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Government by Permanent Emergency: The Forgotten History of the New Deal Constitution

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SUMMARY:
... First, this Article examines the history and effect of the national emergency that President Roosevelt and the New Deal Congress of 1933 declared in America and its eventual impact upon American constitutional law. ... Presidents from Thomas Jefferson to Andrew Jackson to Theodore Roosevelt alluded to this emergency doctrine. ... For instance, one federal district judge upheld certain NRA operations by holding that the national emergency "'may also have the effect of rendering a transaction which in normal times would have only an indirect, incidental, and insignificant effect on interstate commerce, a matter of great moment and of powerful effect in times of great emergency.'" The emergency doctrine analysis addition to commerce arguments, however, fell on deaf ears in other federal courtrooms. ... Opposing lawyers were somewhat slow to challenge the NRA's constitutional shortcomings, primarily because of the Roosevelt Administration's justification that the act responded to a national emergency. ... The impact of Roosevelt's national emergency decree upon the war power is often ignored. ... On March 23, 1970, President Nixon declared a national emergency to confront a strike by U.S. Postal Service employees. ... While modern, federal case law is devoid of emergency power jurisprudence, an unstated recognition of national emergency powers expansion remains an intractable and viable factor in today's constitutional whole. ...

HIGHLIGHT: *"We have long since discovered that nothing lasts longer than a temporary government program."* [n1]

TEXT:
[*259] I. ABSTRACT

The New Deal Court of the late 1930s and 1940s rewrote American constitutional law regarding the scope of national power within the states. Historically, legal analysts

have exhaustively reviewed the impact and aftermath of this alteration. [n2] Left largely unacknowledged, however, is the fact that many of these reforms were originally promoted as temporary "emergency" measures intended to counteract the Great Depression. [n3] After the Depression ended, however, the expanded federal powers, invoked under the New Deal emergency decree and upheld by the United States Supreme Court, remained intact. A radically altered form of American government, without [*260] retreat to its former state, resulted.

President Franklin Delano Roosevelt grounded the New Deal reforms in his powers as Commander-in-Chief and justified their extra-constitutionality under war powers jurisprudence. In effect, the executive branch sought and was granted the power to wage a war on American soil; a war against the invisible and intangible enemy of economic depression and injustice. This war never officially ended, however, and the expansion of the federal government in the 1930s and 1940s became entrenched by the mid-twentieth century. This Article argues that Court rulings interpreting the post-New Deal federal expansion as a mere extension of the Commerce, Tax, and Spending Clauses of the Constitution of the United States are incomplete, unless they include the emergency factor upon which the New Deal reforms were expressly based.

First, this Article examines the history and effect of the national emergency that President Roosevelt and the New Deal Congress of 1933 declared in America and its eventual impact upon American constitutional law. Further, this Article discusses the evolution of the loosely defined and historically hazy Emergency Powers Doctrine, from a perspective that is both doubtful of its constitutionality and critical of its practical implications. Finally, this Article asserts that the post-New Deal expansions of federal power, popularly thought to have been based on liberal interpretations of the Commerce, Tax, and Spending Clauses of the United States Constitution, ultimately derive credence from the federal government's unstated assumption of permanent emergency operations.

II. ROOSEVELT'S INAUGURAL ADDRESS

On March 4, 1933, the American public directed its attention to a rain-pelted podium outside the east wing of the Capitol where newly elected President Roosevelt addressed an anxious nation. [n4] The President's inauguration, however, was overshadowed by an immense economic crisis. Virtually every bank in the country had closed due to the widespread panic, poverty, and homelessness gripping the nation, and pleas for reform came from every direction. [n5] Roosevelt, elected to office with 57.4% of the popular vote, brought with him ninety-seven new Democrats into the House of Representatives and twelve new Democrats into the Senate, and intended to end more than a decade of Republican presidencies with his revolutionary reforms of a grand scale. [n6] The imminent economic collapse set the stage for "masterful presidential [*261] action." [n7]

Although Roosevelt's inaugural address reflected ambitious goals, the language was vague and cryptic. [n8] The President announced:

> I am prepared under my constitutional duty to recommend the measures that a stricken Nation in the midst of a stricken world may require. These measures, or such other measures as the Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring to speedy adoption.
>
> But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crises - broad Executive power to wage a war against the emergency, as great

as the power that would be given to me if we were in fact invaded by a foreign foe. [n9]

These words not only expressed an intention to recommend measures to Congress, but also promised to wage a war against the economic crisis by asserting broad executive power in the event of Congress' failure to enact the appropriate legislation. [n10]

A. Emergency Declared

Immediately following Roosevelt's inauguration, his administration demonstrated that his inaugural reference to "waging a war against emergency" was hardly a metaphor, and that he, as Commander-in-Chief, intended to invoke his executive powers to end the Great Depression. On March 5, 1933, the President issued Proclamation 2038, calling for a special session of Congress to convene. [n11] The following day, he called a governors conference in which he pursuaded the states' governors to pass a resolution pledging their respective state's support for the emergency measures that the President might undertake to correct the nation's economy. [n12]

[*262] Roosevelt proclaimed a banking "holiday" from Monday, March 6, 1933, through Thursday, March 9, 1933. [n13] The holiday, however, was not a holiday in the traditional sense, but rather a federal order for all banks of the nation to close, including banks in those states where no federal relationship existed. The order prohibited gold owners from withdrawing gold from banks and included fines of not more than $ 10,000 and imprisonment of ten years. [n14] The ramifications of such federal coercion met with little opposition in the political realm, owing both to the overall excitement of the moment and the resounding majority in support of Roosevelt in Congress.

B. Constitutional Departure

President Roosevelt's emergency measures departed from the structural norm of the Constitution, not only changing the relationship between executive and legislative authority, [n15] but also rejecting the *laissez faire* traditions of American economic policy and legal jurisprudence. [n16] After the President demanded the four-day business closure of every bank in America and the confiscation of all privately held gold, he then forced the production of all [*263] financial banking information upon the government's demand. [n17] The President commandeered this massive change of the banking structure pursuant to Section 5(b) of the Act of October 6, 1917, [n18] otherwise known, but not referred to by the President, as the Trading with the Enemy Act. [n19] This statute, regulating the affairs of foreign-national non-citizens, was enacted and implemented during World War I, but subsequently suspended at the war's end. Nevertheless, Roosevelt's decree aimed to "proclaim, order, direct and declare" sweeping measures within the domestic domain of the United States; the order applied not only to foreign nationals but American citizens and financial institutions that were under no federal regulation. [n20]

President Roosevelt's actions, of course, clearly violated myriad provisions of the Constitution, including the Commerce Clause, [n21] the Fourth Amendment, [n22] the Due Process Clause of the Fifth Amendment, [n23] the Takings Clause of the Fifth Amendment, [n24] and the Tenth Amendment, [n25] as well as other [*264] protections delineated in the text and amendments of the Constitution. [n26] Additionally, the President's order clearly violated the separation of powers doctrine [n27] and, even if approved by Congress, the non-delegation doctrine. [n28] Roosevelt relied on the proposition that by grounding such extra-constitutional measures in his powers as

Commander-in-Chief, the measures would pass constitutional muster. [n29] The President conspicuously placed military leaders in charge of New Deal programs, [n30] and peppered his actions and statements with metaphors that played on the "depression as war" theme. [n31] Although no truly [*265] tangible "enemy" was evident, the President seized upon the public's popular distrust of the banking establishment, announcing that he sought to thwart the practices of unscrupulous "moneychangers." [n32]

On March 8, 1933, only three days after the inaugural decree, the Federal Reserve Board asked banks to list people who had recently withdrawn gold or gold certificates and did not re-deposit them by March 13, 1933. [n33] The request was widely disseminated in the newspapers of the period, and Roosevelt himself announced that the names would be published. [n34] On March 9, 1933, with the emergency special session of Congress commencing activities, Roosevelt issued Proclamation 2040, extending the emergency beyond the March 9th deadline and stating all earlier provisions were "hereby continued in full force and effect until further proclamation by the President." [n35] The President's efforts to intervene in the economy were either too outlandish to justify a response or too popular to draw any intense conflict with those in the legislative and judicial branches. Perhaps Roosevelt's own political divinity saved many New Deal measures from attack.

[*266] III. CONGRESSIONAL APPROVAL

The authority underlying President Roosevelt's spree of presidential "lawmaking" had been of highly questionable authenticity. [n36] In fact, most of those affected by such acts, including heavily targeted banks, were uncertain whether or not to consider the emergency measures to have the weight of law and abide by them. [n37] Since federal legislative power is vested in Congress, the emergency measures announced without congressional approval were presumptively invalid. [n38]

On the evening of March 9, 1933, with Congress hastily assembled, the President delivered to the floor of both houses a single copy of his emergency banking bill. Since there was no time to print copies of the bill, it was simply read to the assemblies upon its introduction. At 8:30 p.m., Congress hurriedly put the President's proposal to a vote and overwhelmingly passed it. [n39] The vote was taken when every bank in the country had been closed for four straight days, and there was enormous pressure on Congress to allow the banks to open. Unable to justify a delay to debate, several congressmen were pressured to pass the bill even though they opposed many of its provisions. [n40] Due to the short period of time prior to the enactment, some congressmen's votes were not recognized and there was no roll call vote allowed in the House. [n41] To this day, [*267] the legislative intent behind the bill remains unclear. [n42]

The Emergency Banking Act [n43] provided the President with the authority to take any measure he deemed necessary to resolve the banking crisis. In granting the President such wide latitude of power, it appears Congress followed his "recommendations" and granted Roosevelt the quasi-war power he announced that he would have sought in the event Congress failed to enact his measures. Many people felt the enactment of the Emergency Banking Act allowed Roosevelt to wage war on American soil against an invisible and intangible enemy. [n44]

Upon virtually newly plowed earth, [n45] Congress confirmed that the [*268] President's actions and the Secretary of Treasury's actions since March 4th, 1933, (five days earlier) were "ratified" with congressional approval. The Roosevelt

Administration was given power to require people to turn in their gold and gold certificates, on penalty of imprisonment or fine. In fact, the ink had not yet dried on the newspaper accounts of the President's inaugural address before Congress enacted his quasi-war measures into law, and granted his inaugural request for broad executive power to wage a war against emergency. This authority was as great as the power that would have been given him if the nation were in fact invaded by a foreign foe. [n46]

There is little question that but for Congress' alleged ratification of President Roosevelt's actions in the four days preceding the opening of Congress' emergency session, the emergency banking measures would have been struck down as indisputably beyond the scope of executive power. [n47] Even with subsequent ratification by the legislative branch, however, the declaration of national emergency and its accompanying expansion of federal power into extra-federal domain remained an action of questionable constitutionality. The Emergency Banking Act's preamble affirmatively stated: "Be it enacted . . . that the Congress hereby declares that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national [*269] application." [n48]

IV. THE EMERGENCY DOCTRINE

Two propositions implicitly follow from President Roosevelt's declaring that the Great Depression was a national emergency; first, the Executive Office was no longer confined to its duty to merely "take care that the laws be faithfully executed" [n49] and second, the federal government as a whole was no longer confined to the powers provided to it by a strict interpretation of the Constitution with regard to federalism concerns and civil liberties. The Constitution, however, does not provide support for these propositions. In fact, the only constitutional provisions that can be read to imply such an expansion of federal powers are the Constitution's rather ambiguous provisions of empowerment during times of war.

Regardless of its absence from the Constitution itself, it is a long-held belief that an implicit "emergency powers doctrine" exists somewhere within the doctrinal framework of the Constitution. [n50] Emergency powers have allegedly derived from natural law, sovereign tradition, [n51] or some other undefined source. [n52] Presidents from Thomas Jefferson [n53] to Andrew Jackson [n54] to [*270] Theodore Roosevelt [n55] alluded to this emergency doctrine. [n56] The doctrine has weaved in and out of American history since the era of the Alien and Sedition Acts.

Proponents of the doctrine argue that during an emergency, the people can not hold the national government to the strict constitutional constraints that otherwise bind it; similarly, the law does not hold a motorist liable in the heat of an emergency for injuring third persons so long as due care is used in the unusual circumstances. [n57] Emergency theorists point to numerous historical [*271] instances where the executive branch has used extra-constitutional powers to quell mine riots, put down regional rebellions, and deal with exigent domestic developments. [n58] While the Constitution under normal circumstances places stringent limitations upon the federal Executive, this implied emergency power allegedly works to relax constitutional limitations during times of national strife. For their part, proponents of the emergency powers doctrine have tended to place its constitutional source somewhere within the war power provisions of the Constitution, positing that emergency is a subset of war, or that "war" itself means emergency. Yet, even the most religious proponents of the emergency doctrine have had difficulty showing how the Constitution contemplates its

operation in the utter and total absence of war. [n59] Roosevelt's crisis regime was, in essence, a quest for "a doctrine that analogized the Depression to a wartime battlefield." [n60]

When war is declared by Congress pursuant to Article I, Section 8, Clause 11 of the Constitution, the President, in the role personified by George Washington, is expected to carry out the execution of the war until its cessation. Using the powers of the Commander-in-Chief, the President is transformed from a mere enforcer of congressional enactment into an independent source of national leadership, with sufficient lawmaking power to act in any way consistent with winning the conflict. Issued pursuant to a war declaration, acts of Congress are likewise held to an absurdly low standard of validity by the courts. [n61] Why not, ask emergency power proponents, extend such endowments into non-war settings as long as Congress approves? And why not permit Congress to declare war at any time, or at any thing, real or imaginary?

The Framers intended the President to have the ability to act defensively during military attacks and invasions at times when Congress could not gather [*272] in session. [n62] This window of constitutional opportunity provides the President with authority to act as temporary dictator at times of strife and national immediacy. President Roosevelt's window, however, became a barn door through which the President intended to drive the industrial and labor resources of the United States under the very watch of Congress and the courts. Roosevelt's administration played the emergency card at virtually every opportunity, [n63] alleging that the emergency doctrine allowed for virtually limitless action by the President during a national crisis. [n64]

President Abraham Lincoln's expansion of domestic executive war powers prior to and during the War Between the States was the only precedent in American history even remotely resembling these events. Shortly after the fall of Fort Sumter in 1861, President Lincoln called 75,000 militiamen and 42,000 volunteers into federal service, all without a congressional declaration of war. [n65] Lincoln's action, unprecedented at the time, [n66] would become familiar a century later when presidents Eisenhower, Kennedy, Johnson, Nixon, Reagan, Bush, and Clinton all committed U.S. military troops to foreign soil without any congressional approval whatsoever. [n67]

V. WAR DEFINED

Allowing for the existence of an emergency power while not in a war setting, or referring to critical domestic events themselves as war, poses a [*273] number of problems. War, after all, is a specific set of circumstances. Scholars and courts define war in various ways: "that state in which a nation prosecutes its right by force;" [n68] the "hostile contention by means of armed forces, carried on between nations, states, or rulers, or between citizens in the same nation or state; [n69] or "the state of nations among whom there is an interruption of pacific relations, and a general contention by force, authorized by the sovereign." [n70] One serious distinction the emergency doctrine fails to consider, however, is that war is a contest between sovereigns, or at least between a sovereign and an entity claiming rights as a sovereign, such as in the case of a civil war.

Furthermore, a war suggests its own peculiar protocol. [n71] During war, all citizens of an opponent country are enemies. [n72] Property found in this territory is enemy property, subject to capture and seizure by the conquering government. [n73] Such capture or seizure by military agents is not remediable by suit for trespass at common law even

if in error. [n74] In a war between sovereigns:

> The people of the two countries become immediately the enemies of each other - all intercourse commercial or otherwise between them unlawful - all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved, and, in fine, interdiction of trade and intercourse direct or indirect is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land, all treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war, and the law of prizes as defined by the law of nations comes into full and complete operation, resulting from maritime captures, jure belli. War also [*274] effects a change in the mutual relations of all States or countries, not directly, as in the case of the belligerents, but immediately and indirectly, though they take no part in the contest, but remain neutral. [n75]

This protocol of war encompasses a set of military, as opposed to civil, rules. To superimpose such a military code upon the American people tests the very existence of lawful, limited government. While war brings expanded powers, which would not exist except in war, it has never been clearly determined exactly what, if any, are the bounds of the war power. [n76]

A. Is Domestic Emergency Akin to Civil War?

If the national government's war power contains within it an unstated emergency power that the president may wield domestically in time of national strife, is this akin to the exercise of domestic war powers during civil war? Here again, the analogies seem highly fanciful. [n77] "War" in such a domestic context exists when parties in rebellion occupy and hold in a hostile manner any territory, declare their independence, cast off their allegiance, organize armies, and commence hostilities against their former sovereign. [n78] Even an economic crisis of staggering proportions cannot possibly rise to the level of such a turning point. Supreme Court Justice Grier, in *The Brig Amy Warwick*, articulated the view that the true test of whether civil war exists is whether the "regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open." [n79]

Thus, a startling problem exists when such a state is compared to the conditions of The Great Depression. The United States was by no means suffering from a collapse of civil law or government, as all three branches of the national government remained operational.

> The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent [*275] rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars. [n80]

Thus, the belligerents in war maintain equilibrium of value whereas no such equilibrium exists when the government is administering controls upon a population without recognizing any limiting authority. The choice of the war power as a basis for emergency actions is difficult to reconcile with the text and context of the Constitution. Proponents of these expanded federal powers may have to look elsewhere in the Constitution for such justification. [n81]

B. War Doctrine Remains Unsettled

American war power jurisprudence has yet to be organized into a definitive set of rules. The Constitution's drafters designed the powers of war deliberately, in an effort to correct an apparent flaw in the Articles of Confederation. [n82] The Framers of the Constitution divided the national war powers between the executive and legislative branches. [n83] Many authorities fear the potential for the Executive branch, to edge, over time, toward dictatorship and ultimately impose martial law. [n84] Supreme Court Justice Robert Jackson, in [*276] his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, [n85] reasoned that "comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country." [n86]

Over the course of American history, debates have been waged over the appropriate role that each branch of the government should play in wartime. [n87] This conflict of interpretation between the branches reached a feverous pitch during the Vietnam Conflict when Congress enacted the War Powers Resolution over President Richard M. Nixon's veto. The political and constitutional aftermath of the War Powers Resolution was so vague that it forced Congress to hold hearings for a decade, none of which definitively settled the issue. [n88] Even the drafters of the War Powers Resolution admitted it was intended as a mere buffer, requiring the President to submit to the authority of Congress within a given time after committing American troops to a battlefield. Virtually every authority believed that Congress' power to declare war had been lost to the Executive office over time. [n89]

If the constitutional rules of war are themselves unsettled after 220 years, the bounds of the emergency doctrine, indeed its very existence, remains entirely indeterminable. The Supreme Court has only rarely addressed in dicta whether an emergency constitutes an exception to the balance of powers enunciated in the Constitution. [n90] Black's Law Dictionary defines a national emergency as a [*277] "state of national crisis: a situation demanding immediate and extraordinary national or federal action." [n91] If, however, extraordinary connotes extraconstitutional, then there is no authority for "immediate and extraordinary national or federal action" in the text of the Constitution. Mr. Carlisle of Washington City, attorney for the claimants in *The Brig Amy Warwick*, expressed it well:

> The Constitution knows no such word [necessity]. When it pronounced its purpose "to form a more perfect Union, establish justice, secure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity," it declared that to these ends the people did "ordain and establish this Constitution." In this form, and by these means, and by this distribution of powers, and not otherwise, did they provide for these ends; and they excluded all others. Any other means and powers are not Constitutional, but revolutionary. [n92]

VI. REFERENCE TO ACT OF OCTOBER 6, 1917

Returning to Roosevelt's declaration of a national emergency in 1933, it has escaped the attention of all but the shrewdest of scholars that Congress granted the President his extraordinary emergency powers under a deceptive pretext. When Congress convened on March 9, 1933, to pass Roosevelt's emergency banking bill, Congress had little idea of the powers it was invoking. The bill's drafters took care to refer to their legislation as an amendment to the "Act of October 6, 1917," and avoid mentioning its proper name, the Trading With the Enemy Act.

President Roosevelt's earlier proclamation and actions had been expressly based on the authority granted him by the 1917 Act, as it existed before the 1933 amendment. [n93] Yet the original 1917 Act had authorized no such conduct by the President. Roosevelt offered the pretense that "extensive speculative activity abroad in foreign

exchange" which, together with domestic hoarding, had resulted in "severe drains on the nation's stocks of gold." [n94] This was done because unless some foreign impact was alleged, the Act could not apply even if a "war" nexus could be postulated.

As an example of President Roosevelt's deception in his justification of peacetime war measures, his Proclamation 2039 began with the claim: [*278] "Whereas there have been heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding . . . ." [n95] Dr. Eugene Schroder, a harsh critic of the emergency doctrine, pointed out the inherent deception that such a statement relied on. [n96] The people who deposited the gold in the first place had been issued contractual certificates stating that they could have their gold whenever the certificates were presented. [n97] Yet, the proclamation claimed the withdrawals were unwarranted and for the purpose of hoarding. [n98] Realistically, constitutionally protected property rights afford owners the right to "hoard" their gold. Under the Emergency Banking Act, however, the banks were let out of their contractual obligations to return the gold to the rightful owners upon demand. [n99]

VII. "OTHER THAN CITIZENS OF THE UNITED STATES"

The provisions of the original 1917 Trading With the Enemy Act allowing for infringements on civil liberties were expressly directed only at persons other than citizens of the United States. In effect, the federal government assumed total authority over such non-citizen enemy aliens in every way through the Act of 1917. [n100] But with the Emergency Banking Act, American citizens and their transactions were no longer exempt. [n101] By surreptitiously extending World War I-era legislation aimed at foreign nationals to citizens in peacetime, the federal government placed the American people and their transactions in the same category as "enemies." A faithful interpretation of the amalgamation of the two acts can yield no other conclusion: On March 9, 1933, the Congress of the United States declared the American people to be the enemy.

Under the new act, the Roosevelt Administration could freely seize the bank [*279] accounts of any citizen without warrant and demand any citizen to produce accounting records. Roosevelt and his closely held Congress followed the Emergency Banking Act with an entire series of federal legislation designed to regulate and control virtually every aspect of the American economy. Within the first hundred days of emergency rule came such measures as the National Industrial Recovery Act, the Agricultural Adjustment Act, and the Bituminous Coal Conservation Act. Each of these acts involved the nationalization of large sectors of the American economy, under constitutional pretexts that were considered fanciful under the precedents of the time.

For all practical purposes, the Roosevelt Administration and the Roosevelt Congress acted as a single cohesive unit. [n102] The 1932 landslide election had swept an unprecedented 310 Democrats into the House, leaving only 117 Republicans, and reduced the number of Republicans in the Senate from 56 to 35. [n103] Moreover, the elections of 1934 removed another fourteen Republicans from the House and an additional ten from the Senate. [n104] The presence of so many new lawmakers, who owed their political existence to Roosevelt, made the idea of a congressional check on the executive branch a virtual farce. Those who sought to restrain the government from overreaching could only look to the judicial branch.

VIII. CHALLENGES REACH THE COURT

It was not long before a significant number of constitutional challenges made their

way to the courts. [n105] Only a handful of issues arising out of Roosevelt's emergency decree, however, were given exhaustive review by federal appellate courts. In 1934 and 1935, after a year of emergency rule, the first challenges reached the Supreme Court. The first case involving the constitutionality of the "emergency" rule involved a Minnesota state law, patterned after the federal Emergency Farm Mortgage Act, that extended deadlines of mortgages. In *Home Building & Loan Ass'n v. Blaisdell*, [n106] the Court brushed aside a due process property right challenge by claiming that "while emergency does not create power, emergency may furnish the occasion for the exercise of power." [n107]

Although subject to a variety of interpretations, this cryptic holding provided [*280] an immense boost to proponents of the emergency powers doctrine. The State of Minnesota had declared an emergency and taken over much of the state's economy. [n108] The "hands off" proclamation by the national government in *Blaisdell* virtually assured the legitimacy of emergency power, at least with regard to acts of state governments within their own states. [n109]

Again, in *Nebbia v. New York*, [n110] the Court upheld New York's emergency milk price controls from a similar Fourteenth Amendment challenge. Like *Blaisdell, Nebbia* can be interpreted in a variety of ways. [n111] Yet, most observers viewed it as an unprecedented expansion of governmental power to regulate economic concerns in times of economic distress. [n112] While the emergency backdrop of the latter decision was barely touched, [n113] most observers saw *Nebbia* as an affirmation of the emergency powers doctrine. [n114]

Today, scholars often brand the Supreme Court of the early New Deal years as conservative in nature and hostile to President Roosevelt's programs. The *Blaisdell* and *Nebbia* Courts, however, delivered surprisingly favorable reports. These decisions represented a stark turn in the Supreme Court's previous hostility toward state laws that interfered with free market contract rights. [n115]

[*281] *A. Emergency and the Loss of the Gold Standard*

The first major Supreme Court challenge to President Roosevelt's emergency decree came only a year into the declared state of national emergency. In the Court's October 1934 term, it considered four challenges to the emergency banking act in what became known as the *Gold Clause Cases*. [n116] Each case involved issues relating to whether Congress' destruction of gold clauses [n117] passed constitutional muster under the Fifth and Tenth Amendments, as well as Article I, Section 1 of the Constitution. [n118] The gold or silver [*282] standard, although seemingly required by the Constitution, became an early casualty of Roosevelt's emergency declaration, a casualty that has never again been retrieved or resuscitated. Evidencing "legerdemain possibility unmatched in constitutional jurisprudence," [n119] the *Gold Clause Cases* upheld the emergency departure from the gold standard thereby enabling the government to achieve its goals "while maintaining the illusion that those laws were consistent with the Constitution." [n120]

Four Justices, led by states' rights champion James C. McReynolds, bitterly dissented in the *Gold Clause Cases*. Justice McReynolds wrote that the Gold Clause of the Constitution required adherence to a gold standard and that Congress' attempt to deem gold clauses in contracts inoperative was per se unconstitutional. [n121] Observing that U.S. currency "began a rapid decline in the markets of the world" [n122] following the 1929 stock market crash, Justice McReynolds accused the Roosevelt Administration and Congress of trying to undermine centuries-long expectations of stability in

currency by taking American currency off the gold standard.

"We are dealing here with a debased standard, adopted with the definite purpose to destroy obligations. Such arbitrary and oppressive action is not within any congressional power heretofore recognized." [n123] McReynolds scathingly denounced Congress and the President for trying to "destroy private obligations, repudiate national debts, and drive into the Treasury all gold within the country, in exchange for inconvertible promises to pay, of much less value," all under the guise of a "monetary policy." [n124] McReynolds said the government may have realized profits amounting to $ 2.8 billion. [n125] "The [*283] impending legal and moral chaos [was] appalling." [n126]

The *Gold Clause Cases* signified the end of the constitutional requirement that no state shall make anything but gold and silver coin a tender in payment of debts. [n127] Thus, the gold standard became an early constitutional casualty of the emergency. Indeed, the emergency rendered this constitutional provision a dead letter, forever after unenforced and overlooked by the federal courts. [n128] More than sixty years of challenges based on this forgotten textual requirement, some quite compelling in logic, have been scuttled. The emergency is long since over, yet the powder burns and the bullet holes in the Constitution remain.

We now know that if a majority of the Supreme Court had not approved of government abrogation of the use of gold standards in contracts, President Roosevelt was prepared to make a full frontal assault on the Court by going public with a speech which openly condemned the Court and invoked emergency as the touchstone of validity for any measures reasonably submitted in its name. A draft of the speech Roosevelt planned to deliver in the event of a negative ruling included a Civil War-era quotation from Abraham Lincoln, and asserted that "to permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion would so imperil the economic and political security of this nation . . . [that I shall be required to] immediately take such steps as may be necessary . . . ." [n129]

Thus, even as early as February of 1935, the President, together by implication with Congress, was prepared to assert non-war emergency as a ground to subvert the rulings of the Supreme Court. A constitutional crisis of immense proportions was brewing hotly in the background during the Supreme Court's deliberations on the New Deal measures.

B. Romancing the Commerce Clause

The adoption of the Commerce Clause provided a comucopia of constitutional power that allowed for the New Deal federal government to take shape. Yet, the role of President Roosevelt's national emergency declaration in effecting the metamorphosis of the commerce power has been greatly overlooked. Roosevelt's Justice Department instructed its lawyers that the "'so-called emergency argument really constitutes an integral part of the [*284] commerce point, and not a separate proposition.'" [n130] The basic idea was that "transactions which might not ordinarily substantially affect interstate commerce may do so when, in an economic emergency," the nation becomes a more "interdependent economic unit." [n131]

The New Deal policy promoters used the emergency doctrine to lift expansive governmental measures up by their bootstraps, at a time when the measures would otherwise have received negative review in the courts under then-existing precedent. A.G. McKnight, who headed the National Industrial Recovery Act (NRA or NIRA), told his litigation division staff in 1934 that "courts will hardly hesitate to sustain the action

of Congress" when presented with an emergency or national self-preservation rationale. [n132] History shows this strategy to have been overwhelmingly successful. The statutes upheld as crisis measures under the shadow of Roosevelt's emergency were afterward looked upon as precedents for overwhelming expansions, but generally under the commerce power only. What was upheld as proper commerce regulation during the emergency was later considered precedent for the commerce power itself.

The emergency doctrine was an "adjunct to the commerce clause argument" that allowed the latter to pass review in some instances. [n133] For instance, one federal district judge upheld certain NRA operations by holding that the national emergency "'may also have the effect of rendering a transaction which in normal times would have only an indirect, incidental, and insignificant effect on interstate commerce, a matter of great moment and of powerful effect in times of great emergency.'" [n134] The emergency doctrine analysis addition to commerce arguments, however, fell on deaf ears in other federal courtrooms. [n135] The overall notion that Depression conditions required an expansive reading of the Commerce Clause may account for much of the Clause's supremacy during the latter years of the twentieth century. [n136]

[*285] *C.* Schechter Poultry *to the Rescue*

The constitutional revolution under the Roosevelt administration did not go completely unrecognized. As soon as the NRA was enacted, it was criticized as unconstitutional by many in the legal profession. In a sense, it was the most extreme piece of New Deal legislation, yet it was also the vehicle for any future New Deal reformations. The NRA was not only intended to correct free market problems, but also to abolish market capitalism entirely and replace it with code-run regulation by the President. [n137]

The NRA was enacted only four months after President Roosevelt's inauguration and faced embittered combat in lower federal courts. [n138] A year later, however, critics charged that government lawyers were deliberately avoiding a Supreme Court test since only one case had ventured beyond the district courts by appeal. [n139] The Attorney General was said to be so convinced of the NRA's unconstitutionality that he refused to defend it before the Supreme Court. [n140]

Ironically, the emergency backdrop is one possibility why the NRA was kept from appellate review. Opposing lawyers were somewhat slow to challenge the NRA's constitutional shortcomings, primarily because of the Roosevelt Administration's justification that the act responded to a national emergency. [n141] This avoidance of judicial oversight, however, could not last forever. In light of overwhelming precedent against it, observers predicted that the NRA could be justified only as an emergency measure.

The Supreme Court, however, declined to allow the act to survive upon emergency grounds. In *A.L.A. Schechter Poultry Corp. v. United States*, [n142] Chief Justice Hughes took only a few paragraphs to thoroughly dismiss the emergency rationale behind the NIRA, writing, "extraordinary conditions may call for extraordinary remedies," but they "do not create or enlarge constitutional power." [n143]

> The Constitution established a national government with powers deemed to be adequate . . . but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extraconstitutional authority were anticipated [*286] and precluded by the explicit terms of the Tenth Amendment. [n144]

By all appearances, *Schechter Poultry* signified the death kneel for the emergency

powers doctrine, [n145] at least at the federal level. [n146] Still, the possibility of the existence of hidden emergency powers continued to live on. Even Chief Justice Hughes allowed a hint of the doctrine to survive, stating "undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged." [n147]

Furthermore, the trust that the Supreme Court was being candid in its renunciation of the emergency doctrine was probably misplaced. The New Deal Court's ultimate slide into blind deference to Congress' emergency legislation may well have been prompted as much by inner consideration of the crisis rationale as by reconsideration of its Commerce Clause jurisprudence. One legal historian, Michael Belknap, has charged that the Court's infamous 1937 "switch in time" was actually an effort to attain the expedient ends offered by the emergency power doctrine while avoiding the means of admitting the lack of well-established case law during the crisis. [n148] Belknap wrote:

> Like the traveler in Robert Frost's poem, during the Great Depression the legal community came to a fork in the road and was forced to choose between two paths, each of which lay equally open before it. The emergency power concept might have been the road selected to reach the constitutional flexibility that the national government needed to cope with a major domestic crisis. Instead, lawyers and judges opted for judicial self-restraint and took a route toward greatly increased federal regulation, which led to virtually unlimited congressional power under the commerce clause. [n149]

In the end, "the American legal community could not accept the emergency powers doctrine," at least on its face. [n150] Another writer asserted that complete acceptance of the government's emergency arguments would have signaled a reversal of *Marbury v. Madison*, [n151] and the Court would have scuttled its own lofty place in America's constitutional scheme. [n152] Instead, the Court responded to President Roosevelt's 1937 court-packing effort by adopting virtually wholesale the emergency arguments of government lawyers while drafting its [*287] opinions in Commerce Clause terms. The Supreme Court buckled under the weight of immense political power and pressure, [n153] temporarily ending its reign as a counter-majoritarian check on the political branches, but hoped to salvage enough strength to fight another day.

The Court began upholding acts of Congress identical to those it had previously struck down as beyond the government's power. [n154] The pretense the Justices gave was that they were reinterpreting the Commerce, Taxing, and Spending Clauses. The Court never suggested it was submitting to emergency reinterpretation in light of the threats made upon it by the Roosevelt Presidency. The uniqueness of the moment, however, suggested that the Court had sacrificed principle for survival.

The emergency measures eventually proposed by the Roosevelt Administration and ratified by the pro-Roosevelt Congress in 1933 went far beyond actions to defeat economic depression. [n155] New Deal bills also increased federalization of criminal law [n156] and furthered the nationalization of the dual court system (merging law and equity) with the promulgation of the Federal Rules of Civil Procedure in 1938. Both traditional constitutionalists and advocates of departure agreed that the traditional Constitution was reaching the "point of no return." [n157] The emergency had become permanently grafted into American law whether the judiciary admitted it or not.

One significant remnant of the New Deal emergency has been the immense growth of the federal bureaucracy under the executive branch. Until the New Deal Court took shape in the late 1930s, the Supreme Court interpreted the Constitution to require one person, the President, to execute all federal laws. [n158] [*288] The advent of an immense "headless fourth branch of government" was originally allowed solely in the context of the New Deal national emergency. [n159] The passage of time, however, has

rendered the non-delegation doctrine a dead letter at the federal level. Congress may now delegate authority, along with political accountability, broadly to agencies in the executive branch largely independent from the direct control of the President.

The impact of Roosevelt's national emergency decree upon the war power is often ignored. Under the continuing state of emergency, the President routinely thrusts the American military into protracted foreign conflicts without congressional approval. Conflicts in Korea, Vietnam, Iraq, and Somalia were all authorized and fought not with a congressional declaration of war but with emergency delegations of congressional authority.

The Korean War, in particular, was never officially declared as such by Congress. Moreover, at the end of the Korean War, the official state of emergency that was declared by Congress was not terminated. [n160] In fact, the permanent emergency nature of the Cold War transferred the Korean police action into a prolonged domestic concern.

There is also a permanent state of emergency rule over agriculture continuing to this day. The broad grant of regulation over agricultural production and pricing allowed under the modern version of the New Deal (emergency) Agricultural Adjustment Act of 1933 (AAA) allowed President Nixon to impose outright agricultural price freezes in 1972. [n161] The AAA also enabled Presidents Ford, Carter, Reagan, and Bush to virtually control farm production and market prices. [n162]

In addition to the 1933 and Korean War emergencies (both continuing into the 1970s), two other national emergencies were declared. [n163] On March 23, 1970, President Nixon declared a national emergency to confront a strike by U.S. Postal Service employees. [n164] Nixon later proclaimed another emergency in the face of an international monetary crisis, which allowed him to place strict [*289] import controls without lengthy deliberations in Congress. [n165]

IX. EMERGENCY STOPPAGE IN THE 1970S

In 1972, Senators Frank Church of Idaho and Charles Mathias of Maryland launched an investigation into the impact of emergency declarations and the possible consequences of terminating the declared states of national emergency that had prevailed since 1933. Their Special Committee on the Termination of the National Emergency was convened in the backdrop of congressional contempt and distrust for President Nixon with regard to both his foreign and domestic actions. [n166]

The Church-Mathias Committee scoured through the Statutes-at-Large and the United States Code, solicited commentary from executive agencies, and ultimately drafted an eye-opening report on the twentieth century's national emergency declarations. [n167] The foreword of the report opened with the startling statement that "since March 9, 1933, the United States has been in a state of declared national emergency." [n168] The report itself began:

> A majority of the people of the United States have lived all of their lives under emergency rule. For 40 years, freedoms and governmental procedures guaranteed by the Constitution have, in varying degrees, been abridged by laws brought into force by states of national emergency. The problem of how a constitutional democracy reacts to great crisis, however, far antedates the Great Depression. As a philosophical issue, its origins reach back to the Greek city-states and the Roman Republic. And, in the United States, actions taken by the Government in times of great crises have - from, at least, the Civil War - in important ways shaped the present phenomenon of a permanent state of national emergency. [n169]

The committee found that 470 provisions of federal law owed their force to emergency proclamations. [n170] Together these provisions delegate to the President a vast range of powers sufficient to rule the country "without reference to normal constitutional processes." [n171]

Perhaps not a surprise to cynical observers, the federal agencies responsible for administering the delegated power under national emergency pretenses responded by recommending that Congress solidify the authority granted to [*290] them by enacting expressly permanent legislation. The Treasury Department, for instance, recommended that the emergency banking measures enacted on March 9, 1933, and still in effect after forty years, be either retained in present form or enlarged in scope to cover all financial institutions, including foreign banks having offices or branches in the United States. [n172]

In 1976, Congress passed the National Emergency Termination Act (NETA), [n173] requiring that any future national emergency declared by the President terminate on the anniversary of its declaration unless the President publishes in the Federal Register, and transmits to Congress, a notice of its continuation. This enactment, and others thereafter, allegedly terminated all states of emergencies. [n174] This termination, however, was in name only. [n175] The reality was that the emergency powers taken were never returned; they continued in the U.S. Code as permanent powers. [n176] Indeed, the Trading With the Enemy Act (TWEA), still in its New Deal "Americans-as-enemy" format, was specifically exempted from NETA. [n177] The Supreme Court upheld the lengthy period of embargoes and other economic and non-economic sanctions against Cuba, for instance, as a legitimate extension of TWEA. [n178]

Commentators have criticized NETA as essentially meaningless in that a half-century of federal enactments gave the President virtually unlimited regulatory powers over the economy regardless of whether he did so in an emergency context or not. [n179] Moreover, the precedents of the New Deal Supreme Court serve as a permanent gloss on the Constitution, effectively superceding all legislative attempts to draw back governmental powers into their previous, pre-New Deal, shell. [n180] While modern, federal case law is [*291] devoid of emergency power jurisprudence, an unstated recognition of national emergency powers expansion remains an intractable and viable factor in today's constitutional whole. Through its adherence to the emergency doctrine, the Supreme Court imposes no limitations on Congress' direct regulation of manufacturing and conditions of labor and virtually no limitation on Congress' regulation of domestic civil and criminal matters. [n181] As President Roosevelt's New Deal regime gained in age and legitimacy, its original emergency component was forgotten. [n182] "A half-century later, the New Deal Constitution - far less respectful of the rights of property and contract, far more respectful of national power - has been woven into the very fabric of the modern polity . . . ." [n183]

The emergency doctrine as a proposition of law has been permanently wired into the operating systems of our national hard drives yet without any obvious signs of its programming language. A close analog to this state of willful ignorance can be found in the war on drugs, which since the 1970s has exacted a similarly unstated, yet no less palpable, toll on our constitutional substance. [n184] If war, defined in legal terms, allows a relaxation of the Constitution, as emergency doctrine proponents assert, then the war on drugs, like any emergency justification, takes on the characteristics of a traditional war regardless of its origin as a metaphor. [n185] Similarly, today's federal judiciary [*292] has implicitly adopted the emergency doctrine, largely based on an inheritance of jurisprudential interpretations of the Commerce, Tax, and Spending

Clauses that cannot be reconciled with the Founders' vision of such provisions.

X. CONCLUSION

The declaration of a national emergency by President Franklin Delano Roosevelt and the New Deal Congress in 1933 ushered in a new era of constitutional development. Regardless of the Court's declarations to the contrary, the emergency declared by Roosevelt became grafted into the Court's New Deal jurisprudence in the form of drastic reinterpretations of the Constitution's economic clauses. The changes resulting from Roosevelt's emergency measures radically altered the American form of government. [n186] Even after the grounds for the alleged emergency presumably ended, the expanded federal powers invoked under the New Deal emergency decree remained. Today's American political and legal structure is based, to a large extent, on this altered constitutional state invoked by that emergency decree.

Legal Topics:

For related research and practice materials, see the following legal topics: Constitutional LawCongressional Duties & PowersWar Powers ClauseConstitutional LawThe PresidencyCommander in ChiefGovernmentsFederal GovernmentU.S. Congress

FOOTNOTES:

n1 RONALD REAGAN: THE WISDOM AND HUMOR OF THE GREAT COMMUNICATOR 57 (Frederick J. Ryan, Jr. ed., 1995).

n2 *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 3 (1998). "The story of the 'switch-in-time' is among the most enduring chapters of our constitutional history. . . . A vast and remarkably homogenous literature built by legions of lawyers, historians, and political scientists recounts and reiterates the story with varying degrees of subtlety and sophistication." *See* CUSHMAN, *supra*, at 3. *See generally* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987) (contrasting modern post-New Deal government with Framers' desire for limited federal government); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Symposium, *Reinventing Self-Government: Can We Still Have Limits on National Power?*, 4 CORNELL J.L. & PUB. POL'Y 1 (1995) (featuring Dick Armey, Frank Easterbrook, Richard Epstein, Alan Keyes, William Van Alstyne, and others); Charles J. Cooper, *The Demise of Federalism*, 20 URB. LAW. 239 (1988); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); *A Symposium on Federalism*, 6 HARV. J.L & PUB. POL'Y 1 (1982) (featuring Paul M. Bator, Walter Berns, Michael W. McConnell, John T. Noonan, Jr., Theodore Olson, Judge Richard Posner, Antonin Scalia, Judge Ralph Winter, and others).

n3 *See* CUSHMAN, *supra* note 3, at 4 (stating exploration of true constitutional dynamics of New Deal Court remains weak). *But see generally* Michal R. Belknap, *The New Deal and The Emergency Powers Doctrine*, 62 TEX. L. REV. 67 (1983); David A. Pepper, *Against Legalism: Rebutting an Anachronistic Account of 1937*, 82 MARQ. L. REV. 63 (1998) (arguing "switch in time" attempt to return emergency powers doctrine without expressly saying so); Daniel J. Hulsebosch, Note, *The New Deal Court: Emergence of a New Reason*, 90 COLUM. L. REV. 1973 (1990) (stating New

Deal Court forced to defer to exigencies of period). Hulsebosch also suggests the Supreme Court had to reject the emergency doctrine in order to avoid losing the power of judicial review over the political branches. *See generally* Hulsebosch, *supra*.

n4 *See* CHARLES SELLERS, ET AL., A SYNOPSIS OF AMERICAN HISTORY 334 (7th ed. 1992).

n5 *See id.* at 334 (noting Governor of Michigan announced bank holiday and other states followed suit). "By inauguration day, all banks were shut, and some cities turned to issuing temporary currency." *Id.*

n6 *See* Elizabeth C. Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 SYRACUSE L. REV. 139, 157 (1998) (explaining circumstances of President Roosevelt's election).

n7 *See* SELLERS, ET AL., *supra* note 5, at 334 (noting circumstances of economic despair).

n8 *See* SPEECHES OF THE AMERICAN PRESIDENTS 487 (Janet Podell & Steven Anzovin eds., 1988) (describing Roosevelt's first inaugural address).

n9 *Id.* at 489 (quoting Roosevelt's first inaugural address).

n10 *See id.* (expressing perceived mission to accomplish economic reform).

n11 *See* Franklin D. Roosevelt, The President Calls the Congress into Extraordinary Session. Proclamation No. 2038, March 5, 1933, *reprinted in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 17 (1938).

n12 *See* Franklin D. Roosevelt, Address before the Governors' Conference at the White House. March 6, 1933, *reprinted in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 12, at 18-21. Curiously, the meeting of the nation's governors in the White House had been planned a month before the inauguration. *See id.* at 20. At his inaugural address, however, the President expressed his intention to seek the "immediate assistance of the several states" as if he was making an impromptu decision. *See* SPEECHES OF THE AMERICAN PRESIDENTS, *supra* note 9, at 488. Leaders of various public interest groups prepared a formal letter ahead of time, urging governors to express confidence in "the combined voice of the people to show that they are behind him . . . ." Franklin D. Roosevelt, A Letter to the Governors' Conference by a Committee of Citizens Urging Support of the President. March 6, 1933, *reprinted in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 12, at 22. The letter read in part:

> Prompt and decisive action of a national scope, and in several directions, is necessary to prevent economic collapse throughout the land. The ordinary operations of government that prevail and are suitable in time of prosperity with normal conditions, may be too slow to meet adequately this emergency and avoid the danger of this economic avalanche carrying all before it.

Id. (reprinting letter signed by such luminaries as William Green, Rabbi Stephen Wise, and H.G. Harriman). Among the more important considerations before the governors' conference at the White House on March 6, 1933, was whether to extend Roosevelt's federal banking controls over non-federal state-sanctioned banks. *See id.* at 19. This of course invoked immense questions of jurisdiction and federalism. *See id.* The governors, however, apparently offered little resistance in allowing the central

government to extend its controls upon the banks of the several states. *See id.* at 21-22 (cooperating with actions President found necessary to restore banking stability).

n13 *See* Franklin D. Roosevelt, The President Proclaims a Bank Holiday. Gold and Silver Exports and Foreign Exchange Transactions Prohibited. Proclamation No. 2039, March 6, 1933, *reprinted in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 12, at 24-29 [hereinafter Proclamation 2039].

n14 *See* Proclamation 2039, *supra* note 14, at 25, *reprinted in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (1938).

n15 President Roosevelt essentially announced during his inaugural address that he intended to jettison any pretense at maintaining the traditional balance of power between the Presidency and the Congress. "It is to be hoped that the normal balance of Executive and legislative authority may be wholly adequate to meet the unprecedented task before us," he claimed, "but it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure." SPEECHES OF THE AMERICAN PRESIDENTS, *supra* note 9, at 489.

n16 *See* BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 307-14 (1993) (stating *laissez faire* "touchstone" in all legal branches during latter nineteenth and early twentieth century). Moreover, Schwartz points out that a hands-off economic rule was given judicial sanction in the law. *See id.*

n17 *See* Proclamation 2039, *supra* note 14, at 25, *reprinted in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (1938).

n18 40 Stat. 411 (1917).

n19 *See* Proclamation 2039, *supra* note 14, at 25, *reprinted in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (1938).

n20 *See* Proclamation 2039, *supra* note 14, at 25, *reprinted in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (1938).

n21 U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause provides that "Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.; see* Price, *supra* note 7, at 139-226 (discussing unconstitutionality of New Deal's expansion of commerce power).

n22 U.S. CONST. amend. IV. The Fourth Amendment provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

n23 U.S. CONST. amend. V. The Fifth Amendment provides: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ." *Id.* The Due Process Clause of the Fifth Amendment covers acts of Congress which impair the obligation of contracts much in the same way that the Contracts Clause, U.S. CONST. art. I, § 9, cl. 10, covers acts of state legislatures that impair the obligation of contracts. *See, e.g.*, The Sinking-Fund Cases, 99 U.S. 700, 718 (1878); United States

v. Northern Pacific Ry., 256 U.S. 51, 64 (1921); Choate v. Trapp, 224 U.S. 665, 674 (1912). The government actions described in Proclamation 2039, after ratification by enactment of Congress on March 9, 1933, were ultimately reviewed by the United States Supreme Court, in specious fashion, in the *Gold Clause Cases. See infra* notes 121-34 and accompanying text (discussing *Gold Clause Cases*). The Court rejected several Fifth Amendment arguments in upholding the emergency measures. *Id.*

n24 *See* U.S. CONST. amend. V. The Fifth Amendment states in pertinent part: "nor shall private property be taken for public use without just compensation." *Id.*

n25 *See* U.S. CONST. amend. X. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* The precise way in which the Tenth Amendment limits federal power, interestingly enough, became a controversial issue in the wake of President Roosevelt's New Deal policies. A clear reading of the Amendment in its constitutional context indicates that the national government has only the few powers specifically assigned by the Constitution. Some authorities, however, have read the Amendment as a "truism" - a mere statement indicating only that the states have independent existence, rather than any potentially exclusive powers. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.8, at 155-58 (3d ed. 1995).

n26 Indeed, the Act did not go without some critical review in the federal courts. During the October 1934 term of the United States Supreme Court, the Emergency Banking Act, along with other measures passed by Congress and the Roosevelt Administration regarding the regulation of gold, survived challenges based on the Due Process Clause of the Fifth Amendment and the Gold Clause of the Constitution. *See infra* notes 121-34 (discussing *Gold Clause Cases*). What is important in light of this Article is that the emergency declaration and features of the government's actions of March and April 1933 went virtually unchallenged by the Supreme Court.

n27 The separation of powers doctrine governs both the encroachment of the three branches of government on each other and the taking of more power by one branch than constitutionally permissible. *See* ROTUNDA & NOWAK, *supra* note 26, § 7.13, at 270.

n28 The non-delegation doctrine, a sub-branch of the separation of powers doctrine, generally restricts the abdication of legislative affairs by Congress. While popularly thought to have originated with the decision in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the non-delegation doctrine in fact has a long history under various constitutions, although perhaps not in name. *See* People v. C. Klinck Packing Co., 108 N.E. 278, 283 (N.Y. 1915) (finding unconstitutional delegation statute exempting certain employees from laws if commissioner of labor approves); State *ex rel.* Mueller v. Thompson, 137 N.W. 20, 23-24 (Wis. 1912) (striking down law delegating power to grant municipal corporations to local bodies).

n29 *See* U.S. CONST. art. II, § 2, cl. 1. Section 2 of Article 2 states: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." *Id.*

n30 For example, General Hugh Johnson, a War Industries Board veteran of the First World War, was positioned to draft the departmental structure of Roosevelt's

economic recovery programs. *See* Belknap, *supra* note 4, at 75. Other War Industries Board officials from the War returned to Washington to take strategic positions in the New Deal agencies. *See id.*

n31 Roosevelt's March 4th inaugural, for instance, contained numerous phrases comparing the Great Depression to a state of war. Roosevelt stated that the unemployment crisis should be treated "as we would treat the emergency of war," declared that he would lay out "the lines of attack," to Congress, told the audience that "we must move as a trained and loyal army willing to sacrifice for the good of a common discipline," said that he would "assume unhesitatingly the leadership of this great army of our people dedicated to a disciplined attack," and called for "victory" over the crisis. SPEECHES OF THE AMERICAN PRESIDENTS, *supra* note 9, at 487-89. The day after his inaugural, Roosevelt issued a radio invitation to American Legion and members and veterans formally requesting their "military" aid in attacking the economic crisis.

> It is a mistake to assume that the virtues of war differ essentially from the virtues of peace. All life is a battle against the forces of nature, against the mistakes and human limitations of man, against the forces of selfishness and inertia, of laziness and fear. These are enemies with whom we never conclude an armistice. . . . I invite the support of the men of the Legion and of all men and women who love their country, who know the meaning of sacrifice and who in every emergency have given splendid and generous service to the Nation.

Franklin D. Roosevelt, A Radio Invitation to All Veterans for Cooperation, March 5, 1933, *reprinted in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 12, at 17-18. Roosevelt also combined many of his initial New Deal measures with the military command structure. *See id.* He deliberately inserted the gratuitous use of military facilities and equipment into his allegedly anti-Depression measures. *See id.* For instance, the President deliberately designed the Civilian Conservation Corps to employ a representative of the Secretary of War, along with the Secretaries of Labor, Agriculture, and the Interior, on its advisory council. *See* Franklin D. Roosevelt, The Civilian Conservation Corps Is Started. Executive Order No. 6101, April 5, 1933, *reprinted in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 12, at 107-08. The Civilian Conservation Corps employed young men to engage in public works projects such as reforestation and monument-building. *See id.*

n32 *See* SPEECHES OF THE AMERICAN PRESIDENTS, *supra* note 9, at 487. Roosevelt's emergency banking measure was presented to the American people as a means to attack international banking, whose practices were said to "stand indicted in the court of public opinion, rejected by the heart and minds of men." *Id.* This claim now stands as hollow as any that the President made during his inaugural, as the banking community benefited greatly not from inaction, but by federal passage of legislation to keep it afloat. *See id.* Indeed, the international banking community probably had a hand at drafting the very legislation that Roosevelt presented to Congress on March 9, 1933. *See id.; see* also DR. EUGENE SCHRODER WITH MICKI NELLIS, CONSTITUTION: FACT OR FICTION 28 (1995). In fact, the Federal Reserve Board of New York had recommended a proposed resolution, "copied almost word for word in the president's Proclamation 2039," to President Hoover during Hoover's last days in office, thus demonstrating the probable authorship of the Emergency Banking Act. *See* SCHRODER WITH NELLIS, *supra* at 28. It is also notable that upon introduction of the emergency banking bill onto the floor of the House, one keen representative, Emst Lundeen of Minnesota, asked on the record for the identity of its author, a question that was never answered. *See* 77 CONG. REC. 83 (1933).

n33 *See* SCHRODER WITH NELLIS, *supra* note 33, at 27 (adding March 13th deadline later extended).

n34 *See* SCHRODER WITH NELLIS, *supra* note 33, at 27. In some ways, the publication of violators' names illustrates the uneasy position and questionable constitutional basis of the emergency measures, as well as the Administration's knowledge of it. *See id.* The Administration's confidence in the constitutionality of its position gained little from the bluffing nature of such an empty threat. *See id.*

n35 *See* Franklin D. Roosevelt, The President Proclaims an Extension of the Bank Holiday. The Gold and Silver Embargo and the Prohibition on Foreign Exchange. Proclamation No. 2040, March 9, 1933, *reprinted in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 12, at 48 (extending book holiday indefinitely).

n36 *See* 77 CONG. REC. 56 (1933) (statement of Sen. Reed) (asking whether state banks could reopen without permission from Washington).

n37 *See id.* Senator Reed expressed concern that the Senate had been "deluged today with inquiries from State banks . . . ." *See id.*

n38 *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . .").

n39 The measure, however, did not pass without some loud criticism. During the brief period of consideration of the bill, Congressman McFadden of Pennsylvania, who came from a banking background and was somewhat familiar with prior federal banking law, had the following to say:

> Mr. Speaker, I regret that the membership of the House has had no opportunity to consider or even read this bill. The first opportunity I had to know what this legislation is was when it was read from the Clerk's desk. It is an important banking bill. It is a dictatorship over finance in the United States. It is complete control over the banking system in the United States. . . .
> . . . .
> . . . The first section of the bill, as I grasped it, is practically the war powers that were given back in 1917, with some slight amendments. The other gives supreme authority to the Secretary of the Treasury of the United States to impound all the gold in the United States . . . .
> . . . .
> . . . I would like to ask the chairman of the committee if this is a plan to change the holding of the security back of Federal Reserve notes . . . .

77 CONG. REC. 80 (1933).

n40 Senator Connally, for example, stated: "I expect to vote for the bill, though it contains grants of powers which I never before thought I would approve in time of peace." *Id.* at 65. Senator Glass of Virginia also declared that "there are provisions in the bill to which in ordinary times I would not dream of subscribing, but we have a situation that invites the patriotic cooperation and aid of every man who has any regard for his country . . . ." *Id.* at 58.

n41 *See id.* at 83. Representative Emst Lundeen of Minnesota, for example, complained that the bill was "driven through the House with cyclonic speed." *Id.* Representative Lundeen added:

> I have demanded a roll call, but have been unable to get the attention of the Chair. Others have done the same . . . . Fifteen men were standing, demanding a roll call, but

> that number is not sufficient; we therefore have the spectacle of the great House of Representatives of the United States of America passing, after a 40-minute debate, a bill its Members never read and never saw, a bill whose author is unknown. The great majority of the Members have been unable to get a minute's time to discuss this bill; we have been refused a roll call; and we have been refused recognition by the Chair.

Id.

n42 *See generally* Preston Brown, *The Kuwait/Iraq Sanctions - U.S. Regulations in an International Setting*, 562 P.L.I./COMM. L. & PRAC. 7 (1990). "As for the legislative history of [the] amendment to Section 5(b), there is none: 'In fact there seems to be general agreement that most members of Congress hadn't read the bill so it is difficult to say what their intent was.'" *Id.* at 11 (quoting *Emergency Controls on International Economic Transactions and Markup of Trading with the Enemy Reform Legislation: Hearing Before the Subcommittee on Economic Policy of the House Committee on International Relations*, 95th Cong., 92 (1977)).

n43 Pub. L. No. 73-1, 48 Stat. 1 (1933).

n44 *See* SPEECHES OF THE AMERICAN PRESIDENTS, *supra* note 9, at 487 (editor's comments). The "foe" was the Great Depression, a state in which at least one in four Americans were jobless, manufacturing production was half of what it had been only four years earlier, and the threat of starvation hung over broad sectors of the public. *See* SELLERS, *supra* note 5, at 331. After the infamous stock market crash of October 1929, stock prices continued to fall ever lower and confidence in the market evaporated. *See id.* Farm income was cut in half; banks and businesses failed; building virtually stopped. *See id.* "Even those who suffered no personal privation found it hard to dispel fear." *Id.*

Authorities continue to disagree whether such extra-constitutional measures were necessary to avert the Great Depression. Critics of Roosevelt's plan to end the Depression point to numerous opportunities to use simple monetary policy to solve the crisis without resorting to policies that violated the civil liberties of the American people. For example, a number of senators and economists of the period recommended that the national government accentuate its gold standard with a silver standard, enabling silver-backed currency to be issued in small denominations, and increasing the circulation of United States currency. Roosevelt's secretary of the Treasury, Henry Morganthau, Jr., however, looked with contempt upon the advocates of free silver, and deliberately undermined the attempts of silver-backers to implement such an increase. Instead, the Roosevelt Administration continued to deal with the Depression by expanding federal control and government programs. John Morton Blum, who edited Morganthau's diaries for publication, described this subterfuge as "political alchemy of a very high order." JOHN MORTON BLUM, ROOSEVELT AND MORGANTHAU 94 (1970).

Indeed, whether the measures implemented by the Roosevelt Administration actually succeeded in quelling the Depression is widely questionable. Full recovery from the Depression was not seen until mobilization for World War II in the 1940s.

n45 The notion that a president's otherwise extra-constitutional measures may pass constitutional muster by ratification of Congress was shaky even when President Lincoln's actions could be rationally traced to something approaching his war power. The Supreme Court of the United States split harshly over this very question, vis-a-vis the Civil War in 1862. *See* The Brig Amy Warwick, 67 U.S. (2 Black) 635 (1862).

Few legal scholars today consider that the farned Emancipation Proclamation declared by President Lincoln was issued "by virtue of the power" of President Lincoln "as commander-in-chief of the Army and Navy . . . and as a fit and necessary war measure." SCHWARTZ, *supra* note 17, at 259. Lincoln actually conceded that the Proclamation had "no constitutional or legal justification, except as a military measure." *See id.* Lincoln apparently saw the freeing of the slaves as an act flowing from the military power to requisition property. *See id.* at 260. "Legally speaking, the Emancipation Proclamation was effective only as a war measure," and could not be held to have been within the powers of the President during time of peace. *Id.* Only the Thirteenth Amendment enacted in 1865, again a ratification by Congress, allowed the emancipation of slaves to operate after the Civil War ended.

Thus, the actions of President Roosevelt between March 4 and March 9, 1933, would seem to rest on very shallow constitutional sand indeed, being as they were a rather imaginative advancement of presumed "war" authority without war.

n46 *See supra* note 10 and accompanying text (quoting Roosevelt's first inaugural address). The law enacted actually declared that "the actions. . . heretofore or hereafter taken" by the President "are hereby approved and confirmed." 77 CONG. REC. 50 (1933). Senator Robinson of Indiana briefly complained when the bill was introduced that "the Congress will practically abdicate all authority and, for that matter, all its duties in the future, because it specifically approves and confirms everything . . . ." *Id.* at 59. Senator Reed responded by claiming that "the inclusion of the words 'or hereafter' [was] not 'good draftsmanship'" and that it was mere surplusage "because we do not confirm and approve any future act unless it is in compliance with section 5 of the [Trading With the Enemy Act]." *Id.* at 60. These calming claims, however, failed to completely define what, if any, limits were placed upon the President with regard to combating the Great Depression.

n47 Roosevelt's attempt to ground his executive orders in the 1917 Trading With the Enemy Act must be seen as something approaching ridiculous. That Act in no way provided for such presidential action. Roosevelt was clearly legislating from the executive branch in a way that the Framers of the United States Constitution never intended. The Supreme Court stuck down a similar misuse of the presidency in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which invalidated President Harry S. Truman's emergency seizure of several American steel plants, largely because such action had no sanction from Congress.

n48 77 CONG. REC. 50 (1933).

n49 U.S. CONST. art. II, § 3, cl. 3.

n50 *See* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 293 (1998) (noting early Federalists appealed for unconventional action in name of national emergency).

n51 Representative White of Virginia, who addressed his colleagues in the First Congress, once voiced the opinion that the existence of such emergency powers corresponded to "the practice under every limited government." *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1393-94 (1989).

n52 Congress enacted several of the most far-reaching New Deal acts without any statements as to their constitutional foundation, a testament to how Congress viewed

their powers pursuant to the national emergency declared on March 9, 1933. Indeed, some New Deal congressional enactments came with outright declarations of a state of emergency written into them. *See* Hulsebosch, *supra* note 4, at 1994. Supreme Court Justice Sutherland harshly condemned the notion that Congress had access to extra-constitutional powers in its enactments, declaring the Bituminous Coal Conservation Act of 1935 unconstitutional in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Justice Sutherland remarked:

> Recitals contained in [the first section of] the act plainly suggest that its makers were of [the] opinion that its constitutionality could be sustained under some general federal power, thought to exist, apart from the specific grants of the Constitution. . . . These affirmations . . . do not constitute an exertion of the will of Congress which is legislation, but a recital of considerations which in the opinion of that body existed and justified the expression of its will in the present act.

Id. at 289-90.

n53 Notwithstanding Thomas Jefferson's civil libertarian reputation, he once authored this statement in regard to undefined emergency powers: "There are extreme cases when the laws become inadequate even to their own preservation, and where the universal resource is a dictator, or martial law." THE PEOPLE'S ALMANAC # 2 171 (David Wallechinsky, et al. eds., 1978). Jefferson made this statement in connection to the prosecution of Aaron Burr, which Jefferson pursued doggedly throughout his presidency. Critics allege that Jefferson willingly sacrificed his own libertarian principles at his convenience, such as in the case of Aaron Burr or the extra-constitutional acquisition of the Louisiana Purchase from France. *See id.* at 170-71.

Jefferson continued his commentary on this theme after he left the presidency, writing in a letter that there are times when free governments must adopt a doctrine of necessity:

> A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.

Lobel, *supra* note 52, at 1393.

n54 Andrew Jackson, as a general of American troops after the Battle of New Orleans, imposed martial law on the area in 1815. He arrested a Louisiana legislator whom he thought would otherwise create mutiny in his army, and arrested a federal judge who issued a writ of habeas corpus demanding the legislator's release. *See* Lobel, *supra* note 52, at 1394 n.40. Even after the military court acquitted the legislator, Jackson defended such martial rule arguing that necessity justified a "departure from the Constitution." *Id.* at 1394 (noting Jackson defended actions in court proceedings by relying on "Jeffersonian theory of emergency power").

n55 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 211 n.4 (2d ed. 1988) (mentioning "stewardship theory" of Theodore Roosevelt). President Theodore Roosevelt believed:

> The President had not only had a right, but a duty, to take any action essential to the nation's well-being - even if it could not be rooted explicitly or implicitly in a constitutional provision - so long as it was not violative of an explicit constitutional proscription or contrary to an enactment of Congress within the sphere of its enumerated powers.

Id.

n56 Belief in the existence of an emergency powers doctrine, however, is not universal among American presidents. Former Chief Justice and President William Howard Taft spoke critically of the emergency powers doctrine. As president, Taft construed executive authority as stemming from the Constitution alone. *See generally* PAOLO E. COLETTA, THE PRESIDENCY OF WILLIAM HOWARD TAFT (1973) (detailing Taft's constitutional philosophy during presidency). Taft was of the opinion:

> That the President can exercise no power which cannot be reasonably and fairly traced to some specific grant of power or justly implied or included within such express grant as necessary and proper to its exercise. Such specific grant must be either in the Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.

Id. at 12.

n57 BLACK'S LAW DICTIONARY 361-62 (6th ed. 1991). Noted that an "emergency doctrine," or a "rule of necessity," exists in areas of criminal and tort law as a long-understood doctrine. One example of the application of the rule of necessity and the absolute right of self-necessity is the absolute right of self-defense when in danger of losing one's life. The right to kill in self-defense overrides all other law, including the otherwise supreme illegality of causing another's death.

In tort law, emergency, or "imminent peril" is sometimes used as a defense in actions for alleged battery, such as providing medical service to someone incapable of giving consent in an emergency situation. The emergency doctrine implies the consent required to administer emergency medical services. The test is whether the provider used due care to administer help as compared to the actions of a reasonably prudent person under similar circumstances. *See* BLACK'S LAW DICTIONARY 361-62 (6th ed. 1991). All references in the text of this paper to an "emergency doctrine" concern the alleged doctrine of constitutional law promoted in times of national crisis.

n58 For a list of occasions in which the national executive branch employed militia or other extraordinary means to quell volatile domestic happenings, see *Duncan v. Kahanamoku*, 327 U.S. 304, 320-22 & n.18 (1946).

n59 *See* PETER H. IRONS, THE NEW DEAL LAWYERS 53 (1982) (stating emergency doctrine emerged from "the shadowy interstices of the Constitution" during war). *Id.* During World War I, The Supreme Court breathed some life into the doctrine in *Wilson v. New*, 243 U.S. 332 (1917). "Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the assertion of a living power already enjoyed." *Id.* at 348. These words were written during the existence of a declared war, but did not specifically limit emergencies to war situations. This doctrine of emergency was extended in *Block v. Hirsh*, 256 U.S. 135, a 1921 opinion that granted the constitutionality of rent control legislation during the War. *See id.* at 158. Not until *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), did the Supreme Court ever hint at applying an emergency doctrine when no war or warlike situation existed. In *Blaisdell*, the Court wrote that "emergency may furnish the occasion for the exercise of power," but may never create power. *Id.* at 426.

n60 IRONS, *supra* note 60, at 54 (noting some courts reluctant to grant validity to emergency doctrine).

n61 *See* Eugene v. Rostow, *The Japanese American Cases - A Disaster*, 54 YALE L.J.

489, 490-91 (1945) (noting issue whether Supreme Court should judicially review government's internment of Japanese-American citizens). Alternatively, the Court might automatically accept the judgment of the military. *See id.* at 491. "The relationship of civil to military authority is not often litigated." *Id.*

n62 *See War Powers Legislation: Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 92nd Cong. 124 (1971) (statement of William P. Rogers, Secretary of State).

n63 *See* Hulsebosch, *supra* note 4, at 1997-98.

n64 *See* Hulsebosch, *supra* note 4, at 1996. President Roosevelt's director of litigation in the National Recovery Administration claimed the courts would not hesitate to sustain the government's unorthodox actions in the name of self-preservation. *See id.; see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 612 n.20 (1952) (Frankfurter, J., concurring) (recounting Roosevelt's Attorney General "followed the ardor of advocates in claiming everything" during the Administration's seizure of Montgomery Ward). *See id.*

n65 *See* SCHWARTZ, *supra* note 17, at 258.

n66 In 1846, the United States army, under President Polk, fought two battles against Mexico, on Mexican soil, before the passage of an act by Congress which recognized "a state of war as existing by the act of the Republic of Mexico." The Brig Amy Warwick, 67 U.S. (2 Black) 635, 668 (1862). Justice Grier pointed out that this act "not only provided for the future prosecution of the [Mexican War], but was itself a vindication and ratification of the Act of the President in accepting" Mexico's declaration of war on the United States before congressional consideration. *Id.*

n67 Congress' Act of August 6, 1861, did ultimately ratify the conduct of President Lincoln, thus making Lincoln's prior acts valid "as if they had been issued and done under the previous express authority and direction of the Congress." *See* SCHWARTZ, *supra* note 17, at 258 (quoting 12 Stat. 326 (1861). The Supreme Court of the United States, in *United States v. Hosmer*, 76 U.S. (9 Wall.) 432, 434 (1869), ultimately upheld President Lincoln's drastic actions, deciding that Congress ratified them after the fact as pursuant to his Executive War Powers. Thus, this case commenced a tradition of Congressional permissiveness - often won by the Executive, and resented by the Legislative Branch. It was this Lincoln precedent that would influence the next century, "when Presidents would wage war without Congressional authorization." *See* SCHWARTZ, *supra* note 17, at 258.

n68 *The Brig Amy Warwick*, 67 U.S. (2 Black) at 666.

n69 BLACK'S LAW DICTIONARY 1093 (6th ed. 1991).

n70 *See* West v. Palmetto State Life Ins. Co., 25 S.E.2d 475, 477 (S.C. 1943).

n71 *See The Brig Amy Warwick*, 67 U.S. (2 Black) at 687 (Nelson, J., dissenting). "The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international law." *Id.*

n72 *See* Lamar v. Browne, 92 U.S. 187, 194 (1875). The Court upheld the seizure by United States of 1,800 bales of cotton from a Georgia town. Even after all hostilities in

Georgia had entirely ceased and the last Confederate army east of the Mississippi had surrendered, the Court held that Congress' declared state of war continued for several months afterward. *See id.*

n73 *See id.* at 194. Chief Justice Waite acknowledged a general maxim of the law of nations which exempts private property of noncombatants from capture as booty of war. Chief Justice Waite said, however, that in the United States, Congress had statutorily allowed for the capture of all property, including private property, as long as all proceeds went into the government's treasury and did not go to private gain. *See id.*

n74 *See id.* at 197 (noting special "prize-courts" created statutorily possess jurisdiction for redress of such wrongs).

n75 *The Brig Amy Warwick*, 67 U.S. (2 Black) at 687-88 (Nelson, J., dissenting) (citation omitted) (describing legal consequences of war between nations).

n76 *See* Miller v. United States, 78 U.S. (11 Wall.) 268, 292 (1870) (finding power to declare war includes power to seriously wage war). Thus, this is a power with few, if any, limitations in any source of law on either the foreign or the domestic front.

n77 *See* Lobel, *supra* note 52, at 1407 & 1433 n.108 (citing various NEW YORK TIMES reports). Ironically, such an analogy has been earnestly advanced by at least one president. President Richard Nixon claimed during press statements in 1976 that the domestic division of ideology during the 1960s had torn the nation apart in a fashion analogous to the Civil War, thereby making constitutional some executive actions that would have otherwise been unlawful. *See id.*

n78 *See generally The Brig Amy Warwick*, 67 U.S. (2 Black) 635. The parties belligerent in a public war are independent nations, but to constitute war it is not necessary that both parties should be acknowledged as independent nations or sovereign states. War may exist where one of the belligerents claims sovereign rights as against the other. *Id.*

n79 *Id.* at 667.

n80 *Id.*

n81 *See id.* at 692-93 (Nelson, J., dissenting) (stating President's power extends not from executive war power but from power to execute laws). This power is to "preserve the public order and tranquillity of the country in a time of peace by preventing or suppressing any public disorder or disturbance by foreign or domestic enemies." *Id.* at 692. Under such analysis, a president might have implied powers within his power to "take Care that the Laws be faithfully executed" under Article II, Section 3 of the Constitution. Still, however, such implication would have to follow, upon some rational basis, laws enacted by the legislative branch. For alternative sources of implied authority, a president might conceivably look to Article II, Section 1, Clause 1, which states "the Executive Power shall be vested in a President of the United States of America," or to Article II, Section 1, Clause 8, which describes the oath of the president as including the affirmation that he will "preserve, protect and defend the Constitution of the United States."

n82 *See generally* Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175 (1990) (highlighting reasons for

constitutional separation of powers). The Constitution, ratified in 1789, relied heavily on structural division of power to dilute power among many branches and layers, although the term "separation of powers" appears nowhere in the Constitution.

n83 *See* U.S. CONST. art. II, § 2 (providing war powers including power to act as Commander-in-Chief of Army and Navy); U.S. CONST. art. I, § 8 (providing Congress funding power for common defense and general welfare of United States). Certain foreign relations powers are granted exclusively to the Senate, including power to advise and consent to treaties, and to appoint ambassadors and other Executive Branch officials. The combined Congress also has power to make all laws which are necessary and proper for carrying out powers vested by the Constitution to the national government. Furthermore, Congress has sole authority to appropriate funds, a vital power in the area of war operation.

n84 Those who fear that the federal government might succumb to totalitarian urges if provided an excuse under an emergency doctrine are not without a foundation of precedent. In July of 1987, the MIAMI HERALD broke a story revealing that Lieutenant Colonel Oliver North and the Federal Emergency Management Agency (FEMA) had drafted a contingency plan that provided for the suspension of the Constitution, the imposition of martial law, the appointment of military rulers over state and local governments, and the detention of dissidents. *See* Lobel, supra note 52, at 1385. According to Lobel, the revelation that FEMA had drafted such an emergency plan attracted surprisingly little public interest:

> The FEMA plan may have failed to arouse attention because we have grown accustomed to the substantial and steady increase in the scope of executive emergency power during this century. This growth has taken numerous forms: the increased imposition of trade and travel restrictions, the deployment of military personnel alongside civilian law enforcement officials in waging the war on drugs, and the development of a parallel, secret government within the executive branch to confront certain foreign threats.

Id. at 1385-86. *But see* Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1266-67, 1274-83 (1988) (noting Framers feared legislative power more than executive power, adding Article I restraints accordingly).

n85 343 U.S. 579 (1952).

n86 *Id.* at 634 (Jackson, J., concurring).

n87 *See id.* at 641 (Jackson, J., concurring). Justice Jackson noted that the Commander-in-Chief Clause has "given rise to some of the most persistent controversies in our constitutional history." *Id.*

n88 Even as late as 1988, the Senate Foreign Relations Committee established a Special Subcommittee on War Powers with the specific purpose of attempting to evaluate and improve the War Powers Resolution of 1973. Among those testifying were authorities ranging from President Gerald Ford to Professor Ronald Rotunda, co-author of the popular Constitutional Law hombook. Opening the hearings, Senator Claiborne Pell of Rhode Island stated that "from the moment of its enactment over President Nixon's veto, the resolution itself has been an object of dispute rather than an instrument of cooperation." *The War Power After 200 Years: Congress and the President at a Constitutional Impasse: Hearings Before the Special Subcomm. on War Powers of the Comm. on Foreign Relations*, 100th Cong. 363 (1988).

n89 *See id.* at 1. In 1862, the Supreme Court stated that "[the President] has no

power to initiate or declare a war either against a foreign nation or a domestic State." The Brig Amy Warwick, 67 U.S. (2 Black) 635, 668. Under the nineteenth century understanding, however, the president's powers as Commander-in-Chief "not only authorized but bound" him to resist an invasion by a foreign nation without waiting for any special legislative authority. *See id.* Thus, the President's war power is really not a true war power, but only an interim duty to defend the country from invasion.

n90 The writings of the Supreme Court make no mention of a national emergency exception to the balance of powers doctrine, the doctrine of federalism, or any other American legal doctrine.

n91 BLACK'S LAW DICTIONARY 1024 (6th ed. 1990).

n92 *The Brig Amy Warwick*, 67 U.S. (2 Black) at 648.

n93 The original Trading With the Enemy Act was passed on the very day that Congress declared that a state of war existed between the United States and the Imperial German Government, Oct. 6, 1917. Its extensive length and somewhat exhaustive attention to detail, however, reveal it to have been carefully thought out by its drafters long prior to America's declaration of war in 1917.

n94 Proclamation 2039, *supra* note 14, at 24.

n95 Proclamation 2039, *supra* note 14, at 24. That there was widespread speculation in the gold market at the time of President Roosevelt's inauguration is undeniable. One Swiss Corporation, for example, bought up one and one-quarter million dollars, in face value, of gold coins on March 2, 1933, (two days before the inauguration) and had them stored by a company in New York. *See* Uebersee Finanz-Korporation Aktien Gesellschaft v. Rosen, 83 F.2d 225, 226 (2d Cir. 1936). By May 1933, the corporation would have nearly doubled its money, had it been allowed to export the gold. *See id.* The Treasury Department, upon receiving the application of the corporation to transport the gold out of the country, ordered the gold brought to the Federal Reserve Bank of New York and placed in a Treasury Department account. *See id.* at 227. The gold sat idle in storage while court proceedings waged over it, and until the United States Court of Appeals for the Second Circuit upheld the Secretary's order to pay the corporation only the face value of the gold. *See id.* at 230-31.

n96 *See* SCHRODER WITH NELLIS, *supra* note 33, at 29.

n97 *See id.*

n98 *See id.*

n99 *See id.*

n100 The Trading with the Enemy Act continues to exist, and to pose significant international implications, for instance, the United States' relations with Cuba.

n101 *See* SCHRODER WITH NELLIS, *supra* note 33, at 31.

n102 *See* IRONS, *supra* note 60, at 3 (remarking Congress not arena for debate of New Deal issues). In fact, President Roosevelt commanded majorities of almost three-to-one in the House and two-to-one in the Senate and the "Democratic leadership . . . easily . . . shepherded Roosevelt's legislative program to passage." *Id.*

n103 *See* ACKERMAN, *supra* note 51, at 286.

n104 *See id.*

n105 *See* IRONS, *supra* note 60, at 4 (noting New Deal attorneys waged "hundreds of courtroom battles over New Deal statutes").

n106 290 U.S. 398 (1934).

n107 *Id.* at 426.

n108 Minnesota Governor Floyd Olson declared virtual martial law in his state as a response to depression. The state legislature passed a statute relieving property owners facing immediate foreclosure from their mortgage obligations by extending mortgage deadlines past their contract specifications. *See* Hulsebosch, *supra* note 4, at 1988.

n109 *Blaisdell* touched off a flurry of legal commentary pronouncing a new constitutional doctrine. *See generally* Edward S. Corwin. *Moratorium Over Minnesota*, 82 U. PA. L. REV. 311 (1934) (saying *Blaisdell* dissenters had missed boat); Note, *Constitutionality of Mortage Relief Legislation: Home Building & Loan Ass'n v. Blaisdell*, 47 HARV. L. REV. 660 (1934).

n110 291 U.S. 502 (1934).

n111 *See* CUSHMAN, *supra* note 3, at 154 (describing *Nebbia* in context of "restatement" movement's attempt to gain widespread uniformity in case law).

n112 *See id.*

n113 *See* Pepper, *supra* note 4, at 97 (questioning whether emergency powers discussion's absence from *Nebbia* of precedential value in light of *Blaisdell*).

n114 *See id.* at 154 n.212 (citing Irving B. Goldsmith & Gordon W. Winks, *Price Fixing: From Nebbia to Guffey*, 31 ILL. L. REV. 179, 182 n.20 (1936)). Goldsmith and Winks note that despite absence of citations to emergency cases such as *Wilson v. New*, 243 U.S. 332 (1917), *Block v. Hirsh*, 256 U.S. 135 (1921), *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921), and *Blaisdell*, "it is certain that the existence of a critical depression was taken into account, but the language of the opinion does not depend on it." Goldsmith & Winks, *supra*.

n115 *See* Lochner v. New York, 198 U.S. 45, 64 (1905) (invalidating statute prohibiting 60 hour work weeks on Contract Clause and Fourteenth Amendment due process grounds). Modern constitutional scholars look upon the *Blaisdell* and *Nebbia* decisions as a peculiar part of an odd turning point in the Supreme Court's rationale for intervention into the domain of the states. *See* ROTUNDA & NOWAK, *supra* note 26, § 11.3, at 380 (noting *Nebbia* suggested Court's use of substantive due process to invalidate economic or welfare legislation "was at an end").

While the earlier "*Lochner* Era" Court had applied the Due Process Clause of the Fourteenth Amendment to regulate economic laws - largely toward the end of protecting business from increasing government control - the Court increasingly turned to the Commerce Clause in the 1920s and early 1930s to reach virtually identical ends. *See id.* Yet while the invocation of one power was directed toward state

law, the other was directed toward federal law. Roosevelt's ascendancy took place at the very moment when the Court gave up on limiting state economic regulations via due process, yet before the Court took the Commerce Clause in earnest to declare similar regulations void in cases such as *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

This transition in emphasis from substantive due process to the commerce power had not yet matured during the first year of Roosevelt's presidency, which left an opening for the validation of such economic regulation. A striking indication of the slack in this transition can be seen in the case of *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). In *Baldwin*, the Court invalidated certain legal concepts it had upheld only a year earlier in *Nebbia* - on Commerce Clause grounds. For additional insight into the strange doctrinal relationship between substantive due process jurisprudence and the Commerce Clause that existed at the New Deal's moment of birth, see IRONS, *supra* note 60, at 48-50. This strange constitutional backdrop was an "almost insoluble conundrum" for New Deal lawyers attempting to promote the legality of governmental intrusions into private economic decision. *See id.* at 49.

> In joining the *Lochner* doctrine that the Fourteenth Amendment's due process clause barred state regulation of relations between workers and employers with the *Hummer* limitation of the police powers of the federal government, the restrictive line of cases created a 'twilight zone' in which both the states and federal government were powerless to act.

Id. Thus, the *Blaisdell* and *Nebbia* decisions represented stark departures from the then-existent precedent that may well have been attributable to the emergency proclamations upon which they rested.

n116 Norman v. Baltimore & O.R. Co., 294 U.S. 240 (1935).

n117 Gold clauses in contracts - which continue to be common today - are designed to afford a definite standard or measure of value to the parties in order to protect against depreciation of the currency. Chief Justice Hughes, in the *Gold Clause Cases*, found that securities contracts in the United States contained gold clauses "almost as a matter of routine." *See id.* at 312. International agreements likewise have depended on gold clauses for centuries to ensure fairness in business transactions. *See id.* For example, the historic Treaty of Versailles used a gold clause with respect to money obligated of Germany, which was made payable in gold coins from several countries. *See id.* at 299 n.3.

n118 *See id.* at 305-07. The Court found that although contract obligations were protected by the Fifth Amendment Due Process Clause, they "cannot fetter the constitutional authority of the Congress" to regulate the monetary system and its general powers over the currency. *See id.* at 307. "To subordinate the exercise of the federal authority to the continuing operation of previous contracts," wrote Chief Justice Hughes, "would be to place to this extent the regulation of interstate commerce in the hands of private individuals . . . ." *Id.* at 310. In *Nortz v. United States*, 294 U.S. 317 (1935), one of the *Gold Clause Cases*, the Court dealt primarily with a Takings Clause challenge. The plaintiff pointed out that requiring him to exchange gold certificates for federal reserve notes, not redeemable in gold but of the identical face value, violated the Gold Clause because it deprived him of value by greatly depreciating by nearly 40%. *See id.* at 324. The Court brushed away the challenge stating that gold certificates were not warehouse receipts for the gold, but merely legal tender. *See id.* at 326. The Court dismissed the devaluation issue by claiming that, as of 1934, there was no free market of gold in the United States and

thus no dollar value of gold could be determined as a matter of law, world market values notwithstanding. *See id.* at 329-30.

Thus, the Takings Clause challenge was found to be purely academic with no need to be answered. *See id.* at 330. Even Chief Justice Hughes, however, could not allow Congress to so completely repudiate its public debt through such devaluation. In another of the *Gold Clause Cases, Perry v. United States*, 294 U.S. 330 (1935), Chief Justice Hughes declared the proscribing of gold clauses in government bonds to be unconstitutional. John Perry, a holder of United States Bonds with a gold clause appearing pro se, argued that Congress' repudiation of gold as a standard was a complete repudiation of the gold clause in some 18 billion dollars of outstanding bonds of the United States and thus violated the Fourteenth Amendment. *See id.* at 348. The Court this time agreed, finding a distinction between the contractual obligations of private parties and Congress because of Congress' backing of the Gold Clause in its bonds when it enacted or issued them. *See id.*

The *Perry* decision was probably more an effort to save the credit of the United States than to discern a rational rule. *See id.* at 350 (saying that to allow Congress to repudiate the gold clauses in its bond issues would make credit of United States "an illusory pledge"). Stating that gold clauses were binding in this one instance and not in the others, the Court declared the act unconstitutional in violation of Section 4 of the Fourteenth Amendment, which declares that "the validity of the public debt shall not be questioned." *See id.* at 354. But Perry's pro se victory was hollow. Chief Justice Hughes again declared that even though well-established gold values were published on the open world market, Perry's damages could not be calculated, and thus, he failed to show a cause of action for actual damages. *See id.* at 354-57 (discussing problem of value loss with regard to gold).

n119 Hulsebosch, *supra* note 4, at 1998.

n120 *Id.* at 1999.

n121 *See Norman*, 294 U.S. at 316 (McReynolds, J., dissenting).

n122 *Id.*

n123 *Id.*

n124 *Id.*

n125 *See id.* (explaining amount that may be generated by legislative fiat).

n126 *Norman*, 294 U.S. at 316 (McReynolds, J., dissenting).

n127 *See* U.S. CONST. art. I, § 10, cl. 1.

n128 The gold coinage clause of the Constitution joined an impressive list of other constitutional provisions that for various reasons have been recognizably under-enforced by the Court. *See* Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm"*, 21 HARV. J.L. & PUB. POL'Y 719, 791 n.24 (listing other constitutional dead letters).

n129 *See* Franklin D. Roosevelt, *F.D.R. miscellany, Feb. 1935, reprinted in* 1 F.D.R.: HIS PERSONAL LETTERS, 1928-1945 at 459-60 (Elliot Roosevelt ed., 1950).

n130 IRONS, *supra* note 60, at 52-53 (quoting from Justice Department memorandum).

n131 *Id.* at 53.

n132 *Id.*

n133 *Id.* at 53.

n134 *Id.* (quoting *Richmond Hosiery Mills v. Camp*, 7 F. Supp. 139, 144 (N.D. Ga. 1934)). This may be the only published federal opinion to openly state this as a legal proposition, although such an argument was made by attorneys for the government in numerous cases. *See id.*

n135 *See* IRONS, *supra* note 60, at 54. Of the ten federal district court judges who wrote opinions addressing the constitutionality of the National Recovery Act, only three openly accepted the emergency doctrine argument without stating that the underlying Commerce Clause argument would have otherwise failed. *See id.* One anti-New Deal judge declared that he could not conceive of "'any emergency, especially in the time of peace, which would authorize Congress to ignore the Constitution and enact measures tending to regulate purely local business within the several states.'" *Id.* (quoting *Purvis v. Bazemore*, 5 F. Supp. 230, 232 (S.D. Fla. 1933). Another hostile judge wrote that the emergency doctrine "'may not speak into life that which is dead or never was.'" *Id.* (quoting *United States v. Lieto*, 6 F. Supp. 32, 34 (N.D. Tex. 1934)).

n136 *See* IRONS, *supra* note 60, at 52 (noting emergency doctrine seized upon as "powerful supplement" to this basic argument).

n137 *See* ACKERMAN, *supra* note 51, at 286.

n138 *See generally* IRONS, *supra* note 60.

n139 *See* IRONS, *supra* note 60, at 56; *see also* ACKERMAN, *supra* note 51, at 293 (noting NRA's general counsel deliberately tried to dismiss cases that raised constitutional questions).

n140 *See* ACKERMAN, *supra* note 51, at 293.

n141 *See id.*

n142 295 U.S. 495 (1935).

n143 *Id.* at 528.

n144 *Id.* at 528-29.

n145 *See* Pepper, *supra* note 4, at 108 (saying with *Schechter Poultry*, "the emergency doctrine seemed to be stillborn").

n146 *See id.* (adding *Schechter Poultry* implied Court precedent upholding emergency measures "related to states and not to the federal government").

n147 *Schechter Poultry*, 295 U.S. at 528.

n148 *See* Belknap, *supra* note 4, at 67.

n149 *Id.* at 108.

n150 *Id.* at 68.

n151 5 U.S. (1 Cranch) 137 (1803).

n152 *See* Hulsebosch, *supra* note 4, at 2014.

n153 *See* ROTUNDA & NOWAK, *supra* note 26, § 2.6 (stating that Roosevelt may have lost battle but appeared to win war). Several conservative justices apparently changed their positions on New Deal legislation in response to Roosevelt's court-packing plan. *See id.*

n154 The most prominent early example of this "switch-in-time" was probably *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which upheld the constitutionality of a Washington minimum wage statute virtually identical to the statute struck down in *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923). *See* CUSHMAN, *supra* note 3, at 84.

n155 *See* Note, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 HARV. L. REV. 1102, 1114 (1983) (citing 50 U.S.C. §§ 1701-1706 (1977)). The tendency of presidential actions to go far beyond the goals originally intended by congressional emergency proclamations was cited as one of the reasons that Congress sought, in vain, to curtail the emergency powers of the executive branch in the 1970s. *See The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power, supra*.

n156 An example is the act entitled "Compact for the Prevention of Crime With and Among the Several States" enacted by Congress in 1934.

n157 *See* ACKERMAN, *supra* note 51, at 313.

n158 The Court twice struck down congressional delegation of authority to President Roosevelt in the 1930s. *See generally* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). The Court, however, ultimately upheld broad agency delegations. Today virtually no limits are placed on statutory delegations of power by Congress to the president. Even delegations with vague and extremely broad standards (e.g., "public convenience, interest, or necessity," "just and reasonable," and "unfair") have been upheld.

n159 *See generally* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (exhibiting spirited critique of post-New Deal growth in bureaucracy); *see also* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 47-50 (1969); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 8-10, 183-84 (1993) (explaining how agencies make law on ad hoc basis, rather than Constitution's publicly accountable way).

n160 *See* SPECIAL SENATE COMM. ON THE TERMINATION OF THE NAT'L EMERGENCY, EMERGENCY POWERS STATUTES: PROVISIONS OF FEDERAL LAW NOW IN EFFECT DELEGATING TO THE EXECUTIVE EXTRAORDINARY AUTHORITY IN TIME OF NATIONAL EMERGENCY, S. REP. NO. 93-549, at 5 (1973).

n161 *See* Exec. Order No. 11,677, 37 Fed. Reg. 15,483 (1972) (pursuant to Aug. 29, 1949, amendments to emergency-era AAA).

n162 *See* SCHRODER WITH NELLIS, *supra* note 33, at 97-107.

n163 *See generally* SPECIAL SENATE COMM. ON THE TERMINATION OF THE NATIONAL EMERGENCY, *supra* note 161.

n164 *See generally id.*

n165 *See id.* at 6.

n166 The Committee was created pursuant to S. Res. 9, 93d Cong. (1973).

n167 *See generally* SPECIAL SENATE COMM. ON THE TERMINATION OF THE NATIONAL EMERGENCY, *supra* note 161.

n168 Charles McC. Mathias, Jr. & Frank Church, *Foreword* to SPECIAL SENATE COMM. ON THE TERMINATION OF THE NATIONAL EMERGENCY, *supra* note 161, at iii.

n169 SPECIAL SENATE COMM. ON THE TERMINATION OF THE NAT'L EMERGENCY, *supra* note 161, at 1.

n170 *See* MATHIAS & CHURCH, *supra* note 169, at iii.

n171 *See* MATHIAS & CHURCH, *supra* note 169, at iii.

n172 *See* SCHRODER WITH NELLIS, *supra* note 33, at 108-10 (citing Aug. 1, 1974, letter to Church-Mathias Committee).

n173 50 U.S.C. §§ 101-501 (1976).

n174 *See* International Emergency Economic Powers Act, 50 U.S.C. § 1701 (1991) (attempting to restrict president's power to engage in overseas military exercises).

n175 *See* SCHRODER WITH NELLIS, *supra* note 33, at 110.

n176 *See* SCHRODER WITH NELLIS, *supra* note 33, at 110.

n177 *See* Brown, *supra* note 43, at 10 (affirming purpose of International Emergency Economic Powers Act to replace TWEA).

n178 *See* Regan v. Wald, 468 U.S. 222, 232-34 (1984). The *Regan* Court found that the International Emergency Economic Powers Act gave the president broad authority to impose comprehensive embargoes in both peacetime emergencies and times of war, even to the extent of regulating all property transactions with Cuba. *See id.*

n179 *See The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power, supra* note 156, at 1120 (concluding emergency termination legislation yielded no significant procedural or substantive restraints upon president's delegated powers).

n180 The words of Supreme Court Justice Felix Frankfurter seem fitting. Justice Frankfurter wrote with regard to how permission by other branches for executive action may, over time, result in a loss of power to restrict the Executive altogether,

that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive power' vested in the President by [Section 1 of Article II]." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

n181 *See* John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195, 206 (1997) (recognizing Court's refusal to impose constitutional limitations on congressional regulation of manufacturing and labor conditions); *see also* Price, *supra* note 7, at 140 (arguing Court decisions create general congressional police power). One theory, most notably posited by Professor Bruce Ackerman of Yale Law School, contends that the Constitution has been "implicitly amended" by a complex series of political events which culminated in an agreement among the three branches of the national government that the Constitution needed to be altered. *See* Price, *supra* note 7, at 141.

n182 *But see* Price, *supra* note 7, at 145-46. Price asserts that recent court decisions suggest increasing recognition that New Deal Court's "switch in time" "has lead us too far astray from the constitutional text, past the boundary of reasonably 'interpretation' and into . . . [a realm] which will no longer be tolerated as legitimate." *Id.* at 146.

n183 ACKERMAN, *supra* note 51, at 257.

n184 *See generally* Helen M. Kemp, *Presumed Guilty: When the War on Drugs Becomes a War on the Constitution*, 14 QUINNIPIAC L. REV. 273 (1994); Paul Finkleman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993) (arguing war on drugs eroding Constitution); Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987); Jonathan L. Hafetz, Note and Comment, *The Rule of Egregiousness: INS v. Lopez-Mendoza Reconsidered*, 19 WHITTIER L. REV. 843 (1998).

n185 *See* Paul Quin, Note, *Mythical Traditions and Fictions: The Rehnquist Court and United States v. Ursery*, 1 J. GENDER, RACE & JUST. 295, 308 (1997). "Clearly visible behind the Court's veil of manufactured traditions and legal fictions" of the war on drugs is an erosion of respect for constitutional protections and a substituted "implicit agreement between the courts and the legislature that the war on drugs is more important" than the Constitution. *Id. See generally* Madelyn Daley Resendez, Casenote, *Police Discretion and the Redefinition of Reasonable Under the Fourth Amendment: Maryland v. Wilson, 519 U.S. 408 (1997)*, 23 S. ILL. U. L.J. 193 (1998) (desribing fear of drug-related crime has "created an atmosphere where public officials will do almost anything," including infringing upon long-established constitutional rights, to put the American people at ease).

n186 By the end of Roosevelt's New Deal, federal power over economic and social matters within the United States had become essentially limitless. *See* Belknap, *supra* note 4, at 67. The growth of the national government in terms of influence over American life can be illustrated by the fact that in 1929, the national government spent only 2.5% of the American gross national product (GNP), whereas today it spends almost a quarter of the GNP. *See* ROBERT L. LINEBERRY ET AL., GOVERNMENT IN AMERICA: PEOPLE, POLITICS, AND POLICY 72 (2d ed. 1995). In comparison, funds spent by state and local governments constituted 7.4% of the GNP in 1929 and today account for 13% of the GNP. *See id.* Not only does this change illustrate the extreme

trend toward domination by the national government that was perpetuated by Roosevelt's New Deal policies, but it illustrates the overall growth of governmental influence over American life. *See id.*