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THE CONSTITUTION OUTSIDE THE COURTS*

*Michael J. Gerhardt***

Fifteen years ago, Attorney General Edwin Meese gave a speech that sent shockwaves through the legal community. In the speech, Meese boldly claimed that the Supreme Court was not the final arbiter of constitutional meaning. He suggested there was a distinction between the Constitution, which was the supreme law of the land, and the Supreme Court's pronouncements on it, which were not. He explained, "If the Court's decisions really were the supreme law of the land, binding on all persons and governmental entities, including the Court itself, the Court would not be able to change its mind," and we would all be forced permanently to abide by the Court's "derelicts," such as *Dred Scott v. Sanford*, until or unless they were overturned by a constitutional amendment. Meese also acknowledged that the Court was not the only institution responsible for interpreting the Constitution: "[E]very official takes an oath precisely to" the same "effect." Meese's speech was widely viewed as a surprising assault on judicial supremacy—the Court's authority as the final arbiter of constitutional meaning—and consequently drew heated protests, including a rejoinder from Associate Justice William Brennan.

Fifteen years later, Meese's attack on judicial supremacy might seem to some as antiquated, quaint, perhaps irrelevant, and maybe even obvious. To others, it might be sacreligious. Fifteen years later, it might also seem ironic. For the debate over judicial supremacy persists with one major difference being that the parties have switched sides. Many scholars who defended judicial supremacy fifteen years ago now decry it, while many people who had defended Meese have stood silently by in a period in which the Court has tempted its critics by striking down nearly thirty federal laws in six years. The fact is that judicial supremacy is not a view unique to either liberals or conservatives. Our views on judicial supremacy seem to be inextricably linked to the extent of our agreement with the Court's reasoning, rulings, and direction.

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My purpose today is to consider what, if anything, has changed since Meese's speech, particularly with respect to our views on judicial supremacy and the Constitution outside the Court? Some things are clear. It is certainly true that in the fifteen years after Attorney General Meese's speech, we have had a considerable number of political developments and controversies: We have had four Presidents, replaced six justices on the Supreme Court, impeached and acquitted for only the second time in our history a President of the United States, watched the Supreme Court for the first time help to resolve a contested presidential election, had four very contentious confirmation proceedings on four nominees to the Supreme Court (including one rejected by the Senate, another forced to withdraw his nomination, yet another confirmed by the closest vote in the history of Supreme Court confirmations, and one other confirmed as Chief Justice by the closest vote ever for a successful nominee to the chief justiceship), had dozens of judicial nominees who had their appointments frustrated or impeded by a variety of actions in the United States Senate, added a new amendment to the United States Constitution, endured the most devastating domestic terrorist attack in our history, and have been engaged in two wars in the Middle East, with one more on the horizon. While these developments clearly support Meese's point—twenty of the twenty-one events to which I have referred involved critical constitutional decision making outside the Supreme Court—we have yet to assess just how either the notion of the Constitution outside the Court or Meese's target—judicial supremacy—has fared in the intervening period. The time is overdue to consider how the debate over judicial supremacy has evolved over the past fifteen years. How have our attitudes about either the Court or about the Constitution outside the Court changed? What have we learned about the great questions Meese dramatically discussed fifteen years ago?

These questions lead me tonight to consider several themes that have developed over the years relating to the evolution of our understanding of the Constitution outside the Courts. Each sheds important light on both the significance of constitutional interpretation by actors other than the Court *and* the state of contemporary constitutional theory.

First, we persist, for good reason, in having the United States Supreme Court as the institution we most closely associate with the Constitution. One reason is that no other institution seems to speak so regularly about constitutional matters as does the Court. It is not just that we have several hundred volumes of Supreme Court commentary on the Constitution. It is also that, as Attorney General Meese recognized, "the Court is the only branch that routinely, day in and day out, is charged with the awesome task of addressing the most basic and enduring political questions: What is due process of law? How does the idea of separation of powers affect the Congress in certain circumstances? And so forth." Others might go further to suggest that the Court as an institution is better able to make principled judgments about the Constitution than any of the other branches. Its members

reputedly have more time and expertise and more incentive to be impartial in addressing the great questions of constitutional law. They are insulated from direct political pressures because they have life tenure and are guaranteed undiminished compensation, and their duty is, in John Marshall's famous words, "to say what the law is." And if the law in question happens to be the Constitution, then it of course follows the Court has the duty to say what it means in any cases that fall properly within its jurisdiction.

Second, the fixation of our legal culture on the Supreme Court comes at a price, particularly the failure of legal scholars and perhaps the general public to still not consider very seriously how much and how well the other branches (and even state governments) deal with the Constitution. It is hard to overstate the range or significance of constitutional decision making that occurs outside the Court. To be sure, Attorney General Meese mentioned a couple of the more dramatic moments in our history in which presidents made critical constitutional pronouncements. In particular, he mentioned one of the most famous of these instances from our early history when President Andrew Jackson vetoed the Second National Bank. Even though the Supreme Court had upheld the constitutionality of the National Bank, President Jackson maintained both that Supreme Court precedent should not be confused with the Constitution and that as President he too had a responsibility to assert his constitutional views. President Jackson proclaimed:

Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. [Moreover,] the opinion of the Supreme Court . . . ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

It is not an exaggeration, I think, to say that every subsequent president has agreed with Jackson on the independent authority and responsibility of the President to interpret the Constitution.

Attorney General Meese did not mention the after effects of President Jackson's famous veto. It sent shockwaves through the political system, and triggered a series of other constitutional judgments outside the Court. To begin with, Jackson's veto succeeded in killing off the rechartering of the National Bank;

however, he still had to deal with the fact that the National Bank had a couple more years to operate under its initial charter. Consequently, Jackson undertook unilateral action to kill the Bank. He instructed his Secretary of the Treasury, William Duane, to remove all of the deposits from the National Bank and deposit them in state banks. Duane refused. He had concerns about the legality of the President's order. So, Jackson fired Duane, taking a firm stand on an unresolved constitutional issue about the President's authority to remove unilaterally an official confirmed by the Senate. Jackson, never one to back down, did not stop there. He asked his then-Attorney General, Roger Taney, to take over Duane's responsibilities as Treasury Secretary. Taney agreed, and wasted no time in implementing Jackson's plan to transfer National Bank deposits to state banks. Many senators were outraged. They retaliated against Jackson and Taney in several ways. They passed the first and only censure resolution ever against a president to denounce Jackson for trying to destroy the National Bank, which of course owed its existence to previously passed legislation and the Court's imprimatur. Jackson scoffed at the censure resolution, maintaining that if he had truly done something illegal, the proper remedy was to impeach and remove him from office, something he knew that the Congress lacked the fortitude and votes to accomplish. Meanwhile, the Senate rejected Taney's nomination as Treasury Secretary based in part on disagreements with the legitimacy of his implementation of Jackson's order. For good measure, the Senate rejected Taney's subsequent nomination to be an Associate Justice of the Supreme Court. When the dust finally began to settle, the Senate, under new leadership, expunged the censure resolution and affirmed Taney's nomination as Chief Justice of the Supreme Court.

The extraordinary battle over the National Bank was only one of many significant constitutional debates outside the Court that occurred in the nineteenth century. At the risk of trying your patience, I note only a few of the more heated disputes. For instance, during the presidency of Thomas Jefferson there were constitutional challenges over the continued legitimacy of the Alien and Sedition Act, the impeachment of Federalist judges, including Associate Justice Samuel Chase, efforts to abolish recently created circuit courts, Aaron Burr's treason trial, battles with the Tripoli pirates, the Louisiana Purchase, and the legitimacy of a presidential trade embargo authorized by statute. In addition, the Constitution was amended to include the only constitutional amendment passed between Jefferson's presidency and the end of the Civil War, namely, the Twelfth Amendment, which had been ratified to fix a defect in the presidential electoral process that had forced the House of Representatives to confirm Jefferson's election as President. Other constitutional controversies continued apace under Jefferson's successors through the first half of the century, as the nation faced the War of 1812; the Missouri Compromise and the Kansas-Nebraska Act (both raising serious questions about Congress's authority to condition admission of states on measures that it could not impose directly); the set of internal improvements dubbed "the American system"

(which were Henry Clay's aggressive legislative program to promote a stronger and more integrated national economy); continued disputes over Congress's authority to condition the entry of new states into the Union; and the war against Mexico. In a wonderful new book on this period, David Currie suggests:

Look not to the judges, who, like blossoms at the whim of the capricious butterfly, pollinate the constitutional fields now and then according to the vagaries of litigation. [Instead, g]o to school . . . with Presidents, with Cabinet ministers, with members of Congress, who grapple with constitutional conundrums every day, in every action they contemplate, in every exercise of their official function.

Of course, constitutional decision making outside the Court hardly ended there. We are probably all familiar with the constitutional challenges during the Civil War period, including the President's inherent authority to take extreme measures to counter a domestic emergency, such as unilaterally suspending habeas corpus and deploying and managing Union forces in the absence of a formal declaration of war. There was also of course Reconstruction, including hard questions about whether (and how) the Southern states might have to be readmitted into the Union and the conditions, if any, under which to recognize the legitimacy of Southern governments; Congress's authority to pass progressive civil rights legislation under the Thirteenth Amendment; the proper scope and substance of both the Fourteenth and Fifteenth Amendments; the impeachment and trial of a President of the United States for not complying with a law passed over his veto, one that he considered to be unconstitutional; the legitimacy of using special prosecutors to investigate and prosecute corrupt officials in the Grant Administration; the Electoral Crisis of 1876; the assassinations of two presidents—Abraham Lincoln and James Garfield; the necessity and legitimacy of Civil Service Reform; economic depression; and national authority over territories owned by the United States.

Things hardly died down during the first three-quarters of the twentieth century. The list is practically endless, but includes, among many other things, two world wars, three presidential assassinations (as well as the premature death of another president early in his term), another national depression, the fashioning of a national economic recovery program, mass industrialization, several undeclared wars, several controversial treaties negotiated by but rejected by the Senate, the appointments of seven chief justices of the Supreme Court, the rise of the civil rights movement, women's suffrage, the defeat of the Equal Rights Amendment, the addition of eleven new amendments to the Constitution, the rejection of three nominees to the Supreme Court, the development of unilateral executive agreements, and the forced resignations of one Supreme Court Justice and a President of the United States. In these and many other matters, the Court played no role; the critical constitutional judgments were made outside the Court. These are

just the tip of the iceberg, for there have been other actions throughout this period, as was the case throughout the nineteenth century, when presidents and members of Congress have made constitutional judgments, including but not limited to presidents' pardon decisions, presidents' proposing national legislation, presidents' vetoing legislation, the deliberations of members of Congress over the standards for impeachment and removal, representatives' and senators' votes for and against legislation, presidents' negotiating treaties, senators' determining whether to ratify treaties, presidents' standards for nominations, senators' determinations of the standards for confirmation, presidents' standards for removing executive officials, the Congress's standards for approving international agreements made by means other than treaties, presidents' under-enforcement of federal laws and executive orders, the Congress's decisions on how to discipline its own members for their misconduct in office, and the uses of military force without declarations of war.

The third theme to consider in the aftermath of Meese's speech is the significance of all this constitutional decision making outside the Court. A question, long ignored by theorists, is how to evaluate the constitutional decision making of the other branches. Here, I want to offer a few different frameworks within which to evaluate such decision making. The first is to place such decision making within one of three categories—the first is decision making that is subject to judicial review, the second is decision making not subject to judicial review, and the third is decision making to which the courts show great deference. In the first category, members of Congress and the President recognize judicial precedents as persuasive authority, but do not necessarily loosen their commitment to interpreting the Constitution as each sees fit. In this category, it is important to recognize that the choice about following judicial precedent is, in my judgment, a pragmatic one. The question is not necessarily whether political authorities must proceed, but the choices members of Congress make on how to expend their resources given the likelihood of a conflict with the courts. Take, for instance, the congressional response to the Court's decision in the late 1980s to strike down a Texas statute prohibiting the burning of the American flag. The conventional wisdom is that Congress passed a statute knowing that it would be struck down by the Court, and thus only did so to pander to its constituents with the knowledge that there was no real risk the statute would ever become law. I think the conventional wisdom gets it wrong. It is equally, if not more plausible, that members of Congress asserted their own views on the First Amendment. They had every right to disagree with the Court's judgment on the extent to which the First Amendment protected flag burning and acted accordingly. In so acting, the members of Congress demonstrated an important dynamic in our constitutional system in which they are responding to the Court and working towards change in constitutional law.

In each of these three categories, but especially the second one, we can see presidents and members of Congress develop their own methods of interpreting the

Constitution. These methods are not necessarily the same as courts use, but in my view they are no less legitimate. For instance, the practice of each institution not just to take Supreme Court precedent as persuasive authority, but also to develop their own precedents or traditions. In practice, one finds that presidents and members of Congress have not restricted themselves strictly to a single source, such as original understanding. Instead, presidents and members of Congress have treated evolving practice and custom as a significant source of constitutional meaning. For instance, James Madison as President justified supporting the National Bank precisely on the ground that three decades of acceptance had rendered the institution legitimate. The practice followed by Madison and several of the other framers, such as Alexander Hamilton, was to make constitutional judgments based on history, but not strictly the framers' and ratifiers' original understanding. To the contrary, their approach was, as my friend Marty Flaherty describes it, "experiential." He explains that, before Madison, Hamilton had extolled this method, urging in *The Federalist Papers*, "Let experience, the least fallible guide of human opinions, be appealed to for an answer to these [constitutional] questions." Hamilton illustrated what he meant by seeking to distinguish relevant historical successes from failures in surveying how almost a dozen different jurisdictions, foreign and domestic, modern and ancient, had dealt with similar questions.

The third category is perhaps best exemplified by the current war on terrorism. Just as courts played no significant role in resolving the political and constitutional questions triggered by the Korean, Vietnam, and Persian Gulf Wars, the odds are they will not play a decisive role in shaping the Administration's antiterrorism initiatives and measures. While there have been some lower court decisions challenging some of the policies of the Administration to maintain secrecy in some areas (such as immigration hearings) for the sake of protecting national security, none of them comes anywhere close to the heart of the Administration's agenda. Instead, the antiterrorist measures enacted by Congress and implemented by the President have each followed critical constitutional judgments by the leaders of both branches on the scope of the authority of both Congress and the President to thwart domestic terrorist activities. In reaching these judgments, our leaders again have not looked to original understanding, but rather to our national experiences with arguably similar threats in the past. They have searched for reliable evidence of our traditions in the face of domestic threats to our national security, whether they arise in declared wars such as World War II or undeclared wars such as the Civil War.

Beyond these categories, we can measure the impact of constitutional decision making outside the Court on the development of constitutional law. One, often under appreciated fact is how much the Court depends on the support of the other branches to solve crises in constitutional law. Indeed, the Court has never resolved a

genuine crisis in constitutional law without the help or support of the other branches.

To appreciate the significance of the political branches to the implementation of the Constitution, one should consider how different crises in constitutional law are handled. The first to consider is a judicial crisis, which arises not when there is a conflict between the Court and political authorities, but when political authorities persistently 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*—was so unpopular that it took literally a matter of days for the decision to be overturned by a constitutional amendment. While the *Chisholm* decision provoked some controversy, the controversy subsided almost as quickly as it arose.

A better candidate for a genuine judicial crisis is the resistance to, and retaliation against, the Court's decision in *Brown v. Board of Education I*. The Southern Manifesto, and other acts of defiance and protest, followed almost immediately after the decision came down. 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.

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 twentieth century. This period covers both the *Lochner* era and the New Deal era. In the *Lochner* era, or the period from 1893 to 1924, Congress considered twenty proposals to curb the federal courts' jurisdiction in retaliation against the Court's perceived activism. In the remarkably brief period from 1935 to 1937, Congress considered thirty-seven bills proposing to curb the jurisdiction of the federal courts. During his first term, President Franklin D. Roosevelt and other Democrats publicly criticized the Court's rulings striking down several New Deal measures. 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*] incited a firestorm of criticism." 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. 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."

Yet another possible judicial crisis has been engendered by *Roe v. Wade*. 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. 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.

A second kind of crisis is political. I submit 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. 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), but he was the first to be impeached, and thus 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.

The third kind of crisis is constitutional. 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. It came about in part because of the President's and Congress's refusal to back down in trying to contain or get rid of slavery in spite of *Dred Scott v. Sandford*. 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. In doing so, he took a path previously trod by his predecessors in office who had fought to protect a President's right to disagree with the Supreme Court and avoid compliance with it, if at all possible. 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. 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.

It is telling that the Court has not been able to resolve political crises on its own. To begin with, judges lack the means to solve genuine political crises, and national political leaders are 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: For instance, it was not until all three institutions of the national government fell into line behind the Court's decision mandating the end of segregation in public schools, did the resistance break down. By then, *Brown* had gone for more than a decade without full implementation in the deep South. 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. Again, *Dred Scott* 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 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. Andrew Johnson and Bill Clinton did not challenge their impeachments in court, but rather they relied upon

the constitutional process to absolve them. 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. President Lincoln's unilateral suspension of habeas corpus was undoubtedly a dubious act, which Chief Justice Taney condemned as lawless; however, its ratification by Congress very shortly thereafter clarified its legal basis even if the ratification did not fully resolve the political fallout.

The fact that Congress ratified Lincoln's action was not of course the end of the matter. 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 one 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. 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.

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*. In 1988, President Reagan signed legislation formally acknowledging injustices imposed by the internment and providing for the payment of reparations. 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.

Contrary to the protestations of many law professors, *Bush v. Gore* was not a crisis in constitutional law. The case involved a conflict between federal and state judicial authorities, but there was never a question of which of these authorities reigned supreme. Once the Supreme Court decided *Bush v. Gore*, the debate was not about whether the Supreme Court could overturn a state court judgment (settled since *Martin v. Hunter's Lessee*), but rather whether the Court exercised its lawful authority properly in the facts of this case. Even at the time the decision came down, roughly half the country and almost all political authorities largely fell behind it. Subsequent developments, particularly the war against terrorism, have increased the odds against political retaliation against the Court for its decision.

While the Watergate tapes case clearly weakened the political opposition to Nixon's impeachment, it would be wrong to think that it resolved the political conflict between Nixon and Congress. As Gerald Gunther suggested, democratic institutions were proceeding methodically to deal with Nixon's misconduct without waiting for judicial support. Moreover, he suggested that this fact indicates there was no genuine crisis provoked by the movement to impeach Nixon. Had Nixon not resigned, there is every indication that he would not only have been impeached, but there would also have been little doubt the Senate would have convicted and removed him. The impeachment effort against Nixon had 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. 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 to apply only to Federalist judges. This use of impeachment came to an end when the House impeached, but the Senate acquitted, Associate Justice Samuel Chase for various acts, including assisting prosecutions of Republicans for violating the Alien and Sedition Acts passed with the backing of the Adams Administration. Chase's impeachment was a political crisis because it threatened to transform impeachment power into a mechanism to unseat a Justice for actions that could be remedied on appeal. It was a political crisis because judicial independence hung in the balance, but it was resolved by political will.

It is tempting to perceive the New Deal as not fitting within the pattern of political crises I have sketched. It is possible that, by taking a more deferential stance toward progressive economic reform, the Court helped to defuse the brewing controversy or crisis between it and national political authorities. There are, however, two reasons this view is mistaken. First, there is every reason to think that

the political institutions would have dealt with prolonged judicial resistance 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 the scope of Congress's Commerce Clause Power. Second, there is still reason to think that the Court backed down under enormous political pressure not just from the Court-packing plan, but also Roosevelt's overwhelming reelection in 1936 and the mid-term elections of 1938. It is credible to think that one pivotal Justice, Owen Roberts, was convinced to shift his position on economic due process because of the signals sent by Roosevelt's landslide reelection based in part on his campaign against the Court.

When the Court makes mistakes, we should keep in mind the Court's fate will likely depend more on the Constitution outside the Court than on anything the Court does. The structure of the Constitution 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*. 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 are prepared to overrule *Roe*. In other words, the critical response to *Roe* has fastidiously tracked constitutional procedures.

The impact of the constitutional structure 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. In 1824, the failure of any of the major 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. 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 Tilden 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 in a political crisis into a peaceful resolution of their conflict. 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. When the parties are unable to work out their differences through existing checks and balances, a constitutional crisis is likely to ensue.

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. 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.

The fourth and final set of developments after Meese's speech that I wish to consider has to do with another forum, outside the Court, in which the Constitution figures prominently. Here, I refer to the significance and quality of public discourse about the Constitution. My concern here is with citizens' talk about the

Constitution. People discuss the Constitution at home, in school, and at work. The Constitution is also discussed in newspapers and on television, radio, and the Internet. No one has measured the quality or extent of this discussion, but surely it helps to give substance and shape to public attitudes reflected in polling and in social norms that guide public policy.

My own profession contributes significantly to this discourse, though its contributions are not without problems. The problems are evident in two developments in how constitutional theorists treat the Constitution. I consider these important because nowhere outside the Court is the Constitution more frequently debated, analyzed, and probed than the halls of legal academia.

The first development of note is the growing skepticism of constitutional theorists that the federal judiciary serves a meaningful counter-majoritarian function. For example, one problem with the structure of our federal courts, particularly the Supreme Court, is that as an institution it is not sufficiently insulated from the problem of partisan entrenchment. By the problem of partisan entrenchment, I mean the risk that a President can appoint a number of justices who will serve on the Court long after the President that appointed them has left office, the political party whose views they reflect might have lost political favor, and the people of the United States perhaps have concluded that they would prefer for justices to reflect different views on the Constitution. Recall that John Marshall was the last Federalist appointed to the Supreme Court. He served on the Court long after his Federalist Party expired, and to his critics, sought to advance, through his rulings, the long discredited views of his long dead party. Recall further after Roosevelt and Truman appointed eleven justices between them, the New Deal outlook they each reflect had perhaps become antiquated. We are, however, stuck with the justices in spite of these changes.

The attack on the Court as a genuinely counter-majoritarian difficulty also takes another tack. Several scholars have suggested that the Supreme Court is not necessarily a counter-majoritarian institution, in that its decisions largely, if not almost entirely, track majoritarian sentiments and preferences. The presumption of these scholars is that constitutional decision making outside the courts exercises a significant degree of influence over the functioning of the Supreme Court. It might be instructive to examine in greater detail the form and content of such constitutional discourse.

The second noteworthy development relates to the objective of constitutional scholarship. Just what is its purpose? This is not merely an academic question. For it comes up not just here but in confirmation hearings, like those held last week for one of your next distinguished visitors Michael McConnell, whom President Bush nominated to the United States Court of Appeals for the Tenth Circuit. Throughout his hearings, McConnell was pressed to explain how his strong criticism of some prominent Supreme Court precedents, particularly *Roe v. Wade*, could be reconciled

with his obligation as a federal judge not to have prejudged the questions likely to come before him. He was pressed hard to reconcile with his duties as a judge his praise for a lower court judge's refusal to abide by the Court's decision in *Roe v. Wade*. He suggested in response that his praise had been given with tongue in cheek, and that in fact it was intended as a mild rebuke. More generally, he acknowledged that on some issues his thinking had evolved while on many others he had taken provocative positions because that is how the academic game is played, it is how to make a name for oneself and provoke further discussion.

Without disagreeing with soon-to-be Judge McConnell, I suggest that his provocative scholarship is also a major, even perhaps the major, reason for his nomination to a federal court of appeals. When another federal appellate court nominee suggested his provocative comments before the Federalist Society were not necessarily reflective of his genuine views on the subject on which he was commenting—the Commerce Clause—his answer seemed rather disingenuous. For there can be no doubt that the comments themselves got the attention of the people in the White House, which nominated him to his current position.

The distancing of nominees from their writings raises some serious questions. I hasten to add that it is natural and laudatory for a person's views and thinking to evolve over time, not unlike James Madison who moved from opposing the National Bank early in his career to accepting it as President of the United States. That is not bad company to keep. It is especially important that a judge be capable not just of self-criticism but open to differing views and to having those views shape his own thinking on the issues that come before him. But the distancing nevertheless raises questions about what the purpose of constitutional theorizing is and particularly how other people are to rely on it.

The conventional view is that theorists had at least two missions. The first was to speak the truth, i.e., simply to probe and analyze the issues as thoroughly as they could and call them as they saw them. The second was to speak truth to power, i.e., to give to governing authorities the theorists' best thinking on the subject in question. Yet another mission that has been undertaken with increasing zeal over the years has been advocacy, i.e., writing an article or book that effectively serves as a brief for one side or another on an important question of constitutional law. Yet, Professor McConnell's comments suggest still other missions. One seems to be either to entertain or amuse, perhaps with some instructive objective in mind. One objective seems to be provocative, not for the sake of clarifying the truth or speaking truth to power, but merely to get ahead, merely for self-aggrandizement. When one reads an article, say, by Professor McConnell or anyone else for that matter, it is hard now to know how seriously to take them. Should judges be prepared to rely on seemingly meticulous research in an article or should they or their clerks check the research on their own now, because they can no longer be sure whether the person

writing the article had some undisclosed objective, no longer believes what he or she wrote, or merely was trying to dazzle others with his or her intelligence.

My objective, I hasten to add, is not to quarrel with Professor McConnell. I not only have supported his nomination to the federal court of appeals, but also genuinely feel he is one of the most thoughtful, honest, diligent, and respectable scholars of his generation. I have no doubts whatsoever that he will prove to be a credit to the federal bench. I also feel that his path to the federal court of appeals requires us to reconsider how we talk about the Constitution outside the Court. In particular, it requires, I think, that we need to clarify the objective of our commentary. So, in closing, I want to remind you that my comments tonight have been intended solely for the purpose of provoking further thought about one of the most under appreciated dimensions of constitutional law, constitutional discourse undertaken outside the Supreme Court. Tonight is a wonderful example of how such discourse may be undertaken with great civility, tolerance, perhaps a little humor, and a lot of attention. Thank you.

