

2002

# Crisis and Constitutionalism

Michael J. Gerhardt

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## Repository Citation

Gerhardt, Michael J., "Crisis and Constitutionalism" (2002). *Faculty Publications*. 861.  
<https://scholarship.law.wm.edu/facpubs/861>

# ARTICLE\*

## CRISIS AND CONSTITUTIONALISM

Michael J. Gerhardt\*\*

### I. INTRODUCTION

No one loves a good crisis more than a constitutional law professor. We live for crises. We make our living writing and talking about them. And, in recent years, there has been a lot for us to write and talk about. In the past few decades, we have experienced such astonishing events as three serious impeachment attempts against presidents, several undeclared wars, including the current war at home and abroad against terrorism; a major, post-election dispute between the major presidential candidates, including the first time the Supreme Court resolved a judicial contest over a presidential election and arguably picked the winner; and several of the closest, most contentious Supreme Court confirmation hearings ever. Indeed,

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\*Professor Michael J. Gerhardt delivered this Article at the University of Montana School of Law on February 28, 2002, as the inaugural Judge James R. Browning Distinguished Lecturer in Law.

\*\*Arthur B. Hanson Professor of Law, William & Mary Law School. I am grateful for constructive feedback I received from Tom Baker, Bill Van Alstyne, and the participants in a faculty workshop at William & Mary Law School, for the extraordinary honor of serving as the first Judge James R. Browning Distinguished Lecturer in Law, and for the wonderful hospitality I received during my visit to the University of Montana Law School as the first Browning Lecturer.

if you wanted to find another generation that has faced anything like the domestic challenges that have confronted us in recent years, you would have to go all the way back to the Civil War.

We have come to know each of these events as either constituting or barely avoiding a crisis in constitutional law.<sup>1</sup>

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1. See, e.g., Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 604 n.74 (1983) (noting that "If, for example, President Nixon had refused to give the 'Watergate' tapes to the Special Prosecutor after the Supreme Court ordered him to do so in *United States v. Nixon*, 418 U.S. 683 (1974), a constitutional crisis could well have resulted."); Candace H. Beckett, *Separation of Powers and Federalism: Their Impact on Individual Liberty and the Functioning of Our Government*, 29 WM. & MARY L. REV. 635, 644 (1988) ("During the most serious constitutional crisis of recent decades, even countries with democratic heritages, such as those of Western Europe, could not understand American concerns with the Nixon Administration's transgressions of power. But Americans were alarmed, and the checks and balances locomotive went into high gear. Congress investigated the activities, the courts interpreted the law, and the press, protected by the first amendment, reported the developments that resulted in the downfall of an administration."); Alfredo Garcia, *"No Fetish" for Privacy, Fairness, or Justice: Why William Rehnquist, Not Ken Starr, Was Responsible for William Jefferson Clinton's Impeachment*, 10 CORNELL J.L. & PUB. POL'Y 511, 513, (2001) ("My aim is to place the 'affair,' and the constitutional crisis it engendered, in a broader perspective. In short, the Starr investigation illustrated the Rehnquist Court's extreme deference to law enforcement objectives, to the detriment of the liberty interests of American citizens and the legitimacy of its own jurisprudence;" *id.* at 575. "At the outset of this endeavor, I sought to give a broader explanation for the constitutional crisis that embroiled the nation as a result of an illicit affair between the President and a young, impressionable intern, and the President's attempt to deny it;" *id.* at 580. "The Clinton constitutional crisis emerged not from a 'politically naive' Supreme Court; it was born of ignorance of the ramifications of criminal constitutional jurisprudence in the most 'real' of worlds."); Timothy Zick, *The Consent of the Governed: Recall of United States Senators*, 103 DICK. L. REV. 567, 610 (1999) ("If the country learned anything from the constitutional crisis brought about by the impeachment proceedings involving President Clinton, it was that the people can indeed put aside self-interest and partisanship for the common good. In other words, they proved themselves capable of choosing whom they please to govern them. The Framers' two-thirds vote requirement may have been the safeguard that ultimately prevented the president's impeachment, but the peoples' voices were also heard throughout the process that led to President Clinton's acquittal."); Mark Tushnet, *The Supreme Court 1998 Term Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 60-61 (1999) (footnotes omitted) (maintaining that the Clinton impeachment was not a constitutional crisis) ("[A]s President Clinton's impeachment and its outcome have demonstrated, impeachment need not be anything major. The impeachment of President Clinton seems to have had little effect qua impeachment. Within six months of President Clinton's acquittal, a leading Republican was quoted as observing, 'We have a president rolling the Congress, getting everything he wants.' Rather than as a constitutional crisis, we might see the impeachment as a 'no harm, no foul' event: anticipating an acquittal, a highly partisan and polarized House of Representatives satisfied its majority's partisan interests by voting for impeachment, without destabilizing the constitutional order. Similarly, future presidents might conclude that there is no serious risk in practicing the politics of preemption: impeachment might occur, but without serious consequences."); Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422, 459 (2000) ("The Clinton impeachment was so unsatisfying in part because it seemed so constitutionally unimportant. The heaviest

artillery in the constitutional arsenal was called out to address a scandal of the meanest character. Despite a numbing amount of commentary on the scandal, there was surprisingly little effort to explain the constitutional value of an impeachment. Republicans seemed to assume that Clinton had defaulted on his presidency and could be removed from office on a technicality. The President and his defenders, of course, were in no position to advance a rich constitutional defense of the presidency, but they seemed content to exploit Republican weaknesses. With its foreordained outcome and sordid subject matter, the impeachment was a constitutional crisis only in its banality.”); Cass R. Sunstein, *Bush v. Gore: Order Without Law*, 68 U. CHI. L. REV. 737, 758 (2001) (“The Court’s decision in *Bush v. Gore* [produced] a prompt and decisive conclusion to the chaotic post-election period of 2000. Indeed, it probably did so in a way that carried more simplicity and authority than anything that might have been expected from the United States Congress. The Court might even have avoided a genuine constitutional crisis.”); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 46 (“Consideration of the practicalities of continued recounting is notable by its absence from the opinions of the dissenting Justices in *Bush v. Gore*. They were content to leave the matter to be resolved by Congress in January—or later, for that matter. I cannot see the case for precipitating a political and constitutional crisis merely in order to fuss with a statistical tie that, given the inherent subjectivity involved in hand counting spoiled ballots, can never be untied. Had the responsibility for determining who would be President fallen to Congress in January, there would have been a competition in indignation between the parties’ supporters, with each side accusing the other of having stolen the election. Whatever Congress did would have been regarded as the product of raw politics, with no tincture of justice. The new President would have been deprived of a transition period in which to organize his administration and would have taken office against a background of unprecedented bitterness. His “victory” would have been an empty one; he could not have governed effectively.”); Feature, *War Powers Revisited*, 37 STAN. J. INT’L. L. 171, 180 (2001) “[The] lengthy and persistent struggle between the branches over the constitutionality of the War Powers Resolution has proven impervious to political resolution, in somewhat the same manner as the constitutional controversies over the President’s power to remove Executive officials and the legislative veto could not be resolved politically. Judicial resolution of the issue is the only method to resolve this intractable dispute between the political branches over their respective constitutional authorities before it erupts again in the context of another constitutional crisis of the order presented by the Vietnam War. Judicial resolution could prevent the inevitable repetition of the traumatic constitutional experience the country and the government experienced during that war - an experience from which the Congress sought to protect the Nation by enacting the War Powers Resolution. The cost of judicial abstention now is likely to be paid by future generations.”); Memorandum, *Indochina: The Constitutional Crisis*, reprinted in 116 CONG. REC. 15,409, 15,411 (1970) (authored by Yale Law Professors Alexander Bickel and Elias Clark, 12 Yale law students, and a number of prominent lawyers); William D. Rogers, *The United States Constitution In Its Third Century: Foreign Affairs: Epilogue: The Constitution and Foreign Affairs: Two Hundred Years*, 83 AM. J. INT’L. L. 894, 895 (1989) (“The Iran-contra affair then can be seen as the capstone incident of an extended period of constitutional competition between the branches over foreign policy. Persuaded that Congress was wrong, a band of zealots seized a piece of the international relations power of the executive branch, cutting squarely across the expressed legislative policy of the Boland amendment. In the effort, they lied to Congress (and may have misled even the President himself . . . It is therefore something of a paradox that, within 2 years of Iran-contra, there should be so general a sense that the nation is moving away from the concerns that inspired the constitutional crisis and toward a new bipartisanship in foreign affairs.”); Dr. Anthony Simones, *The Iran-Contra Affair: Ten Years Later*, 67 UMKC L. REV. 61, 75 (1998) (“The Iran-Contra Affair did not occur merely because the Reagan Administration thought it could pursue

There are, however, two major problems with such characterizations. The first is that none of these events constitutes a genuine crisis. The second is, in spite of all of the interest constitutional scholars have had in crises, most do not define what they mean by a constitutional crisis. Indeed, there is no consensus on any standards for determining what constitutes a crisis in constitutional law.<sup>2</sup> In short, we lack any

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its initiatives secretly. It occurred because our system allowed the Reagan Administration to believe it could pursue its initiatives secretly, while it encouraged Congress to insist on access and accountability. . . . Ours is a system which allows the President to engage in covert operations which require secrecy for their success, yet which gives Congress access to information about those operations, and which ultimately provides the President with a weapon that he may use to keep this information from Congress. When both Congress and the Reagan Administrations sought to avail themselves of the opportunities presented by our constitutional system, the struggle between secrecy and accountability produced a constitutional crisis.”); Laurence H. Tribe, *Reagan Ignites a Constitutional Crisis*, N.Y. TIMES, May 20, 1987, at A31 (“When Ronald Reagan was elected on an antigovernment platform, pundits smiled. When incumbent President Reagan was re-elected on such a platform, political scientists were puzzled. But when the President’s status as a perpetually bemused and patriotic outsider is transformed from a political stance into a shield against the rule of law, a constitutional crisis is at hand.”).

2. See, e.g., Ward Farnsworth, “To Do A Great Right, Do A Little Wrong”; A User’s Guide to Judicial Lawlessness,” 86 MINN. L. REV. 227, 245-46 (2001) (footnote omitted) (“The usual definition of a constitutional crisis is a dispute between coequal branches of government about the Constitution’s meaning that calls into question the authority of either one to trump the other.”); Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 88 (1998) (“[W]hen Congress and the President have tested the constitutional limits of their power over the courts . . . the result has typically been a constitutional crisis. Some obvious examples include the 1801 Act and its repeal, the 1805 impeachment proceedings against Justice Samuel Chase, the 1937 court-packing plan of Franklin Roosevelt and the 1989 nomination of Robert Bork to the Supreme Court. Constitutional crises are occasionally unavoidable and instructive, but they are hardly to be encouraged or held aloft as defining features of a constitutional democracy in good repair.”); Robert G. Kaiser, *No “Crisis” Yet From Electoral Uncertainty, Say Legal Scholars*, WASH. POST, Dec. 11, 2000, at A10 (quoting John Yoo as saying a “constitutional crisis is if people ignore or attack the Constitution”; Christopher Schroeder as suggesting a constitutional crisis arises when “one of the branches of the government decides not to acknowledge and accede to . . . the legitimate authority of another branch of government”; and Michael Gerhardt as defining “a constitutional crisis as a confrontation of great national importance “in which the Constitution does not provide a clear answer . . .”); Miles Benson & J. Scott Orr, *Staying Alive; Stage May Be Set For a Constitutional Crisis*, SAN DIEGO UNION-TRIB., Dec. 10, 2000, at G1 (“Dean L. Kinvin Wroth of Vermont Law School defines a constitutional crisis as ‘the point at which one branch or level of government declines to obey the mandate of another.’”); Dana Milbank, *Worst-Case Scenario: The U.S. Has None; Constitutional Crisis, Chaos Forseen if Top Leaders Killed*, WASH. POST, Dec. 10, 2001, at A1 (quoting Washington State Rep. Brian Baird as stating “If somebody hits us in a severe and coordinated attack, there will be great confusion and possibly a constitutional crisis.”); H. John Rogers, *Presidency on a Platter; High Court Supremely Bold in Election Ruling*, CHARLESTON GAZETTE & DAILY MAIL, Feb. 2, 2001, at 5A (“The system works tolerably well as long as the judiciary only snips at the heels of the

constitutional values are implemented.

If one were genuinely interested in determining how written constitutionalism gets implemented (and that is the process by which the Constitution's binding authority operates), courts are not the best place to look. It might be useful to examine those instances in which adherence to the written Constitution is getting stretched to, if not beyond, the limit. If, as is commonly suggested, a constitution's mandates are "proscribed by Philip sober to control Philip drunk,"<sup>6</sup> there is likelier to be no instance in which Philip is more drunk or less disposed to act responsibly than a genuine crisis in which authorities are severely tempted to take their powers beyond the written limits set forth in the Constitution.

So, my first objective is to explain the criteria for determining a crisis in constitutional law. I use these criteria to clarify the relationship among the three different kinds of crises in constitutional law – judicial, political, and constitutional. Once I have clarified the different elements of each of these, I will demonstrate how this understanding illuminates the significance of the recent controversies to which I have referred above, and how the binding authority of our Constitution is achieved through its implementation. Perhaps most importantly, I suggest constitutional crises are extremely rare episodes in which national political leaders recognize the inadequacy of the Constitution. Their recognition that the Constitution cannot answer the critical problem at hand is an acknowledgment of the limits of the written Constitution. In every other circumstance that falls short of a genuine constitutional crisis, the pull of the Constitution as a framework not only for discussion but also for resolution of conflict is evident. Consequently, constitutional crises are distinctive as the only instances in which the limits of written constitutionalism are not just reached but also breached.

## II. UNDERSTANDING CRISES

There are at least three kinds of crises in constitutional law. The first is a judicial crisis. It is tempting to define a judicial crisis as arising when political authorities object to the Court's

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6. DAVID BREWER, AN INDEPENDENT JUDICIARY AS THE SALVATION OF THE NATION, IN NEW YORK BAR ASSOCIATION, PROCEEDINGS OF THE NEW YORK BAR ASSOCIATION 37, 37-47 (1893), *reprinted in* 11 THE ANNALS OF AMERICA: AGRARIANISM AND URBANIZATION 1884-1894, at 423, 428 (1968).

framework for judging whether something is a constitutional crisis or not.

My purpose today is to fill this void. My intention is to develop a framework for analyzing crises in constitutional law, and to assess the implications of this framework for understanding constitutional law. In fact, understanding why none of the many incidents characterized recently as crises actually were genuine crises helps to answer one of the biggest, if not the biggest, question in all of constitutional law: how our written Constitution continues to bind the nation long after the deaths of those who drafted and ratified it.<sup>3</sup> Understanding the elements of a crisis helps to illuminate our continued national commitment to written constitutionalism.

We are only just now beginning to understand the ways in which our Constitution binds the nation. The trick to understanding how the Constitution retains its binding authority over time requires us to explore how our Constitution is implemented, i.e., how its various guarantees, values, and provisions are translated into action.<sup>4</sup>

For many if not most constitutional theorists, the central institution responsible for implementation of the Constitution is the federal judiciary.<sup>5</sup> I think legal scholars give courts far too much credit for maintaining constitutionalism. In fact, courts are marginally involved in the implementation of the Constitution. They deal only with a relatively small number of constitutional issues. Courts are not the principal fora in which constitutional issues arise or get addressed. In practice, the vast majority of constitutional issues are dealt with outside of the courts. It is outside of the courts, in Congress, the White House, federal agencies, and even state governorships and legislatures, that constitutional issues are routinely addressed and most

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executive and legislative branches of government, but where judges seek to supplant la volente general with their own socioeconomic thinking (as happened during Roosevelt's first term) we are brushing up against a real, rather than euphemistic constitutional crisis.").

3. See generally JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001).

4. Michael J. Gerhardt, *The End of Theory*, 96 NW. U. L. REV. 283 (2001) (reviewing JED RUBENFELD, *FREEDOM AND THEORY: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001)). See also CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001); RICHARD H. FALLOW, JR., *IMPLEMENTING THE CONSTITUTION* (2001).

5. Though he arrives at it by a different route, Jed Rubenfeld ends up offering a relatively typical account of the federal judiciary as the primary institution responsible for maintaining national commitment to the Constitution over time. RUBENFELD, *supra* note 3.

having struck down or overridden something they have done. If this were our working definition, I suggest that there would be a problem, because the definition I have just given you is none other than the classical understanding of the counter-majoritarian difficulty as described by the late Alexander Bickel,<sup>7</sup> and there would be a crisis each and every time the Court exercised judicial review to strike down some democratic enactment or decision. To say that a political objection to a judicial decision provokes or precipitates a judicial crisis dilutes the meaning of crisis, because it would mean we have been experiencing a crisis just about every time an exercise of judicial review provokes some angry or negative reaction from some political authorities. It is likely, at least in theory, that a judicial decision overturning some popular enactment (or action by a democratically elected official) will anger some constituency. Some scholars have recently suggested, however, the extent of such conflicts are greatly exaggerated;<sup>8</sup> they have argued that only rarely has there been a decision of the Supreme Court that did not enjoy the support of the majority of Americans at the time it was decided or soon thereafter.<sup>9</sup>

A more plausible definition of judicial crisis arises not when there is a conflict between the Court and political authorities,<sup>10</sup> but rather when political authorities persistently to refuse to follow and to retaliate against the Court's answer to a question of constitutional meaning. Under this definition there have been remarkably few genuine judicial crises. Many episodes commonly thought to constitute crises fall short. For instance, the first time the Court exercised judicial review to strike down a state law – *Chisholm v. Georgia*<sup>11</sup> – was so unpopular that it took literally a matter of days for the decision to be overturned by a constitutional amendment.<sup>12</sup> While the *Chisholm* decision

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7. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2nd ed.1986).

8. See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

9. See Michael J. Klarman, *Bush v. Gore: Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001).

10. Note that the Court has struck down 28 federal laws in the past six years, but no scholar has yet designated these decisions as constituting a crisis in constitutional law. A few scholars have, however, suggested this trend constitutes a revolution in constitutional law. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

11. 2 U.S. 419 (1793).

12. See Klarman, *supra* note 9.



provoked some controversy, the controversy subsided almost as quickly as it arose.

A better candidate for a genuine judicial crisis is the political fallout from and retaliation against the Court's efforts to enforce its decision in *Brown v. Board of Education I*.<sup>13</sup> The Southern Manifesto and other acts of defiance and protest followed almost immediately after the decision came down.<sup>14</sup> The defiance persisted throughout most of the 1960s, until the President and Congress decisively sided with the Court through the enactment of the 1964 Civil Rights Act and other progressive civil rights measures. Once all three institutions of the national government fell into line behind desegregation, the resistance began to break down.<sup>15</sup> By then, *Brown* had gone for more than a decade without full implementation in the deep South.

Another popular candidate for a judicial crisis is the conflict generated by the Supreme Court's propensity to protect economic liberties and property rights in the first few decades of the 20<sup>th</sup> century. This period covers both the *Lochner* era<sup>16</sup> and the New Deal era.<sup>17</sup> In the *Lochner* era, or the period from 1893 to 1924, Congress considered 20 proposals to curb the federal courts' jurisdiction in retaliation against the Court's perceived activism.<sup>18</sup> In the remarkably brief period from 1935 to 1937, Congress considered 37 bills proposing to curb the jurisdiction of the federal courts.<sup>19</sup> During his first term, President Franklin D. Roosevelt and other Democrats publicly criticized the Court's rulings striking down several New Deal measures.<sup>20</sup> By 1936, as Michael Klarman suggests, "both Democrats and Republicans endorsed state minimum wage legislation, and thus [the Court's decision in *Morehead v. New York ex rel. Tipaldo*<sup>21</sup>] incited a

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13. 347 U.S. 483 (1954).

14. See generally LUCAS POWE, *THE WARREN COURT AND AMERICAN POLITICS* (2000). See also Gerhardt, *supra* note 4.

15. See Klarman, *supra* note 9.

16. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001).

17. Klarman, *supra* note 9 at 1751 (referring to "the New Deal constitutional crisis" but not explaining why). See also William Carlsen, *Roosevelt's End Run Around the Courts; Secret Trials Provoked Constitutional Crisis*, SAN FRAN. CHRON., Nov. 30, 2001, at A18 (stating that, "The tense legal drama unfolding in Washington in the summer of 1942 had all the trappings of a constitutional crisis.").

18. Stuart S. Nagel, *Court-Curbing Periods in American History*, in *THE IMPACT OF SUPREME COURT DECISIONS* 35, 35-47 (Theodore L. Becker ed., 1969).

19. *Id.* at 36-37.

20. Klarman, *supra* note 9, at 1751.

21. 97 U.S. 702 (1936).

firestorm of criticism."<sup>22</sup> That decision was the proximate cause of Roosevelt's infamous Court-packing plan, which was the most notorious of the many assaults undertaken at the time against the Court.<sup>23</sup> Though the proposal failed, constitutional scholars to this day still debate the significance of this failure and its connection to the Court's purported "switch in time."<sup>24</sup>

Yet another possible judicial crisis has been engendered by *Roe v. Wade*.<sup>25</sup> The nation remains divided in its agreement with the fundamental rule announced in the case, and several presidents – Ronald Reagan, George H. W. Bush, and George W. Bush – openly campaigned against the decision and purposely nominated as judges people who were opposed to the decision.<sup>26</sup> To this day, Republican and Democratic presidents make choices of judicial nominees based to a significant degree on their attitudes about the legitimacy of *Roe*. The persistence of the relevance of *Roe* to judicial selection indicates the extent to which the political discord engendered by the decision still rages.

If a judicial crisis is predicated on persistent political resistance to a judicial decision, what is a political crisis, and how does it differ from a judicial crisis? I suggest a political crisis arises when political authorities are fighting amongst themselves for supremacy over a particular domain of policymaking.

Prime examples of political crises (of varying intensity) are the set of presidential impeachments, beginning with Andrew Johnson and including Richard Nixon and Bill Clinton.<sup>27</sup> In the first of these instances, Congress and the President were plainly in a contest for supremacy in dictating Reconstruction policy. Interestingly, Johnson was not the first president to have been threatened with impeachment because of his overzealous use of the veto (and efforts to assert his will over domestic policymaking),<sup>28</sup> but he was the first to be impeached and thus

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22. Klarman, *supra* note 9, at 1751.

23. WILLIAM EDWARD LEUCHTENBURG, IN *THE SHADOW OF FDR: FROM HARRY TRUMAN TO GEORGE W. BUSH* (3rd ed., rev. & updated 2001).

24. See EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000).

25. 410 U.S. 959 (1973).

26. See generally, DAVID ALISTAIR YALOF, *A PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF THE SUPREME COURT NOMINEES* (1999).

27. See generally MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2000).

28. Earlier threats of impeachment had been directed against President John Tyler and President Andrew Jackson.

to face removal for his understanding and deployment of the prerogatives of his office. As one can see, the magnitude of the crisis seems to have diminished with each of the episodes, so the greatest controversy arises with Johnson because of the great stakes involving the balance of power, followed by the serious conflict between Nixon and Congress culminating in his resignation, and the more tepid conflict – tepid, i.e., by relative comparison – of the Clinton impeachment ordeal.

At what point does a judicial or political crisis transform into a constitutional crisis? My answer is only rarely. I understand a constitutional crisis to arise when conflicting authorities recognize the limits of the Constitution, i.e., when contending authorities find or acknowledge that the Constitution provides no answer to the controversy at hand. A constitutional crisis is not necessarily the result of the joining of judicial and political crises. A constitutional crisis is not just a serious conflict among the leaders of national political institutions, or between the courts and the political branches, but rather a special circumstance in which political leaders recognize that the Constitution provides no guidance and no adequate process for resolving the political crisis at hand.

Where have we seen such crises? I suggest two examples here. The first is that slavery precipitated a political crisis that ultimately transformed into a constitutional crisis when the Southern states seceded from the Union. Secession presented the President and the Congress with a problem for which the Constitution had no answer.<sup>29</sup> It came about in part because of the President's and Congress' refusal to back down in trying to contain or get rid of slavery in spite of *Dred Scott v. Sandford*.<sup>30</sup> Hence, *Dred Scott* precipitated a judicial crisis that helped to transform an ongoing political crisis over slavery into the constitutional crisis of secession. I do not think *Dred Scott*, standing alone, constituted a constitutional crisis, because political authorities who disagreed with it were not unfamiliar with how to deal with constitutional decisions with which they disagreed. Lincoln, for instance, simply refused to acknowledge the decision as legitimate and thus to enforce it.<sup>31</sup> In doing so, he took a path previously trod by his predecessors in office who

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29. Compare 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) and MARK V. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

30. 60 U.S. 393 (1856).

31. See generally *id.*

had fought to protect a president's right to disagree with the Supreme Court and avoid compliance with it, if at all possible.<sup>32</sup> There were, however, no adequate constitutional mechanisms available to solve secession.

Another example of a constitutional crisis occurred in 1800 when Thomas Jefferson and Aaron Burr received the same number of votes in the Electoral College.<sup>33</sup> While they (and their supporters) knew which had run as president and vice-president, and thus which should have been considered the victor in the presidential election, Burr's refusal to acknowledge the obvious forced the House of Representatives to resolve which of the two men was president. In making this decision, the House received no guidance from the Constitution or historical practices. While the House voted ultimately to designate Jefferson as President (after several attempts), the confusion, discord, and uncertainty generated by the tie vote in the Electoral College between the top two Republicans running in the election precipitated a movement to amend the Constitution, culminating in the Twelfth Amendment.<sup>34</sup>

### III. THE BIG PICTURE

The framework I have proposed for clarifying different kinds of crises in our constitutional system is incomplete. At the very least, further clarification of the relationship among these different kinds of crises – and the implications of these relationships for written constitutionalism – are necessary. First, judges lack the means to solve genuine political crises, and national political leaders can be instrumental in helping to resolve judicial crises. On the few occasions when courts have triggered crises, judges have had to rely on the political process ultimately to resolve them. I can think of no judicial crisis that courts have settled on their own. Even when courts have been called upon to resolve political crises, they have failed to do so. Dred Scott is the most spectacular example of such a failure; it exacerbated rather than helped to resolve the crisis over the future of slavery in the United States.<sup>35</sup> Again, Dred Scott

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32. One obvious model for Lincoln was Andrew Jackson's veto of the Second National Bank.

33. See TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT* (1994).

34. David P. Currie, *Post-Originalism, The Constitution in Congress: The Jeffersonians*, 68 U. CHI. L. REV. 1089 (2001).

35. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN*

helped to push the political crisis over slavery into a constitutional crisis.

Nor can I think of a political crisis that courts have resolved. When political crises have been resolved short of a constitutional crisis, it has not been by courts but rather by political leaders operating within the Constitution's intricate system of checks and balances. Political crises are resolved through accommodations however difficultly achieved through existing constitutional mechanisms. In other words, political crises can be resolved by political leaders who struggle amongst themselves until a political rather than a judicial solution is achieved. The political ill-will generated by the Alien and Sedition Acts ended not because of anything courts did, but rather because of the actions of national political leaders.<sup>36</sup> President Lincoln's unilateral suspension of habeas corpus was undoubtedly a dubious act, which Chief Justice Taney condemned as lawless;<sup>37</sup> however, its ratification by Congress very shortly thereafter clarified its legal basis even if the ratification did not fully resolve the political fallout.<sup>38</sup> Andrew

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AMERICAN LAW AND POLITICS (2001).

36. See JOHN CHESTER MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* (1951).

37. *Ex parte Merryman*, 17 F. Cas. 144 (1861).

38. The fact that Congress ratified Lincoln's action was not of course the end of the matter. Indeed, the fact that Congress and the President ultimately joined together to support suspension of habeas corpus illustrates another kind of political crisis that has the distinct potential to transform into a constitutional crisis. This situation arises when national authorities join together to retaliate against some relatively defenseless segment of the population. This situation entails, in other words, a conflict between national authorities on the side and a relatively powerless constituency or group on the other. A prime example of such a conflict is the internment of Japanese-Americans in World War II. Federal military and political leaders put together the internment plan with little or no evidence in support, but the Supreme Court ratified it in a closely divided opinion. See *Korematsu v. United States*, 323 U.S. 214 (1944). With political and judicial authorities unified against them, the incarcerated Japanese-Americans had no recourse left – the Constitution was literally of no avail to them until well after the War. A 1980 Act of Congress established a Commission on Wartime Relocation and Internment of Civilians to study the Japanese relocation during World War II. The Commission concluded, "The promulgation of Executive Order 9066 [which the Court had upheld in *Korematsu*] was not justified by military necessity, and the decisions which followed from it [were] not driven by analysis of military conditions. The broad historical causes which shaped [the exclusion decisions] were race prejudice, war hysteria, and the failure of political leadership. [A] grave injustice was done." Report of the Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 18 (1982). In 1984, a federal district court relied on the Commission's findings in granting a writ of coram nobis and vacating the conviction of Fred Korematsu, the original defendant in *Korematsu*. See *Korematsu v. United States*, 584 F.Supp. 1406 (N.D.Cal. 1984). In 1988, President Reagan signed legislation formally acknowledging injustices imposed by the internment and providing for the payment of reparations.

Johnson and Bill Clinton did not challenge their impeachments in court but rather relied upon the constitutional process to absolve them.

Courts also played no significant role in resolving the political and constitutional questions triggered by the Korean, Vietnam, and Persian Gulf Wars.<sup>39</sup> Courts also will likely not have a significant role in settling some fundamental questions arising in the recent against terrorism, such as the legitimacy of President Bush's executive order authorizing military tribunals for some non-citizens charged with terrorist activities against the United States. It is too soon otherwise to predict the outcomes or the significance of the cases challenging some aspects of the conditions, such as the secrecy, under which some people are being detained by the federal government in the war on terrorism.

While the Watergate tapes case clearly weakened the political opposition to Nixon's impeachment,<sup>40</sup> it would be wrong to think that it resolved the political conflict between Nixon and the Congress. As Gerald Gunther suggests, democratic institutions were proceeding methodically to deal with Nixon's misconduct separate from and without judicial intervention.<sup>41</sup> These institutions were not looking to the courts for help or reinforcement. Moreover, Gunther suggests that this fact indicates there really was no genuine crisis provoked by the movement to impeach Nixon. Had Nixon not resigned, there is every indication that Nixon would not only have been impeached but there would also have been little doubt the Senate would have removed him.<sup>42</sup> The impeachment effort against Nixon had

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Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. app. § 1 (1989)). It is conceivable that in the framework I have suggested that the exclusion and internment of Japanese-Americans constitute a constitutional crisis because clearly the Constitution provided no adequate mechanism to protect the Japanese-Americans on the West Coast from the "historical causes" cited by the Commission on Wartime Relocation and Internment of Civilians. More precisely, the lapses and failures that led to the exclusion and internment of Japanese-Americans during World War II could be understood as a crisis in which national political, military, and judicial authorities joined together to deprive them a constitutional remedy for the damage done to them.

39. The legality of each of these "wars" was greatly debated during their respective durations, and continues to raise questions about where they fit within the constitutional framework. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY* (1993).

40. *Kutler v. United States*, 423 U.S. 959 (1975).

41. Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 20 UCLA L. REV. 30 (1974).

42. Richard Posner suggests, however, had Nixon been willing to place himself at the mercy of the American people immediately after the Watergate break-in he might

a momentum separate from the judicial process.

The Jefferson administration's attempted employment of the impeachment power to create vacancies in the federal judiciary posed a different kind of political crisis.<sup>43</sup> It did not just begin, simply enough, from one judicial decision (or one judge's actions), but rather the crass desire to use impeachment to get rid of "unfit" judges apparently defined in such a manner as only to apply to Federalist judges. This deployment of impeachment came to a head when the House impeached but the Senate failed to convict Associate Samuel Chase for various judicial acts, including providing assistance to prosecutions of Republicans under the Alien and Sedition Acts passed with the backing and approval of the Adams administration.<sup>44</sup> Chase's impeachment was a political crisis because it threatened to transform the impeachment power into a mechanism to unseat a justice for his conduct on the bench. In other words, Chase's impeachment was a political crisis in which the independence of the judiciary hung in the balance.<sup>45</sup>

It is tempting to perceive the New Deal crisis as not fitting within the pattern of political crises I have sketched.<sup>46</sup> It is possible that, by taking a more deferential stance toward economic regulations, the Court helped to defuse the brewing controversy or crisis between it and national political authorities. There are, however, two reasons this perspective is wrong. On the one hand, there is every reason to think that the political institutions could or would have dealt with the Court's opposition to the New Deal. In time, President Roosevelt's appointees would surely have dominated the Court, at which point the Court would have shifted its positions on economic due process and Congress' Commerce Clause powers. On the other hand, there is still reason to think that the Court did back down under enormous political pressure not just from the Court-

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have deflected the impeachment action initiated against him. Richard A. Posner, *Dworkin, Polemics and the Clinton Impeachment Controversy*, 94 NW. U. L. REV. 1023 (2000).

43. See N. E. H. Hull & Peter Charles Hoffer, *Historians and the Impeachment Imbroglio: In Search of a Servicable History*, 31 RUTGERS L. REV. 473 (2000).

44. See William H. Rehnquist, *The American Constitutional Experience: Remarks of the Chief Justice*, 54 LA. L. REV. 1161, 1166-67 (1994).

45. See Stephen B. Presser, *Et Tu Raoul? Or the Original Misunderstanding Misunderstood*, 1991 BYU L. REV. 1475 (1991); Stephen B. Presser, *The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Constitutional Jurisprudence*, 84 NW. U. L. REV. 106 (1989).

46. Klarman, *supra* note 9, at 1751.

packing plan but perhaps more importantly from Roosevelt's overwhelming re-election in 1936 and the mid-term elections of 1938. It is credible to think one of the pivotal justices, Owen Roberts, was ultimately convinced to shift his own position on the propriety of economic regulation because of the signals sent by the election of 1936, in which the American people overwhelmingly re-elected Franklin D. Roosevelt based in part on his campaign against the Court.<sup>47</sup>

A second important clarification involves the causes for crises. The apparent triggers of a judicial crisis include, among others, a sharp ideological divide between the leaders of political and judicial institutions, a very serious social or economic conflict, and significant public and special interest opposition.<sup>48</sup> Interestingly, there is a clear pattern to the persistent retaliations undertaken by Congress against the courts: Democrats (as the party purporting to represent populists and minorities) have tended to mobilize against the decisions protecting economic liberties and property rights, while Republicans (as the party purporting to defend majority and business interests) have tended to mobilize against decisions that favor minorities or reduced majoritarian power.<sup>49</sup> Protracted or intense federalism and separation-of-powers conflicts turn to a significant degree on partisanship and conflicting desires to control the means to resolve some socially or politically significant conflict (involving, for instance, the national economy, civil rights, or national security).

Third, the framework I have sketched for understanding crises in constitutional law illuminates how the Constitution binds through its implementation. Many events have not risen to the level of a constitutional crisis because the contending parties have framed their arguments in constitutional terms and accepted that the Constitution provided a process for resolving their dispute. The electoral dispute of 2000 fits this picture perfectly, in spite of the outcries that it either came close to being a crisis or actually was a crisis.<sup>50</sup> It was not a judicial crisis, because (1) national political authorities did not resist or

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47. Compare Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 228-39 (1994), and Laura Kalman, *Law, Politics and the New Deal*, 108 YALE L.J. 2165 (1999).

48. See generally Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: the Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001).

49. See Nagel, *supra* note 18.

50. Klarman, *supra* note 9, at 1725-26.



retaliate against the decision and (2) state political authorities never had the opportunity to retaliate against the state court decisions. It was never a political crisis at least at the national level. This was unlike any of the previous electoral disputes of 1800, 1824, and 1876, all of which ended up in the House, one of which required a constitutional amendment,<sup>51</sup> and another of which produced the federal statutory mechanisms on which both Bush's and Gore's lawyers relied upon, and referred to repeatedly throughout the conflict.<sup>52</sup> In this dispute, national political leaders never had the chance to formally contest the outcome and thus it hardly qualifies as a political crisis. Since the dispute was not a political crisis, it never had the chance of becoming a constitutional crisis. No major political leader ever challenged either the federal courts' authority to resolve the conflict or claimed the Constitution provided no process for resolving the dispute. To the contrary, the major parties each claimed the law and the Constitution were on their side.<sup>53</sup> When the Court finally settled the dispute, no national political leaders suggested resisting it.

If the electoral dispute of 2000 was a crisis at all, it was almost entirely internal to our court system. At its most intense, it was a contest among federal and state judicial authorities, but there was never a question of which of these authorities reigned supreme.<sup>54</sup> Once the Supreme Court decided *Bush v. Gore*,<sup>55</sup> the debate was not about whether the Supreme Court could overturn a state court judgment (settled since *Martin v. Hunter's Lessee*<sup>56</sup>), but rather whether the Court exercised its lawful authority properly in the facts of this case.

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51. U.S. CONST. amend. XII.

52. See Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 974 (2001).

53. Indeed, the parties were determined to cast their arguments in the manner least offensive to the Constitution. At every step, Bush's and Gore's respective advocates maintained in state and federal courts that the Constitution and relevant statutory provisions favored their positions. Before the Supreme Court, the prevailing side argued, for instance, that the Court's precedents on voting rights as well as the applicable federal statute supported both the Court's jurisdiction and the overruling of the state supreme court's decision favoring Gore. No matter what one thinks of *Bush v. Gore*, the parties claimed constitutional legitimacy, including precedents, for everything they argued and did. Even if you disagree with some of those precedents (as I am sure some of the justices and even some of Bush's lawyers did), their disagreement did not preclude them from relying on those precedents as a legitimate basis for the ultimate decision.

54. See *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

55. 531 U.S. 98 (2000).

56. 14 U.S. 304.

Even at the time the decision came down, roughly half of the country and almost all political authorities largely fell behind it.<sup>57</sup> Subsequent developments, particularly the war against terrorism, increase the odds against political retaliation against the Court for its decision.

In the wide range of conflicts that fall short of a constitutional crisis, the structure of the Constitution operates as an imposing force. For instance, the supermajority vote requirement for removal of impeached officials imposes such a high hurdle on removal that it cannot be too surprising to find that only about half of the officials impeached in our history have also been removed.<sup>58</sup> In other words, the supermajority vote requirement helps to stack the deck against removal. Thus, there was never a serious question about whether the Senate would ever remove Clinton from office for his misconduct related to Monica Lewinsky.

The structure also provides the means by which the political branches can correct (or at least try to correct what they regard as) judicial errors. The Constitution provides a wide variety of mechanisms that they have used to redress or retaliate against the Court's mistakes. We saw how quickly political leaders reacted to correct what they perceived as the error of *Chisholm v. Georgia*.<sup>59</sup> In the aftermath of *Roe* we have seen presidents deride the decision, call for its overruling, support legislation designed to weaken it, and seek to appoint justices who would overturn (or at least severely limit) it; members of Congress, particularly senators, question its legitimacy and propose both amendments and different kinds of jurisdictional limits to overturn or limit the damage of the decision; and at least four justices prepared to overrule *Roe*.<sup>60</sup> In other words, the critical response to *Roe* has fastidiously tracked constitutional procedures.

The structure's impact is evident from a survey of the political crises generated by the electoral disputes of 1800, 1824, and 1876. In 1800, national leaders were vexed at the omissions of the original Constitution, and their solution was to change the Constitution.<sup>61</sup> In 1824, the failure of any of the major

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57. See Klarman, *supra* note 9, at 1748; Friedman, *supra* note 48, at 1448.

58. See Michael J. Gerhardt, *The Special Constitutional Structure of the Federal Impeachment Process*, 63 LAW & CONTEMP. PROBS. 245 (2000).

59. 2 U.S. 419 (1793).

60. See Klarman, *supra* note 9.

61. U.S. CONST. amend. XII.

presidential candidates to get a majority of electoral votes led to a proceeding in the House in which, Andrew Jackson claimed, John Quincy Adams entered into a "corrupt bargain" with Henry Clay to steal the election.<sup>62</sup> Jackson took his case to the American people, who heard his message and overwhelmingly elected him to the presidency in 1828. In that circumstance, there was no need to change the Constitution, because it provided the political means by which Jackson could seek redress. In 1876, there were serious questions about the outcomes of close votes in some states (including Florida) forcing the House back into the position to resolve the disputes. Relying on the constitutional language empowering each chamber of Congress to adopt appropriate procedures to implement their respective authorities, the House appointed a special commission, which rendered a rather dubious opinion about how disputed electoral votes should be counted. Samuel Tildren graciously accepted the commission's vote, while Rutherford B. Hayes agreed to serve only one term as a means to quiet discontent over the decision. Hayes agreed further to cut a deal with Southern Democrats to end Reconstruction in exchange for their not challenging further the commission decision. There was nothing extra-constitutional about these measures.

To the contrary, these informal agreements were arranged within the checks and balances set forth in the Constitution. A genuine constitutional crisis was ultimately averted because the checks and balances of the Constitution proved adequate to force the disputants into a peaceful resolution of their conflict. In other words, political crises present prime opportunities to measure the extent to which the Constitution's checks and balances can force parties into accommodations. When the parties to a dispute make recourse to existing constitutional mechanisms to resolve their differences, there is plainly no constitutional crisis.<sup>63</sup> When the parties are unable to work out their differences through existing checks and balances, a constitutional crisis is likely to ensue.

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62. See generally 2 ROBERT VINCENT REMINI, *THE COARSE OF AMERICAN FREEDOM, 1822-1832* (1998); HARRY L. WATSON, *LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA* (1990); PAUL C. NAGEL, *JOHN QUINCEY ADAMS: A PUBLIC LIFE, A PRIVATE LIFE* (1999).

63. For example, the Bush administration claims no novel authority for what its most aggressive actions in combating terrorism have been. It relies on Supreme Court precedent and prior presidents' executive orders to support its authority. In attempting to reconcile its actions with the Constitution, they implicitly ratify the existing constitutional order.

The dynamic in a genuine constitutional crisis is, however, radically different from those of judicial and political crises. It is here that the limits of written constitutionalism have been not only reached but also exceeded. This is the rare circumstance in which the contending parties recognize that the Constitution provides no answer to their dispute or even the means, as it exists at the time of their dispute, by which to resolve it.

Consider, again, the example of secession. The contending sides clearly had their respective arguments, many of which were claimed to have been grounded in the Constitution or some authoritative source of constitutional meaning. The difficulty was that the sides could not agree on how, or even whether, the Constitution provided the means by which to resolve their different views on the constitutionality or legitimacy of secession. Secession was the culmination of the failure of either political or judicial authorities to settle the legitimacy and future of slavery on then existing constitutional terms. There simply was no common or middle ground left for the major disputants to settle their fundamentally different visions of the Constitution, including the nation's and states' respective authorities under it. The middle ground of course would have to have been something grounded in or consistent with the Constitution, but none was ever found.<sup>64</sup> Hence, it is only in the rare circumstance of a constitutional crisis, as I have defined it, that the Constitution is of no avail. And that is precisely the point, for the crisis is the anxiety and conflict generated by the recognition that the Constitution cannot, and does not, solve the crisis facing the country.

A final clarification involves the relationship between the framework I have suggest for analyzing crises in constitutional

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64. One could argue, I suppose, that the efforts of national political leaders from the 1840s until Lincoln's election had been attempting in vain to find such common ground. The Missouri Compromise, the Great Compromise of 1850, and the Kansas-Nebraska Acts conceivably could each be characterized as political attempts to reconcile the conflict over slavery and states' rights under the Constitution. It was, however, clear by the time Lincoln was preparing to take office that political authorities had lost hope in any peaceful, political solution to the problem of slavery. Less than a week before Lincoln took office, the House and the Senate had passed a constitutional amendment to prohibit an end to slavery. The amendment provided, "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." J.Res. 13, 36th Cong., 2d Sess., 12 Stat. 251 (1861). The idea behind the amendment was that the process of amendment had become futile to deal with the crisis over slavery. Most leaders expected war to come by that point no matter what Lincoln or anyone else tried.

law and another possible crisis in constitutional law.<sup>65</sup> In 1996, Professors Mark Tushnet and Louis Seidman of Georgetown declared that there was a crisis in constitutional theory because it had lost its way.<sup>66</sup> They expressed concern that civility in academic discourse about the Constitution no longer seemed possible. They also worried that constitutional theorists had become too preoccupied with courts and not enough with the quality of the decision-making of the political branches. Not long thereafter, several judges and other prominent scholars denounced a growing divide between constitutional theory and practice.<sup>67</sup> They complained that constitutional theory has become increasingly irrelevant to constitutional practice and particularly adjudication. Perhaps the most prominent critic of modern constitutional theory has been Richard Posner, who argues that constitutional scholars need to care less about dazzling each other and developing arcane specialities, and care more about mastering inter-disciplinary disciplines of much greater use to federal judges.<sup>68</sup> I suspect there are even many

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65. This conception of a constitutional crisis has important implications for the relationship between written constitutionalism and precedent. One important function of precedent, as I have explained it, is to facilitate commitment to the written Constitution. How is this possible? The answer is evident from our exploration of the nature of judicial, political, and constitutional crises and what transforms a judicial or political crisis into a constitutional crisis. A judicial crisis might exist in circumstances in which either the scope of the authority of the courts is indeterminate or courts are challenging the authority of the political branches on grounds unacceptable to them. Even in the latter circumstances, precedent serves to prevent the so-called judicial crisis from evolving into a political crisis or, worse, constitutional crisis. Even in the case in which the court faces a question of first impression, there might be precedent for the Court's exercising judicial review over a similar or analogous conflict. In this manner, precedent helps to diffuse anxiety over the Court's exercise of judicial review. Even if the Court exceeds its authority and triggers political retaliation or dissent, there is precedent for that: after *Dred Scott*, Lincoln, for instance, refused to defer ever again to the Court. If matters degenerate into a political crisis, precedent, broadly understood, may serve the important function or purpose of providing the hook by which authorities retain (and exhibit) their commitment to the written Constitution. A political crisis might, however, transform into a constitutional crisis when there is not only an absence of any salient judicial precedent but recognition of the absence of no helpful or meaningful prior experiences, practices, or traditions. A constitutional crisis is thus that rare circumstance in which the nation and the parties recognize the limits of written constitutionalism as reflected in the failures of any of the traditional sources of constitutional meaning, including precedent, to solve the crisis at hand.

66. See generally LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES* (1996).

67. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998).

68. Posner, *supra* note 67, at 10.

students who wonder what the point is of seemingly unending, increasingly clever academic efforts to resolve the counter-majoritarian dilemma. In addition, the fact that the academy is apparently dominated by political liberals interested in promoting judicial activism helps to exacerbate the divide between theory and practice, because most judges are much more inclined to vigorous judicial restraint.<sup>69</sup>

This divide is further exacerbated, Posner claims, by the general deterioration of academics' performances as public intellectuals.<sup>70</sup> The reasons for this deterioration are manifold, including the lure of notoriety of commenting on high-profile controversies as they are unfolding.<sup>71</sup> Several studies demonstrate the media's increasing penchant for soft news – reporting primarily consisting of commentary or speculation about scandal – rather than hard news – strictly focusing reporting data rather than opinions.<sup>72</sup> This penchant is a function of the growing pressure on news organizations to increase their audience shares by entertaining their viewers at least as much as informing them. The media by and large does not want academics because of their expertise but rather because of their ability to generate conflict and drama. The academics who can deliver become celebrities.

I agree with Judge Posner up to the point of blaming the academy for lacking norms by which to hold the legal scholars who debate themselves (and their profession) as celebrities or scandal-mongers in the media,<sup>73</sup> but the suggestion of a crisis is itself the problem. Contrary to Posner's assertions, the legal academy has plenty of mechanisms already in place to hold legal academics responsible as public intellectuals. The trick is to recognize and fortify each of these. First, the legal academy itself polices a good deal of academic commentary, so that academics who spend much time at all as public intellectuals are likely to receive evaluations from their colleagues as well as

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69. See generally J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1998).

70. Posner, *supra* note 67, at 4.

71. Posner, *supra* note 67, at 2.

72. See generally Michael J. Gerhardt, *Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals*, 60 MD. L. REV. 59, 96 (2001); BILL KOVACH & TOM ROSENSTIEL, *WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA* (1999) (explaining that in a "search to reclaim audience, the press has moved more toward sensationalism, entertainment, and opinion"); ROBERT WATERMAN MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (1999).

73. Posner, *supra* note 67, at 10.

their students. Posner's book is only one such example, as are the many articles Posner cites that have been written by law professors denouncing some of their colleagues' advocacy as public intellectuals.<sup>74</sup> Second, the media itself does more policing than perhaps we give it credit, particularly with respect to publicizing the possible conflicts-of-interest of some commentators. Several organizations dedicated to evaluating journalists' performances have recommended for some time that news organizations undertake more efforts to disclose their commentators' affiliations or biases. Third, while entrepreneurship is an important norm in the academy, its maintenance does not mean law professors cannot monitor their own public commentary.

Their challenge is not, as Posner suggests, somehow to employ the same methodology in different fora, for this would be impossible given the limitations and norms of different fora. Instead, the challenge for legal scholars is to meet the criteria for excellence in each of the different fora in which they participate. If scholars write editorials, then it is fair to hold them to the standards of professional editorials. If scholars become pundits, then of course we should be prepared to hold them to the standards (if there are any) of punditry. If scholars choose to comment in newspapers or the media as public intellectuals, then we should hold them to the standard of public intellectuals commenting in the media. And if scholars return to the academy and return to plying their trade there, then we should hold them to the standards of excellence in the fields in which they claim expertise.

If there is anything missing in these scenarios, it might be the failures of different fora to develop standards of performance. These failures are hardly irremediable. In the legal academy, standards are our stock and trade. Everything is graded, and everything is judged. So, I am not concerned and consider there to be no crisis if some legal scholars make outlandish comments outside of the academy. My primary job – indeed, the one I am trying to perform today – is to ensure that they do not repeat them here.

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74. It is interesting that in determining the people who should qualify as public intellectuals in his study, Posner does not consider polling experts in different fields about which of their members they might consider as public intellectuals.

## IV. CONCLUSION

I have intended to share with you some thoughts about the ways in which divisive constitutional issues get addressed, responsibly in my view, outside of the courts. To be sure, the courts, particularly with judges as skilled, disciplined, and honorable as Judge Browning, have served as an indispensable institution for implementing and clarifying the meaning of the Constitution in an important range of cases. But it would be shame, even perhaps a crisis I suggest, if we were to fail to recognize that the Constitution's continued viability requires the respect and adherence of all of those institutions and actors in whom it vests responsibility, including each of us. In the end, it is through maintaining all of the procedures authorized by the Constitution and respecting all of the Constitution's guarantees that full implementation of the Constitution takes place, and crises are averted.



