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Incrementalism v. Disjuncture: The President and American Political Development

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INCREMENTALISM V. DISJUNCTURE: THE PRESIDENT AND AMERICAN POLITICAL DEVELOPMENT

Marc Landy*

J. DAVID ALVIS, JEREMY D. BAILEY, & F. FLAGG TAYLOR, IV, THE CONTESTED REMOVAL POWER, 1789–2010 (2013). Pp. 264. Hardcover $ 34.95.

MICHAEL J. GERHARDT, THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY (2013). Pp. 313. Hardcover $ 34.95.

In studying the development of the presidency one is faced, as with the development of virtually any institution, with a decision about whether to emphasize incrementalism or disjuncture in explaining its path. Either choice will inevitably serve to illuminate as well as to becloud important truths. The *Contested Removal Power, 1789-2010* takes the route of disjuncture.[1] As the title indicates, it focuses on the struggle between the president and Congress over that power, with the courts periodically intervening to give points to one contestant or the other. Although the struggle is ongoing, the book concentrates on key episodes that have resulted in momentous change: the decision of the first Congress to grant the president removal power; the promotion of the principle of rotation in office by presidents Jefferson and Jackson; the Congressional challenge to the removal power culminating in the impeachment of Andrew Johnson; the reassertion of presidential removal prerogative the Supreme Court promulgated in *Myers v. U.S.;* and the significant modifications to that prerogative brought about by the proliferation of Independent Regulatory Commissions and enshrined by the Supreme Court in *Humphrey's Executor v. U.S*.[2]

By contrast, The *Forgotten Presidents: Their Untold Constitutional Legacy* stresses the role of incremental change in the evolution of the presidency.[3] It focuses on thirteen "forgotten" presidents to show that even the least appreciated, most obscure of our chief executives made important contributions to the presidency.[4] Gerhardt likens the accretion of precedents added on by many presidents to the common law made by courts.[5] "Like the

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1. J. DAVID ALVIS, JEREMY D. BAILEY, & F. FLAGG TAYLOR, IV, THE CONTESTED REMOVAL POWER, 1789-2010 (2013).
2. *Id.*; Myers v. U.S., 272 U.S. 52 (1926); Humphrey's Executor v. U.S., 295 U.S. 602 (1935).
3. MICHAEL J. GERHARDT, THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY (2013).
4. *Id.* at xv.
5. *Id.* at xii.

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common law, the power of the presidency has developed incrementally, one decision at a time and depends on precedent made by presidents, not courts."[6] Gerhardt ostentatiously ignores the contributions made by the Mount Rushmore presidents and skips over their allegedly transformational accomplishments. Instead, as the title implies, his book is devoted to the study of the thirteen presidents he deems to be the most obscure to emphasize how much the construction of the office owes to even its least prominent occupants. He thus dissents from the disjunctive approach inherent in the "Big Bang Theory" of executive branch development, the notion that the major changes in the office occurred at a few critical transformational periods.[7] Landy and Milkis call them "conservative revolutions."[8] Steven Skowronek calls them "reconstructions."[9]

POSITIONS IN THE CONTEXT

The Contest Removal Power tells a great story of epic struggles between the branches and among members of the Supreme Court, but it is no mere narrative. It reveals how the removal contests embody and elucidate core questions of American constitutionalism and American political development. Since the Constitution does not mention removals, the book's careful scrutiny of the ongoing debate enables the authors to define the positions that were present during the original removal power contest and that continued to define the contours of debate in the subsequent ones:

1. *Advise and Consent*: The Constitution requires that the Senate give its advice and consent to a removal.
2. *Congressional Delegation*: The Constitution provides Congress with the authority to delegate this power where Congress pleases.
3. *Executive Power Theory*: The Constitution locates this power with the president.[10]

A fourth position, that impeachment is the sole removal avenue the Constitution provides figured in the original 1789 debate but, unlike the other three, did not continue to play a significant role in the subsequent removal contests.[11] Although *Congressional Delegation* arguments play a role in subsequent contests these are not as consequential as the arguments made on the basis of *Executive Power Theory* and *Advise and Consent*. For brevity's sake, this review concentrates upon Alvis, Bailey and Taylor's account of those two positions.

Both those positions endure but they have also undergone crucial changes of substance and emphasis. For example, Jefferson and Jackson's defense of Executive Power Theory relied heavily on Madison's defense of Executive Power Theory. But each added rationales of its own. Likewise, there is considerable overlap between Hamilton's opposi-

6. *Id.*
7. *Id.* at xvi.
8. MARC LANDY AND SIDNEY M. MILKIS, PRESIDENTIAL GREATNESS 4 (2000).
9. STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 36-39 (1993).
10. ALVIS ET AL., *supra* note 1, at 7.
11. *Id.* at 24.

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tion to the Executive Power Theory and that proffered by the proponents of the independent regulatory commissions a century later, but the differences between the two arguments are equally salient. Thus the reader must come to grips both with fundamental aspects of constitutional contestation that endure throughout the course of American political development and with the ways that revised understandings of the meaning and nature of democracy and of the purposes and scope of government changed the game.

The root cause of the contest about removals is the Constitution's silence on the matter. Article Two delineates the president's appoint power replete with the requirement that Senate advise and consent (which quickly boiled down to consent) to all appointments not considered "inferior":

> [H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[12]

But there is no concomitant statement about how these officers are to be removed. Participants in the removal debate have been free to fill the void with whatever meaning comports best with their predilections concerning how the president and Congress should function and how the two branches should relate to one another.

EXECUTIVE POWER THEORY: WASHINGTON TO JACKSON

In the early going, the most prominent proponent of Executive Power Theory was the man who was Commander-in-Chief before he was ever president, George Washington. Whether commanding soldiers or bureaucrats, Washington believed that a chief executive could only do his duty if he could control the behavior of his underlings.[13] It is more surprising that James Madison agreed with Washington and, as a member of the House of Representatives, led the fight to enshrine that view into law.[14] Madison had not always been such a fan of executive power. His blueprint for the Constitution, the so-called Virginia Plan, did not provide for a strong executive.[15] But he seems to have accepted the essential argument proffered by Washington and other champions of executive power that granting the president removal power was not simply a means to aggrandize the office; it was the only way to hold the president accountable for his actions. If he could not remove disobedient underlings, he could not be held responsible for the courses of action they took. Therefore what at first brush seemed like a broadening of presidential power was, properly understood, also a means for checking it.

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12. U.S. CONST. art. II, § 2.
13. ALVIS ET AL., *supra* note 1, at 10, 27, 76, 92.
14. *Id.* at 98.
15. Edmund Randolph, *Variant Texts of the Virginia Plan*, TEACHING AMERICAN HISTORY, http://teachingamericanhistory.org/library/document/variant-texts-of-the-virginia-plan/ (last visited Jan. 29, 2015).

Accountability is stressed by all subsequent adherents of exclusive presidential removal power. But as *The Contested Removal Power* shows, Jefferson and Jackson add critical democratic dimensions to their rationales for granting sole removal power to the president. Jefferson's expanded understanding of the removal power was tied to his broader transformation of the presidential office.[16] Unlike Washington and the Federalists, Jefferson was a democrat and he considered the president to be democrat-in-chief. The president represented the will of the people and therefore he required removal power in order to do the people's bidding. Although Jefferson claimed to abhor political parties, he defended the removal of Federalists on the grounds that even if they were not a full-fledged party they were a political faction that opposed his policies and hence were obstructing the people's will. His ambivalence toward party, and toward his role as party leader kept him from engaging in a wholesale purge of Federalists. But he did remove a goodly number of them, claiming to do so not in the name of Republican Party triumphalism but simply to bring about a rough parity between the number of Republican and Federalist office holders.[17]

Jackson shared Jefferson's democratic understanding of the presidency but not Jefferson's ambivalence toward party. Therefore, he abandoned his idol's desultory approach to removal in favor of a more systematic replacement of incumbent officials who had supported his rivals with loyal Jacksonian Democrats. Removals would now follow the party line according to the principle of rotation in office, a principle that his partisan opponents, the Whigs, would cheerfully adhere to, as would their successors the Republicans.[18]

As we shall soon see, Jackson's support of frequent rotation in office in line with the election returns was diametrically opposed to Hamilton's support for continuity in office. Jackson believed that if office holders remain in place for too long they would come to view their office as their personal property. In Jackson's mind, those offices were the people's and any incumbent was merely a transient guest.

ADVISE AND CONSENT: FROM HAMILTON TO THE RADICAL REPUBLICANS

As the Federalist Papers he authored on the presidency demonstrate, Alexander Hamilton was a great champion of a strong executive.[19] But in Federalist 77 he parts with the Executive Power Theory to support making the Senate a full partner in executive removal. "The consent of that body [the Senate] would be necessary to displace as well as to appoint."[20] This was not a contradiction. Involving the Senate would actually strengthen the Executive Branch by contributing to the stability of the administration. In contemporary parlance the administration refers to the governance of a particular president, as in the Obama Administration but that was not Hamilton's usage or meaning. In his mind the administration transcends the tenure of any particular president.

Even in the absence of full-fledged political parties, Hamilton could see that the election of new presidents, especially if they were significantly at odds with their predecessor would create inexorable pressure to interrupt steady administration by replacing

16. *Id.* at 49.
17. *Id.* at 48-55.
18. *Id.* at 67-72.
19. JOHN JAY, ALEXANDER HAMILTON & JAMES MADISON, THE FEDERALIST PAPERS (1961).
20. *Id.* at 459.

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those whose views differed from the new incumbent. The Senate would serve as a very useful obstacle to such turnover:

> A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration, will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government.[21]

Its slow turnover gave the Senate a steadiness capable of preserving that same quality in the administration. Any official worth his salt could cultivate enough support among senators so that he could most likely thwart the effort of a hostile president to oust him. With the aid of Senatorial involvement Hamilton foresaw the development of a body of administrators whose lengthy tenure and relative immunity from political pressure would enable them to acquire the experience and expertise needed to make sound decisions and bring complex enterprises to fruition. He envisaged the establishment of an administrative body along the lines of what came to be the British Civil Service. As he feared, in the absence of Senate advice and consent, presidents from Jackson onward felt no compunction about removing enemies and using the ensuing vacancies to reward friends.

The desire to preserve stability of administration made Hamilton as much a foe of unvarnished congressional involvement in removal as of presidential dominance. The very qualities that made the House of Representatives a vital democratic component of the constitutional order—its large size and the short duration of members' terms—made it unsuitable for participation in either appointments or removal:

> A body so fluctuating and at the same time so numerous, can never be deemed proper for the exercise of that power. Its unfitness will appear manifest to all, when it is recollected that in half a century it may consist of three or four hundred persons. All the advantages of the stability, both of the Executive and of the Senate, would be defeated by this union, and infinite delays and embarrassments would be occasioned.[22]

Note Hamilton's prescience in envisaging that the Union would grow so large as to require the House to expand to virtually its present size. Such a continental enterprise would have even greater need of the steady administration that only Senatorial removal

21. *Id.*
22. *Id.* at 463.

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consent could provide than did the mere strip of coastline, with some fingers pointed inland, that comprised the United States of his day.

Hamilton, posthumously, got his wish many decades later when Congress passed the Tenure of Office Act of 1867.[23] It required Senate agreement to the removal of any appointee to whom it had previously given its consent.[24] Like the protagonist in a fairy tale, Hamilton should have been more careful about what he wished for. The purpose of the Act was not to ensure steady administration but rather to shift policy-making regarding the defeated Confederacy from the President to the Congress. Lincoln had preached "charity for all."[25] While it is impossible to know entirely what that would have meant in practice had he lived, clearly it would not have added up to the Draconian policies pushed by the congressional Republican majority. One may take the Radical Republican side in the debate about Reconstruction but one cannot argue that it added up to the sort of continuity that steady administration implies.

MYERS V. HUMPHREY'S EXECUTOR

The Tenure of Office Act endured for several decades after Johnson left office.[26] But its subsequent history likewise failed to enhance steady administration. Rather it became a weapon wielded by the Senate in the continual battle with various presidents over the disposition of federal patronage. Combining the Hamiltonian means for curbing presidential power, consent by the Senate, with the end prescribed by Jackson, rotation in office, produced the worst possible result. It created a spoils system lacking any means for public accountability. Indeed it was public disgust with the congressionally-dominated patronage system that led to the other greatest removal restriction effort of the late nineteenth Century, Civil Service Reform.[27]

Initially, Civil Service Reform applied to only a few realms of federal public service.[28] But, within that sphere, appointments to office were made via examination rather than political connection and removals did not follow the election cycle but were only for cause. Over time, the portion of the federal service placed under civil service protection expanded.[29] The greatest expansion took place during the New Deal, as FDR sought to protect the vast army of federal appointments he had made from dismissal by later, possibly less progressive presidents.[30] As Sid Milkis shows, FDR was no Jackson. In order to protect the programs he had put in place he would hamstring the ability of his popularly elected successors to be fully accountable to the popular will. He would use Hamiltonian means to achieve not Jeffersonian but Progressive ends.[31]

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23. ALVIS ET AL., *supra* note 1, at 99.
24. *Id.*
25. Abraham Lincoln, *Second Inaugural Address,* Inaugural Addresses of the Presidents of the United States (1989), *available at* http://www.bartleby.com/124/pres32.html.
26. *See generally* ALVIS ET AL., *supra* note 1.
27. *Id.* at 114-26.
28. *Id.*
29. SIDNEY M. MILKIS, THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL (1993).
30. *Id.* at 115-16.
31. *Id.* at 38-47.

Congress repealed the Tenure of Office Act in 1887.[32] This boon to the presidency was reinforced thirty years later by the Supreme Court's decision in *Myers v. U.S.*, which unambiguously supported executive power theory as originally articulated in 1789.[33] Writing for the majority, Chief Justice Taft stated that the Constitution vests executive power in the president and that his ability to remove recalcitrant subordinates is essential to the execution of that power.[34] Furthermore, the Senate was incompetent in matters of removal[35]:

> When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee as is the president, but, in the nature of things, the defects in ability or intelligence as an officer under the president are facts as to which the president, or his trusted subordinates must be better informed than the Senate . . . .[36]

But what the Court giveth it can take away. Nine years after *Myers* it denied the president the power to remove commissioners of independent regulatory agencies (IRCs).[37] Prior to the New Deal, the two outstanding IRCs were: the Interstate Commerce Commission (ICC) founded in 1887; and the Federal Trade Commission (FTC), founded in 1914.[38] The impetus for the creation of IRCs was twofold. Proponents of extending the reach of the federal government to include such matters as setting railroad rates, and punishing anti-competitive behavior by business firms believed that such efforts required a level of impartiality and technical expertise that could only be achieved and maintained if they were kept out of the patronage process.[39] And, for the most part, neither congressional supporters nor opponents of these new and ambitious federal initiatives favored ceding full authority over them to the president.[40] By establishing long terms for IRC commissioners, staggering their appointments so that no individual president could name a majority of them in a single presidential term and denying the president the power to remove them, except for cause, Congress severely limited the president's ability to dominate the IRC's.[41] But Congress did not entirely undermine its own ability to influence the IRCs.[42] It retained the ability to exercise removal power over commissioners by reducing the length of their terms in office as it did to FTC commissioners in 1930, and to make use of riders to IRC appropriations bills to accomplish the same thing.[43]

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32. ALVIS ET AL., *supra* note 1, at 113.
33. JUDGING EXECUTIVE POWER 7 (Richard J. Ellis ed., 2009).
34. *Id.*
35. *Id.*
36. *Id.*
37. ALVIS ET AL., *supra* note 1, at 161.
38. *Id.* at 148.
39. *Id.* at 145.
40. *Id.* at 149-50.
41. *Id.* at 148.
42. *Id.* at 149, 156-57.
43. *Id.* at 156-57.

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In the wake of *Myers,* FDR expected that the Supreme Court would overturn congressional efforts to deprive him of the authority to remove IRC commissioners.[44] However, when FDR tried to fire William Humphrey, a Coolidge appointed FTC commissioner, the Court in *Humphrey's Executor v. U.S.*, overruled the president.[45] It determined that the FTC was not, strictly speaking, an executive agency but rather an entity with "quasi-judicial and quasi-legislative" duties.[46] Therefore, the precedent set by *Myers* granting the president unconditional executive branch removal power did not apply.[47] Thus, the Court upheld the argument for steady administration, at least for the very specialized set of hybrid entities the IRCs purportedly comprised.[48]

FDR responded to *Humphrey's Executor* by launching a full scale assault on the very concept of IRCs. The Committee on Administrative Management he appointed recommended folding all the IRC's into existing cabinet departments and terminating their independent status.[49] Alas, Congress would not accept this recommendation and so matters stand to this day.[50] The Executive Power theory is the dominant element regarding presidential removal power but the continued existence of IRC's as well as the extensive protections offered via civil service regulations place severe limits on the president's power. Neither Washington nor Hamilton have entirely won out, the contest continues.

THE FORGOTTENS

There are three important lessons to be drawn from focusing on the Forgottens, as Gerhard urges readers to do. First, genuine precedents were established by a few of the forgotten president that influenced the future course of the presidency.[51] Second, the deviation of all four of the Whig presidents from anti-executive power Whig party orthodoxy shows just how strong a tug the presidential office and its perquisites exercise over those who come to occupy it.[52] This is true even when the incumbent has previously expressed reservations about presidential power.[53] Finally, one comes to appreciate the important role played by the three "Anti-Greats"—Cleveland, Taft, and Coolidge. I call them the Anti-Greats to emphasize that, unlike most of the other "Forgottens," they were not mediocre. They were as strongly dedicated to their belief in limited government and protection of private property as the Progressive were to expanding government and altering property rights.[54] They were not "conservative revolutionaries."[55] They were conservative conservatives. They fought hard and well for their convictions.

The first and most important precedent set by a "Forgotten" was John Tyler's. The

44. *Id.* at 162.
45. *Id.* at 161.
46. *Id.* at 161-62.
47. *Id.* at 162.
48. JUDGING EXECUTIVE POWER, *supra* note 33, at 20.
49. ALVIS ET AL., *supra* note 1, at 168-69.
50. *Id.* at 171-72.
51. GERHARDT, *supra* note 3, at xii-xiii.
52. *Id.* at xii.
53. *Id.* at 26.
54. *Id.* at 128, 172, 191.
55. LANDY & MILKIS, *supra* note 8, at 200.

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original Constitution was unclear about what was to happen if a president died in office.[56] It simply said that in such an event, the vice president shall discharge "the Powers and Duties of the said Office"[57] Does that mean that the vice president serves on an interim basis? If so, how long is the interim? Does he continue to do so for the entire unexpired term or merely until a special election is held? William Henry Harrison was the first president to die in office.[58] Upon learning of Harrison's death, Tyler rushed to Washington and immediately called an emergency meeting of Harrison's cabinet.[59] When Daniel Webster addressed him "Mr. Vice President," he objected stating that he was now the president.[60] The Cabinet voted unanimously to recognize him as such and he was quickly sworn in by a District of Columbia Circuit Judge.[61] Congress, faced with this fait accompli, acquiesced to Tyler becoming the president.[62] Once this precedent was established it was never challenged.

Grover Cleveland set a precedent when he deployed federal troops to break the Pullman Strike.[63] This was not the first time a president summoned troops.[64] Recall Washington summoning them to quell the Whiskey Rebellion and Jackson's pledging to do so in response to South Carolina's nullification threat.[65] But those were responses to threats of insurrection.[66] Although the Pullman Strike did disrupt the mails, protecting mail delivery was a mere pretext for Cleveland's real motive which was to protect the property rights of company owners.[67] Hence, he was wielding the might of the federal government to resolve a labor-management dispute.[68] This precedent set the stage for Theodore Roosevelt's threat to end the Anthracite Coal Strike of 1902 by nationalizing the coal mines and use federal troops to operate them.[69] The irony is that in this latter instance TR was wielding federal military might in aid of the workers, not the capitalists.

Calvin Coolidge appointed two special prosecutors to investigate and prosecute suspected crimes occurring during his administration—those involved in the Teapot Dome Scandal.[70] Although he was not the first to appoint special prosecutors—Grant had done so—he was the first not to interfere with their investigations and to allow them to follow up those investigations with prosecutions of federal officials.[71] He is therefore, the real initiator of the special prosecutor phenomenon that would play such a large role in subsequent presidencies,[72] most notably in the Nixon administration.

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56. GERHARDT, *supra* note 3, at 39.
57. U.S. CONST., art. II, § 1.
58. GERHARDT, *supra* note 3, at 39.
59. *Id.* at 39.
60. *Id.*
61. *Id.* at 40.
62. *Id.* at 39-40.
63. *Id.* at 164.
64. LANDY & MILKIS, *supra* note 8, at 29.
65. *Id.* at 103.
66. *Id.* at 29.
67. GERHARDT, *supra* note 3, at 164.
68. *Id.* at 163-65.
69. ROBERT J. CORNELL, THE ANTHRACITE COAL STRIKE OF 1902, 210-11 (1957).
70. GERHARDT, *supra* note 3, at 198.
71. *Id.* at 198-99.
72. *Id.*

PRESIDENTIAL AUDACITY IN WHIG CLOTHING

The Forgotten President's depiction of the Whig presidents shows how the presidential office can bend and even suppress the political and ideological predilections of the office holder.[73] The Whig presidents did not make politics, in the way Skowronek describes. Instead, the exigencies of being president made them. As its name implies, the Whig party was dedicated to curbing the power of the "king," King Andrew, and his dynasty.[74] The greatest of the Whigs, Webster and Clay, never ascended to the presidency, although, particularly in Clay's case, it was not for lack of trying.[75] They were creatures of Congress, and they were committed to placing Congress, not the president, at center stage.[76] Nonetheless, as each new Whig president came into office he found himself resisting the demands of powerful congressional Whigs in order to preserve his executive authority.[77]

This dynamic began with the very first Whig president, William Henry Harrison, who rebuffed Henry Clay's effort to dictate the composition of his cabinet.[78] His successor, John Tyler, likewise resisted congressional pressure to dictate appointments and also violated Whig orthodoxy in his use of the veto power.[79] Following Washington's precedent, the Whigs believed that the veto should only be exercised to overturn legislation the president deemed to be unconstitutional.[80] Tyler cast six vetoes, the most of any ante-bellum president (Madison cast one more if pocket vetoes are included).[81] He included unconstitutionality among his rationales for casting them but did not limit himself to that justification.[82]

Zachary Taylor continued the iconoclastic tradition by exercising legislative leadership.[83] He proposed that California and New Mexico be admitted to the Union.[84] Since each would enter as a free state, Southern Whigs adamantly opposed the plan.[85] The staunchest anti-slavery Whigs supported it but even they were troubled by Taylor's assertion of such aggressive presidential intervention into what Whigs believed to be the exclusive preserve of Congress.[86] The last Whig president, Millard Fillmore was perhaps the least iconoclastic but he too resisted the efforts of his Whig congressional colleagues to dictate his appointments.[87] This impressive litany of anti-orthodoxy makes a convincing case that the nature of the presidency is such as to press even a reluctant incumbent against succumbing to the blandishments of parliamentarianism. When one actually sits in the

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73. *Id.* at xii.
74. *Id.* at 3.
75. *Id.* at 27.
76. *Id.* at 26.
77. *Id.* at xii.
78. *Id.* at 28-29.
79. *Id.* at 41, 48.
80. *Id.* at 70.
81. *Id.* at 41.
82. *Id.* at 42.
83. *Id.* at 69.
84. *Id.*
85. *Id.* at 70.
86. *Id.* at 70-71.
87. *Id.* at 89-90.

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president's chair, the kaleidoscope shifts.

ANTI-GREATS

The significance of the Anti-Greats is twofold. First, they made critical decisions that at least temporarily stemmed the tide of governmental expansion. Second, they serve as the model of the presidential road not taken, a model that may prove of more than historical significance if the contemporary presidency continues to founder.

As president, Cleveland led the fight to repeal the Silver Purchase Act, which sought to increase inflation by taking the US off a strict gold standard.[88] The Gold Standard's great virtue was that it deprived government of any ability to manipulate the currency and Cleveland therefore considered a vital means for keeping the government from meddling with the economy.[89] The Act enabled government to interfere with the standard by measuring its value not only in terms of the scarce metal, gold, but also in terms of a certain amount of the more abundant metal, silver, thus cheapening the dollar.[90] The book omits Cleveland's other dramatic effort to limit the reach of the federal government, his veto of the Texas Seed Bill.[91] In the mid-1880s, Texas suffered a terrible drought.[92] To keep from starving, Texas farmers were forced to eat their seed corn and therefore had no seeds left to plant.[93] In response Congress appropriated ten thousand dollars to enable them to buy seeds.[94] Cleveland vetoed the bill because the Constitution made no provision for such largesse, because it was not a proper activity for government and because it would undermine the moral character of the recipients[95]:

> I do not believe that the power and duty of the general government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit . . . the lesson should be constantly enforced that, though the people support the government, the government should not support the people . . . Federal aid in such cases encourages the expectation of paternal care on the part of the government and weakens the sturdiness of our national character.[96]

William Howard Taft's "Anti–Greatness" lay in his efforts to curb what he took to be the unconstitutional excesses of his predecessor Theodore Roosevelt.[97] TR had repudiated the strict reading of the Constitution to which all his predecessors had at least paid lip

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88. *Id.* at 156.
89. *Id.*
90. *Id.*
91. Cleveland and the Texas Seed Bill, BILL OF RIGHTS INSTITUTE, *http://billofrightsinstitute.org/resources/educator-resources/lessons-plans/presidents/texas-seed-bill/* (last visited Nov. 5, 2014).
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. Grover Cleveland, *Veto Message, Texas Seed Bill,* LUDWIG VON MISES INSTITUTE (Aug. 20, 2009), http://mises.org/daily/3627.
97. GERHARDT, *supra* note 3, at 172-73.

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service.[98] Instead of limiting the powers of the federal government to those expressly enumerated in that document, he believed that the document should be interpreted to permit the federal government to do whatever the Constitution did not expressly forbid, as long as those actions were in the public interest.[99] Taft sought to revive the earlier, restrictive understanding.[100] He was especially critical of TR's extensive use of executive orders to withdraw public lands for conservation purposes.[101] Such policies were legislative in nature and therefore required congressional not presidential action.[102] When TR's favorite, Forest Service head Gifford Pinchot, opposed Taft on this matter, Taft fired him.[103]

Coolidge urged Congress to cut taxes and it responded with four separate tax cuts.[104] He opposed regulating farm prices, wages and working conditions and did not believe that the Commerce Clause should be construed to permit such interventions.[105] Like Cleveland, he bitterly opposed federal disaster relief and on largely the same grounds.[106] But unlike Cleveland, he lost his battle and ultimately signed a Mississippi flood disaster aid bill.[107]

CONCLUSION: THE FORGOTTEN V. THE REMEMBERED

These lessons are useful and important, but overall one is struck by how little the Forgottens contributed to the development of the presidency as compared to the Remembered: Washington, Jackson, Lincoln and FDR. Three important precedents is not a lot to show for thirteen presidencies. The malleability of the Whig presidents in response to the exigencies of office testifies to just how powerful and enduring the precedents established by their memorable forebears were. The Anti-Greats were not mediocre and they certainly influenced the thinking and rhetoric of the modern Anti-Great, Reagan. But at least so far, none of their efforts have succeeded in diminishing the reach and influence of the national government and of its most powerful agent, the president. They did not create common law.

Much of the rest of Gerhardt's book undermines its own claims as it chronicles the fecklessness and the debacles of the Forgottens, which luckily did not become part of the "common law" of the presidency. Thus Martin Van Buren flouted the Constitution and supported efforts in Congress to refuse to receive anti-slavery petitions.[108] Millard Fillmore failed to emulate the more principled position taken by his predecessor, Zachary Taylor, who sought to bring California and New Mexico into the Union with no slavery strings attached. Instead, he signed the Compromise of 1850, which included the infamous Fugitive Slave Act.[109] Franklin Pierce's indulged in strident defense of slave-owner's

98. *Id.* at 172.
99. *Id.*
100. *Id.*
101. *Id.* at 175.
102. *Id.* at 175-76.
103. *Id.* at 176-77.
104. *Id.* at 192.
105. *Id.* at 210.
106. *Id.* at 211.
107. *Id.* at 191-95, 211.
108. *Id.* at 12.
109. *Id.* at 83-85.

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Landy: Incrementalism v. Disjuncture: The President and American Politic

rights.[110] Jimmy Carter bungled his presidential transition.[111] These are just a few choice examples; there are so many others.

The explanatory battle between incrementalism and disjuncture is not a fair fight. The presidency is the only part of the constitutional order where the spotlight falls on a single individual. Therefore it is perhaps not so surprising that when conditions permit and when the incumbent possesses extraordinary qualities, big things happen. The conditions must be there. Ambition and political talent are not enough. TR and Bill Clinton are good examples of the limits imposed on presidential accomplishment by relatively quiet times. As Skowronek shows, the reconstructive presidents could only embark upon their transformative efforts when the public was in a mood to repudiate the previous presidential regime. Under those propitious circumstances, talented and bold statesmen took advantage of the crisis to profoundly alter the office and the government it presides over. They are not forgotten.

110. *Id.* at 98.
111. *Id.* at 222.

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