim that it was nearly universal many decades before then.

<sup>48</sup> The third branch of the federal government may indicate yet another lag in the institutional timing of accepting executive orders. Theodore Roosevelt’s unprecedented use of executive orders often ran into fierce congressional opposition, and subsequent presidents’ executive orders have occasionally provoked angry legislative responses, but Congress has generally been disinclined and/or unable to resist presidential policymaking via executive order. Branum claims that this may be because of the politics of collective action: “Some in Congress have been only too happy to sit back and watch as the President facilitates the promulgation of policy that would be difficult to get through Congress. [However] The longer this state of affairs is allowed to continue, the harder it will be to curb the abusive excesses of executive power by future presidents” (Branum, p21-2). In

Regardless of the particular factors within each institution that influenced their respective temporal orderings, the main point here is that the temporal disparity between the judicial acceptance of executive orders and their widespread use by presidents is a prime example of the same political phenomenon having different developmental trajectories in different institutional settings.

#### **4. Constitutional Change.**

The preceding implication (i.e., different timing in different institutions) is predicated on the view that in addition to an historical change in the institution of the presidency, there was also a judicial or constitutional aspect to the development of executive orders. However, a focus on the idea of constitutional development itself suggests two further implications, which are related but distinct. Specifically, the evolution of executive orders indicates that there have in fact been significant developments in the constitutional dimension of the presidency, and it also suggests that those constitutional developments have not been so radical as to constitute a break with the original constitutional order. I will address each of these points in order.

##### **A. Dynamic, Not Static:**

Again, my analysis of executive orders suggests that the constitutional dimension of the presidency has changed. The question of how to understand constitutional change is at the heart of much scholarly debate in public law and American political development. In terms of scholarship on the presidency, Stephen Skowronek's analysis in *The Politics Presidents Make* may be instructive. Skowronek's complex schema has occasioned considerable acclaim, criticism, and confusion. I regard it as one of the most original and powerful analyses that political science has produced in its first century as a separate discipline, one with profound explanatory and even predictive power.<sup>49</sup> A brief summary of his analytic schema may serve to demonstrate the nature of constitutional change with regard to the presidency.

According to Skowronek, historical changes in the institution of the presidency can best be understood by disentangling the different dimensions or orderings of institutional politics. For Skowronek, these are the separate but related layers in which presidential politics occur, the historical media or synchronous modes through which the institution evolves. He refers to these dimensions in several ways, but for present purposes they may be termed constitutional, secular, and political, and their main characteristics are as follows.

Skowronek's constitutional dimension concerns the various formal powers and arrangements that flow from the Constitution. For Skowronek, this dimension is static: the Constitution is constant, and "all presidents have had the same basic constitutional prerogatives."<sup>50</sup> But the Constitution compels presidents to act, according to Skowronek, and presidential action generally results in change and political development. Thus, the Constitution is simultaneously constant and a catalyst for change, which Skowronek registers on other, non-constitutional dimensions.<sup>51</sup>

Skowronek's "secular" dimension is essentially the same as regular chronological time, but it focuses on presidential power. It concerns "the institutional resources and governing responsibilities of the executive office" and how they have changed from George Washington to the present.<sup>52</sup> In this

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contrast, Huntington says it is because "Congress has not appropriately adjusted to the twentieth century" (Huntington, in Nivola, et al).

<sup>49</sup> Skowronek never predicted in print that Bill Clinton would be impeached, but his analysis points almost inevitably to that outcome. See Skowronek's exchange with Douglas Hoekstra in *Presidential Studies Quarterly*, p672.

<sup>50</sup> Skowronek, 1997, p9; Cf. Walter Dean Burnham's book review, p486.

<sup>51</sup> Skowronek, 1997, p15, 34. Cf. Chief Justice John Marshall's claim about constitutional constancy and immortality: "...a constitution is framed for ages to come and is designed to approach immortality as nearly as human institutions can approach it."

<sup>52</sup> Skowronek, 1997, p30.

regard, Skowronek depicts a succession of four structures of presidential power, or four modes of extra-constitutional organization of the office to its political and institutional resources: patrician, partisan, pluralist, and plebiscitary.<sup>53</sup> In addition to these historical periods, Skowronek's secular dimension also describes an increase over time in the power, independence, and responsibility of the presidency, although this increase is largely mitigated by the "thickening" of the overall institutional universe.<sup>54</sup>

The focus of Skowronek's analysis is his third dimension, which he calls "political" time. This consists of the political ordering of institutional commitments, "the various relationships incumbents project between previously established commitments of ideology and interest and their own actions in the moments at hand."<sup>55</sup> Skowronek categorizes presidents in terms of their political identity (affiliated or opposed) and the strength of previously established commitments (resilient or vulnerable), generating four justifications for political authority: reconstruction, disjunction, preemption, and articulation.<sup>56</sup> These different warrants for the legitimate use of presidential power are the central feature of political time and arguably also Skowronek's overall account. These structures recur over time, such that it is possible to make instructive comparisons across secular time of presidents who are situated similarly in political time.

All three of Skowronek's dimensions or orderings occur simultaneously but distinctly, so that presidential action is highly complex. Moreover, the different dimensions very much influence one another: "order along one dimension effects order along the next."<sup>57</sup> Thus, the institutional development of the presidency is driven by three separate sources and their various interactions.<sup>58</sup> Again, Skowronek's political dimension seems to offer remarkable explanatory power. And my earlier argument for considering TR as the initiator of the "modern" presidency might be accommodated by a somewhat more punctuated version of Skowronek's secular dimension (i.e., with a marked change under TR, rather than a gradual change over time). However, an understanding of the development of executive orders suggests that Skowronek's constitutional dimension of presidential development might need to be significantly modified. Specifically, Skowronek claims that the constitutional dimension of presidential power is constant, but the evolution of executive orders indicates significant changes in the constitutional conception of the presidency.

Before examining the implications of executive orders for Skowronek's constitutional dimension, it may be useful to distinguish different possible versions of his claim of constitutional constancy. I consider the first two of these versions to be misinterpretations or mischaracterizations of Skowronek's actual view, but it may nevertheless be instructive to consider them. First, if his claim is simply that the Constitution has not changed, then it cannot be right, as the document has been formally amended twenty-seven times, and some of those amendments have directly addressed the presidency. Second, if Skowronek's claim of constitutional constancy obtains not at the level of the text but rather at the level of broader constitutional understandings, then it is also problematic: the text admits of a multiplicity of different and competing conceptions about the presidency and other matters, and the dominant (or authoritative) conception of our constitutional order has changed greatly over time.

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<sup>53</sup> Skowronek, 1997, p53.

<sup>54</sup> Skowronek, 1997, p9, 31, 55.

<sup>55</sup> Skowronek, 1997, p30.

<sup>56</sup> Skowronek, 1997, p34.

<sup>57</sup> Skowronek, 1997, p11.

<sup>58</sup> Skowronek's three dimensions may perhaps be (re)conceived as concentric circles that increasingly constrain presidential action: the Constitution limits the universe of possible presidential actions to those that are consistent with the constituted order (Lincoln's supposed violation of the Constitution in order to save the Constitution is a hard case); history then limits the range of presidential actions from those that are constitutionally legitimate to those that are appropriate or acceptable for a given historical era (e.g., it would have been unthinkable for a nineteenth century "party" president to directly engage the public in the manner of a late twentieth century "plebiscitary" president); and a president's particular political context rules out yet more actions (e.g., Carter was not fully free to repudiate the dying New Deal regime). Skowronek does not present his three dimensions in this way, but such a picture seems consistent with his account, if we allow that actions along one dimension can and do affect the other dimensions.

A third possibility is that Skowronek's claim of constitutional constancy obtains only at a very high, abstract level. This is the interpretation that I believe he intends. For Skowronek, the Constitution creates a particular role or place for the presidency in the constitutional order, and it is that place and its relation to the Constitution's other creatures that is constant, not the constitutional text or constitutional understandings. This place involves what Skowronek regards as the Constitution's impetus for presidential action and the political disruption that tends to follow it.<sup>59</sup> Minor constitutional changes may occur (through amendment or interpretation or otherwise), but the overall constitutional structure persists; regardless of which particular constitutional vision is dominant, the basic nature of the presidency vis-a-vis the rest of the constitutional order persists. But even understood in this fashion, it is not clear that Skowronek's constitutional dimension can make sense of executive orders, either in terms of constitutional theory or the development of case law.

At the level of constitutional theory, executive orders are often justified in terms of executive prerogative, as in Locke's *Second Treatise of Government*. Such accounts generally accord the executive some leeway for actions that are not specifically provided for in the constitution, on the grounds that they are extra-constitutional or perhaps pre-constitutional. Either way, it is not clear how Skowronek's constitutional dimension can account for such executive powers. It is one thing for the presidency to consistently prod and prompt the rest of the constitutional order, as Skowronek suggests, but it is another to account for the constitutional propriety of executive action that seems at odds with that order. One might argue that the idea of an executive constantly disrupting the political system might square with the modern practice of presidents regularly using executive orders for significant purposes, but it cannot explain how that practice developed and was legitimated and institutionalized. This failing may not count for much among those who regard constitutional theory as only tangentially-related to the hurly-burly of institutional politics, but the problem also obtains at the more concrete level of case law.

Executive orders are not mentioned in the Constitution, so the story of how courts came to accept and to limit them is crucial to understanding their place in politics. As we have seen in Chapter Three, there is a complex, decades-long jurisprudential narrative about executive orders. The law-like status of executive orders, the judicial respect and even deference that they command, and the scope of their legitimate use are not articulated in the Constitution but rather evolved over time. Attention only to the Constitution's broad structure is insufficient to account for the constitutional status of executive orders. It is by no means clear that executive orders are inherently or implicitly constitutional or that their judicial acceptance developed inevitably and simply as the vagaries of the U.S. Constitution naturally unfolded in case law; unfortunately, those appear to be the only possibilities that Skowronek's constitutional dimension can accommodate. Put simply, public law effectively changes the constitutional order, and such changes should be reflected on the constitutional (not secular) dimension.

I have suggested that whether the constitutional foundation of executive orders inheres in a broad executive power that predates or overflows the Constitution, or it evolved through a series of court cases, or both, it cannot easily be explained in terms of Skowronek's constitutional dimension; Skowronek's conception can accommodate neither the constitutional theory nor the case law evolution of executive orders. Again, if his claim of constitutional constancy is taken at face value, then it is implausible, given the many clear changes of constitutional substance, understanding, and doctrine that mark American political history. But if the claim of constitutional constancy is understood as applying only at a high level of abstraction (as I have suggested, describing a consistent constitutional impetus for presidential disruption), then Skowronek gains immunity to the above charge of ignoring empirical constitutional change, but at the cost of not being able to account for any of those lesser constitutional changes. In other words, if we conceive of the constitutional order only in terms of static macro-level architecture, there is a great deal of smaller yet real constitutional life that we miss.<sup>60</sup>

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<sup>59</sup> Cf. Miroff.

<sup>60</sup> In a related version of this worry, by taking the broad constitutional order as given, the scope of inquiry and imaginative capacity are inherently constricted, as radical constitutional alternatives are ignored. Thus, beyond any difficulty in adequately addressing constitutional change within the system, such an approach may also have difficulty adequately addressing the possibility of radical change of that system. (I am indebted to Will Harris for first apprising me of a version of this point.)

Whether in terms of only the presidency or American politics more broadly, the constitutional dimension of development is sufficiently robust and varied, at both the theoretical and the empirical levels, that an adequate theoretical treatment of it must somehow capture its variable character; the constitutional dimension must allow for change and development. Just as some mix of stability and alterability is necessary for the continued well-functioning of a constitution, similarly some allowance for change is necessary for a complete systematic understanding of constitutional politics.<sup>61</sup> For this reason, I see a need to alter the apparatus with which Skowronek views institutional order and change, by allowing for a dynamic rather than static constitutional dimension. In short, a basic understanding of executive orders suggests that one of Skowronek's three dimensions need to be further developed, such that significant change occurs along all three of his institutional dimensions.<sup>62</sup>

By broadening Skowronek's constitutional dimension in this way, it becomes possible to comprehend not just executive orders, but also a host of important constitutional phenomena. For example, such a modified constitutional dimension could accommodate Bruce Ackerman's account of regular democratic politics being periodically punctuated by significant changes in constitutional understandings.<sup>63</sup> Skowronek's schema cannot account for this sort of extraordinary politics. While Ackerman discerns periodic eruptions of new constitutional politics, for Skowronek that element is perpetually dormant.

Similarly, a broader constitutional dimension could accommodate the concern that different tensions within the Constitution (perhaps resulting from its many compromises) can drive political development. Douglas Hoekstra articulates a version of this concern, as he suggests that Skowronek's regime cycles may in fact be driven by unresolved constitutional and ideological tensions and that Skowronek underestimates the extent to which constitutional thought can constitute political institutions.<sup>64</sup> This is an important consideration, because it points to the mutual influence between the constitutional and political orders, a relationship that Skowronek's static constitutionalism renders as only unidirectional.

If we accept this change to Skowronek's analytical framework, then how exactly would such a complex dynamic framework capture institutional development? On Skowronek's analysis of order and change, the Constitution essentially provides the order while the other two dimensions register the changes. If we reconceive his constitutional dimension as fluid, then change could occur on all three dimensions, as it seems to in reality. Insofar as change can be comprehensible only against a given frame of reference or a background context, the lack of a constitutional frame means that the past and the status quo would offer the only way to discern any developing historical trajectory in the flux of the three changing orders. Thus, change may be easier to accommodate on this modified version of Skowronek's schema, but it may also be more difficult to discern and to describe.

With three changing dimensions, not all need (or are apt) to change in same way; the degree and nature of change on the three fluid dimensions might well be different. This means that change along, between, and among the three dimensions may either shift dramatically or flow regularly.<sup>65</sup> On the modified typology that I suggest, change within the presidency becomes more complicated (but realistic), while the role of the presidency in creating systemic change and development remains much the same.

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<sup>61</sup> It might be objected that such a constitutional dimension captures the whole polity, not just the presidency, such that it is of the wrong magnitude for understanding specifically presidential politics. However, Skowronek's other dimensions, especially secular time, account for forces outside the presidential office to some extent, and the interaction between and among dimensions also points to the need for broader institutional understandings. Skowronek's constitutional dimension can be broadened enough to account for these facts, but it need not also account for constitutional politics well beyond the presidency.

<sup>62</sup> Furthermore, it may be useful to think not of three dimensions but of three modes of time, three media through which phenomena persist and change. Since Skowronek conceives of his constitutional dimension as constant, it seems to be more of a fixed point than a timeline.

<sup>63</sup> Ackerman, Bruce. We The People. Harvard, 1991.

<sup>64</sup> Hoekstra, p657.

<sup>65</sup> As George Johnson put it in a book review of Stephen Wolfram's A New Kind of Science, "... the continuum is a fiction. Time doesn't flow, it ticks. Space is not a surface but a grid." New York Times Book Review. June 9, 2002. Cf. Orren and Skowronek's concept of intercurrency between or among different orderings.

Skowronek and Bruce Miroff and Henry Jones Ford, among others, see the presidency as the primary engine of American political development, and altering the constitutional dimension as I have suggested need not change that role. Skowronek contends that the Constitution imparts to all presidents the motivation to act and that presidential action generally leads to change, and a broadened constitutional dimension need not alter that special dynamic.

In sum, Skowronek's analytical framework offers an excellent way to make sense of the overall development and dynamics of the presidency, but my analysis of executive orders suggests that at least one part of Skowronek's framework may need to be modified.<sup>66</sup>

## B. Developed, Not Different:

The development of executive orders also has implications for another aspect of how we understand the constitutional dimension of political development: insofar as there has been significant constitutional development, have we departed from the original constitutional order? In other words, is the regular presidential use of executive orders for important purposes a development that is antithetical to original constitutional understandings and hence represents a break with the Constitution's system, or have the changes been internal to or consistent with the original system?

Theodore Lowi articulates one view of this matter in *The Personal President*. According to Lowi, "The accumulated changes in national government since the 1930s have brought the United States into an entirely new constitutional epoch."<sup>67</sup> For Lowi, one of the main changes is the growth in the power and activity of the executive. Peter Nardulli makes a similar claim: "The recent emergence of the president as a powerful actor in the policy marketplace is somewhat difficult to reconcile with the framers' conception of the government they were creating. They rejected hierarchical, command-oriented model of government with a strong central locus... The emergence of the bureaucratic state, even more than the increasing dominance of the president, seems to provide irrefutable evidence of the failure of U.S. constitutionalism."<sup>68</sup> In short, the development of a strong executive, presumably including the regular use of executive orders for important purposes, may constitute a fundamental break with our founding commitments.

In contrast to this view, other scholars see no constitutional disconnect, but rather changes within the same constitutional context. For example, Jeffrey Tulis claims that the common version of the modern presidency construct (though not the rhetorical presidency that he describes) can be traced to (latent or implicit) aspects of the original constitutional system, as evidenced by Hamilton's arguments about it, with the result that the modern presidency is not extra-constitutional. As Tulis explains, "the familiar argument that such change represents a constitutional revolution is wrong, or mostly wrong. Properly conceived, the Constitution is better understood as the generator of these developments rather than the repudiator of them, or most of them... big government and the modern presidency are not new at all, but rather implicit in commitments ratified two centuries ago. Their later emergence signifies the development of a constitutional logic, not the repudiation of constitutional principle."<sup>69</sup>

I agree with Tulis's overall conclusion, but for a slightly different reason than the one he adduces. In my view, the acorn of today's mighty oak of executive orders can be found in the Constitution, such that the regular presidential use of executive orders for important purposes represents a significant development but not a sharp break with our constitutional order. As I see it, the reason that the development of presidents regularly using executive orders for important and controversial purposes does not represent a radical break with the original constitutional order is because that order is so vague about

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<sup>66</sup> Like Theodore Roosevelt and Skowronek's other "orthodox innovators," I want to preserve and extend the existing authoritative structure, albeit in a modified form. As an analogy to the sort of modification that I suggest for Skowronek's schema, consider that one proposed by Nichols and Franklin in their 2004 MPSA paper, in which they argue for changing Skowronek's conception of what constitutes a regime.

<sup>67</sup> Lowi, *Personal President*, p. xi.

<sup>68</sup> Nardulli, p23-4.

<sup>69</sup> Tulis in Fausold and Shank, p134.

the nature of executive power. That Article II is vague seems uncontested; what is debatable is *why* it is vague. And as I have suggested earlier, that vagueness is due in part to the nature of executive power; as Mansfield and others have argued, executive power is inherently impossible to narrowly delimit.

In short, insofar as executive orders represent one manifestation of executive power's proclivity for issuing forth in extra-constitutional ways, for developing in strong ways not clearly provided for by a constitution, their regular use for important purposes constitutes a growth within the necessarily loose confines of the constitutional order, not a radical break with it.

## **5. Agency and Development.**

A fifth implication of the development of executive orders for broader debates in political science concerns the causes of political development, rather than its character or conception. Scholars have argued for the primacy of a variety of different developmental engines for different political phenomena and for politics in general. With regard to presidential power, the most commonly adduced developmental engines are the Constitution, macro-level social changes, the size of the federal government, war and other emergencies, congressional and/or judicial acquiescence, ideas or ideology, and individual agency. It may well be the case that these and other causes all played a role in the development of executive orders, and it may also be the case that some causes are even partially dependent on one another, such that any hierarchical ranking is problematic.<sup>70</sup> However, the evolution of executive orders strongly suggests that individual agency was crucial.<sup>71</sup>

On my account, Theodore Roosevelt's free, conscious choice to use executive orders for a host of important purposes underscores the ability of individual agency to cause political development. The Constitution is in many respects loose and vague, more of a sketch of the political order than a detailed blueprint. It permits a great multiplicity of particular possibilities, and often all that is needed in order to realize one of the many radically different but still constitutional alternatives is a little constitutional imagination and the right political will and circumstances to bring it to fruition. Executive orders perfectly fit TR's stewardship view of the presidential office, and his determination to use them for a variety of purposes and his success in institutionalizing their use indicates how important his personal actions were in the overall developmental process.

While few other scholars have yet addressed the question of the cause of the development of executive orders, many scholars have discussed the development of the presidency in general, and many of them might well disparage my pro-agency account. For example, Corwin claims that "The rise of presidential authority cannot be accounted for by the intention of presidents; it is the product of political conditions which dominate all the departments of government."<sup>72</sup> And presidential historian Henry Graff offers a more direct rebuttal: "Most of the features of the modern presidency would have developed even if William McKinley had not been assassinated."<sup>73</sup> Nevertheless, at least with regard to the development of executive orders, TR's actions strongly indicate that individual agency was crucial. Had he never been president, it is entirely possible that someone else might have eventually established the norm of presidents regularly using executive orders for important purposes, but it is not certain.

Of course, the question of the importance of agency is at the heart of many scholarly debates. According to Skowronek, "The question of agency is, along with its counterpart, the question of structure, the analytic centerpiece of the problem of presidential leadership."<sup>74</sup> I concur, but the importance of TR's agency for the development of executive orders suggests that Skowronek may overemphasize the role of

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<sup>70</sup> Cf. Brinkley's review of Gaddis. See also Orren and Skowronek (2004), p16, 189-90.

<sup>71</sup> According to Orren and Skowronek (2004), "APD highlights agency" (p21).

<sup>72</sup> Corwin, 1984, p27-8.

<sup>73</sup> Graff, p385.

<sup>74</sup> Skowronek, 2002, p750-1. Similarly, Rogers Smith has argued that political inquiry has often had a "tension between convictions that politics, and human agency in politics, really *matter*, usually on the assumption of some sort of human free will; and desires to *explain* politics and political decisions, almost inevitably in terms of exogenous, impersonal forces that may then seem far more important than 'mere' politics" (Smith, 1992, p3).

structure at the expense of the role of agency.<sup>75</sup> Skowronek's schema can account for individual initiative, but only to a point. Individual presidents are free to exercise their various powers as they see fit, but only within the confines of the particular historical and political context that they inherit. Roosevelt's use of executive orders suggests that the range of actions available to individual presidents may be wider than Skowronek thinks. As Robert Lieberman explains, there is "the possibility that human agency can defy the constraints of political and social structures and create new political possibilities."<sup>76</sup>

In Skowronek's defense, however, it should be noted that his more recent writings suggest that he is aware of the implications of unilateral presidential actions for the balance between agency and structure:

A stronger conception of agency may be teased out of recent work dealing with unilateral action by presidents (Mayer 2001; Moe 1985; Moe and Howell 1999a, 1999b). The idea that presidents are not only driven to innovate but that they hold certain advantages over those who might stop them lends a more dynamic, or at least elastic, element to structural explanations. In the long run, it might even revive interest in the dialectical relationship between structure and agency in presidential politics. At present, however, the potential for presidents, as agents of change, to alter the structures that confine them is addressed only by implication.<sup>77</sup>

One of the goals of this paper is to begin to develop that implication into a fully articulated argument.

In claiming primacy for agency as the engine of the development of executive orders, my account may be vulnerable to several potential misunderstandings and criticisms. First, it is not the case that agency alone was responsible for the development of executive orders. Other factors also played a role. For example, the Constitution certainly structures, motivates, and sustains the interbranch struggle for power. Furthermore, it incorporates and perhaps animates the inherently extra-constitutional nature of executive power.

In terms of ideas, the broad, loosely defined ideology of Progressivism also played an important part in the development of executive orders. TR's choices very much helped to entrench a Progressive view of large, activist government (and a stewardship view of an activist presidency at the forefront of that government). In some respects, TR's conscious agency was a part of a broader ideological shift; TR may be seen as the point-man or the vanguard of the Progressive revolution. However, unless we are prepared to attribute causality to ideas themselves (as some are), we need to be sensitive to the role that individuals play in understanding and acting upon ideas. TR was undoubtedly influenced by nascent Progressive ideals, but it was his particular actions in pursuit of those ideals that most mattered here.

And of course broader empirical circumstances also played a role in the development of executive orders. On my account, the advent of significant executive order usage under TR facilitated, but was not caused by, the growth in national governmental capacity. Nevertheless, TR's actions could not have succeeded or been institutionalized had it not been for certain empirical circumstances. As TR himself said, "a man has to take advantage of his opportunities, but the opportunities have to come."<sup>78</sup>

Second, in stressing the importance of individual agency for the development of executive orders, I do not want to disparage the significance of more structural factors in other regards. Indeed, the ability to discern structural causes where there seem to be only individual factors, to see the forest for the trees, is often key to the analysis of power (e.g., in a traditional Marxist manner, or in a more subtle structuralist manner, as with Foucault).

Third, in addition to being crucial in the development of executive orders, an appreciation of agency can also be crucial to understanding the institution of the presidency more generally. As

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<sup>75</sup> Some critics have suggested that Skowronek's book *The Politics Presidents Make* should be retitled *The Presidents Politics Make*. This is of course an unfair caricature, as Skowronek's account does allow for some agency (e.g., he credits Jimmy Carter with doing a lot after being dealt a bad hand), but Skowronek's overall emphasis is clearly on the limits of structure rather than the possibilities of agency.

<sup>76</sup> Lieberman, p698.

<sup>77</sup> Skowronek, 2002, p750.

<sup>78</sup> Dallek, p14.

presidential adviser Clark M. Clifford noted, “The executive branch of our government is like a chameleon. To a startling degree it reflects the character and personality of the President.”<sup>79</sup> Similarly, Corwin claims “what the presidency is at any particular moment depends in important measure on who is President.”<sup>80</sup> Although the presidency (as an institution) is not identical to or reducible to the president (as an individual), the latter can greatly influence the former.<sup>81</sup>

One way to gauge to relative strengths of agency and structure in the presidency is to consider the extent to which presidents after TR have been free to ignore the norm that he established of presidents regularly using executive orders for important purposes. In other words, if agency is so strong, then presidents are surely free to deviate from newly established practices, whether to resume older patterns of behavior or to strike out in new constitutional directions. Several of TR’s successors (not least among them his hand-picked successor, Taft) favored a more traditional, reserved view of the presidency and might therefore have been expected to employ executive orders less frequently and for less momentous purposes than did TR. However, virtually every president after TR has used executive orders as he did. This suggests that notwithstanding the importance of TR’s agency, presidents may not be entirely free to act as they choose.

In 1913, Woodrow Wilson claimed that “The president is at liberty both in law and conscience to be as big a man as he can. His capacity will set the limit.”<sup>82</sup> Writing in the mid-twentieth century, however, Neustadt added the following addendum: “But nowadays he can not be as small as he might like.”<sup>83</sup> Similarly, Hugh Hecllo noted in his 1977 review of presidency literature that “Massive attention is devoted to the special characteristics of particular presidents but ‘something’ about the office seems to be forcing all Presidents into similar willful behavior patterns.”<sup>84</sup> In short, TR’s strong individual agency may have been the exception rather than the rule among presidents.

Fourth, the centrality of individual agency in establishing the practice of presidents regularly using executive orders for important purposes may be ironic, in that it reverses the overall importance that I want to attribute to constitutional and individual factors in understanding presidential power: executive orders came to be a crucial constitutional dimension of presidential power largely through the actions of an individual, TR. But even though agency played the central role in establishing this crucial power, the power remains constitutional in nature and is not now dependent on the individual for its legitimacy. In other words, executive orders show that presidential power is fundamentally constitutional rather than personal, even though acceptance of their constitutional status was largely achieved through personal action.

Again, TR’s role in the development of executive orders suggests that individual agency can be a primary cause of political development. Other forces can certainly be strong and in many cases decisive, but individuals are neither passive receptors of ideas nor unthinking responders to the stimuli of empirical conditions or broad social forces.<sup>85</sup> To argue otherwise is to ignore the obvious fact of human diversity. As Kevin McMahan notes, “The forces of history are undoubtedly strong, but that does not mean we should ignore individual and institutional action.”<sup>86</sup>

- **Conclusions:**

The five implications sketched above undoubtedly vary in terms of their originality, plausibility, and significance. None of them amounts to a truly original call for a radical rethinking of American

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<sup>79</sup> Clifford, quoted in Greenstein, 2000, p189. Cf. Ferrell.

<sup>80</sup> Corwin, 1984, p29-30.

<sup>81</sup> According to Orren and Skowronek (2004), “Institutions are not independent of the individuals who operate them” (p82).

<sup>82</sup> Laski, p129. (From Constitutional Government, p69).

<sup>83</sup> Greenstein, 2000, p251.

<sup>84</sup> Hecllo, p32.

<sup>85</sup> Cf. Smith, 1992, p35.

<sup>86</sup> McMahan, p203.

politics or American historical understandings, but each may be adduced as a rationale in wider debates about those matters.

Before concluding this section, it may be useful here to briefly consider the extent to which it is possible and/or desirable to generalize from aspects of the presidency to broader issues in American politics, as I have attempted to do here. On one hand, the presidency is only one institution among many. It is unique and idiosyncratic and can vary greatly with the individual who occupies the institution. With a set of only 42 presidents, the institution simply may not presently have enough variation along enough dimensions to permit fruitful analysis, let alone to yield broadly applicable principles. Attempts to apply lessons learned from it to other political areas should therefore be cautious. On the other hand, the presidency can nevertheless tell us much about broader topics. It is arguably our most visible, important, and influential political institution, and it embodies and reflects many aspects of our broader political life. It may therefore be only appropriate that lessons learned there have some purchase elsewhere.

Beyond considerations of the dangers in seeking to apply knowledge of aspects of the presidency to broader considerations, there is also the question of why it might be valuable to do so. In other words, there is a question about the relationship of focused historical research to broader intellectual endeavors. Briefly, one might discern four levels of such scholarship. First, there is the study of discrete historical phenomena, such as the development of executive orders.<sup>87</sup> A basic description of what has hitherto been understudied may be of only antiquarian value, but it may also provide crucial data for a second level of scholarship, namely broader debates about specific historical changes, such as the nature and growth of presidential power, or the advent of the modern presidency. Beyond this, there is a third level of scholarly inquiry, in which the manner or method of conducting the social scientific analysis of historical phenomena is itself the focus of concern. Orren and Skowronek's work on the nature of historical institutionalism and American political development falls into this category. Fourth, there is the aspiration to produce a true general science of politics.

Where do executive orders and this paper fall in this schema? Like many historically-minded social scientists, I am deeply skeptical about the prospects for a general science of politics.<sup>88</sup> However, at the other extreme, the study of historical phenomena is of limited use if it produces only data with no meaning.<sup>89</sup> It is more valuable and interesting if it produces knowledge or arguments that can travel, that will not be limited to the particular subject of inquiry but that will have some broader applicability or generalizability.<sup>90</sup> Such an ability may well enhance the value of the work in question by placing it in a broader theoretical framework and thereby enabling it speak to a broader audience, and it may also call for changes in those theoretical understandings.

In this paper, I have tried to go beyond the first level of historical inquiry and to connect with the second and third levels. My aim has been to sketch some of the implications of my research on executive orders for broader debates in political science.

## **PART II: Executive Orders and Politics:**

Apart from what the evolution of executive orders implies for political science, there is also the question of its implications for real politics. The development of executive orders is in many respects part of the broader themes of the growth of presidential power and, arguably, the acquiescence of the other branches and perhaps even the American people.

As we have seen, the judiciary began to accept executive orders in the early nineteenth century and has seldom questioned their propriety since. Congress could reign in the presidential use of executive

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<sup>87</sup> This is what Pierson identifies as the first of three "historic turns" in the social sciences (Pierson, 2004, p4).

<sup>88</sup> Cf. Pierson, p73.

<sup>89</sup> Cf. Pierson (2004): "...historical analyses are seen as antithetical to the identification of patterns and the development of generalizations" (p168). In contrast, Orren and Skowronek (2004) claim "APD's interests are anything but antiquarian" (p197).

<sup>90</sup> Cf. Pierson, 2004, p6.

orders, but it is apparently disinclined to do so.<sup>91</sup> Few members of Congress seem to regard executive legislation as a problem or an intrusion on the constitutional sphere of the legislature. The Senate's 1974 report on executive orders claimed that passing legislation to better check executive orders should be a priority for Congress, but three decades later Congress has not acted, and it does not appear that such action will occur anytime soon. Consider the following account by Joan Didion of a recent congressional hearing:

“when a former longtime member of the House of Representatives, Lee Hamilton, suggested at a hearing of the Senate Governmental Affairs Committee that recommendations of the 9/11 Commission could be put in effect by ‘executive order,’ not only no polarization but virtually no response, no discussion of why someone who had long resisted the expansion of executive power now seemed willing to suggest that a major restructuring of the government proceed on the basis of the president’s signature alone. Was he suggesting a way to shortcut the process on only minor points? Or, since he seemed to be talking about major changes, was he simply trying to guide the Senate to the urgency of the matter? Such questions did not enter the discourse. There was only silence, general acquiescence, as if any lingering memory of a separation of powers had been obliterated...”<sup>92</sup>

This clearly underscores the fact that Congress is simply not interested in reigning in executive lawmaking.

The regular use of executive orders for important purposes may now be accepted nearly universally, and it may even be in some respects necessary for the well-functioning of government, but political acceptance and administrative pragmatism do not eliminate the basic constitutional worry that executive orders can jeopardize the balance of the American constitutional order. In the end, the best check on the abuse of such directives may be political rather than constitutional, especially given the disinterest of the legislative and judicial branches. Just as John Locke’s defense of executive prerogative power was ultimately justified in terms of its ability to further the general welfare, the ultimate check may reside with the people. Insofar as the constitutional tension inherent in executive orders is tolerated on the pragmatic grounds that there is great utility in their use, when executive orders no longer advance the public good, their legitimacy is void.

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<sup>91</sup> Cf. Moe and Howell (April), p147; Hinkley.

<sup>92</sup> Didion, Joan.

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