CONSTITUTIONAL CORNER

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On the Need for a Theory of Constitutional Ethics

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For decades, constitutional theory has been primarily concerned with the judicial interpretation of rules. Since the 1950s, constitutional theorists have been occupied by the task of providing justifications for court actions. This task is a valuable and interesting one. The renewed activism of the court refocused attention on the extent to which the Constitution imposed legal constraints on government action. The particular substance of much of the court's constitutional jurisprudence in the postwar period, combined with the new political science orthodoxy on the nature of American politics, encouraged the belief that the court was the sole forum of principle within the American constitutional system. The court alone would deliberate on constitutional values and would then translate those values into judicially enforceable rules that elected officials were to follow. Within the boundaries imposed by those constitutional rules, the unprincipled struggle of interests could reign. The theoretical challenge was in identifying the appropriate constitutional rules and in defending the judiciary's prerogative to specify and enforce them.

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This preoccupation with the work of the court is unsurprising for a theoretical enterprise rooted in legal academia, but this approach to constitutionalism has broad encouragement. The evolution of American constitutional texts has focused on the creation of more formal and legalistic constraints on government. The earliest state constitutions tended to use normative language directed at government officials to express basic constitutional commitments. Later constitutions replaced these statements of principle with legal directives, dropping words like "ought" and adding words like "shall."[1] The establishment of judicial review relied upon and reinforced the view that constitutional language and debates were best framed in terms of binding law.[2] This creation of an institutional check on government action that violates constitutional commitments is rightly regarded as an important American innovation and contribution to the constitutional tradition.[3]

The development of the concept of constitutional law has been supplemented by a "realist" perspective on politics that tends to absolve non-judicial government officials of constitutional responsibility. The Founders themselves were impressed with a "new science of politics" that relied upon a system of structural restraints that played interest against interest, power against power, rather than on the moral goodness of the men who occupied positions of power. This perspective has been even more emphasized in the 20th century than in the early days of the republic, elevating Federalist 10 to canonical status. Modern social scientists have stripped moral concepts from their empirical analysis. Modern politics is assumed to be about power, not principle. The revolution in the study of the presidency initiated by Richard Neustadt is indicative. Neustadt's most notable predecessor, Edward Corwin, examined the presidency by analyzing the constitutional powers of his office and the purposes for which they had been and could be employed.[4] By contrast, Neustadt titled his book simply "presidential power."[5] His focus was strictly instrumental and strategic. He analyzed political means not ends, influence not authority. The Constitution becomes the special province of the judiciary and those who study it. It is irrelevant to the realm of politics, except to the extent that judicial orders impinge on the freedom of movement of government officials.

Such a model of the Constitution as a set of externally enforced rules is both empirically and normatively problematic. Empirically, it is not at all clear that this approach accurately describes political reality. One need not discount the importance of power in politics in order to recognize the significance of authority or ignore the mechanics of the instrumental rationality of political actors in order to recognize public deliberation on political ends. A constitutional

theory and a political science that assumes that the behavior of political actors is unaffected by the Constitution will always be incomplete.

Normatively, a constitutionalism concerned only with a system of rules is likely to be unworkable and perverse. Constitutionalism is equally concerned with setting limits on government and defining the ends of government. Constitutionalism grew out of an effort to redefine the appropriate uses of public power, and its history has been marked by a progressive effort to refine the instruments for appropriately channeling that power and recurrent efforts to rethink the foundations of government authority. A constitutionalism modeled simply as a system of rules implies an interest only in the boundaries of political power, eschewing a teleological concern with the uses of that power. The law as applied to private individuals quite appropriately avoids making a substantive judgment as to individual ends. The law merely creates a framework for social coordination, allowing individuals discretion to follow their own goals within that framework.[6] Constitutions cannot be neutral as to how public power is used. Constitutional law is only one tool among many for directing political power toward achieving genuinely public ends. For private individuals, the law is backed by the force of the state. For government officials, a constitution reduced only to law really does become a mere "parchment barrier."

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I want to call attention to three particular problems associated with thinking about the Constitution simply as a system of rules. All three of these problems are raised by recent political events, in particular the impeachment of President Bill Clinton. Judge Richard Posner has recently concluded that the impeachment demonstrated the irrelevance of constitutional theory to important public disputes, and in keeping with other recent arguments of his, he blames the influence of moral philosophy for the inability of constitutional theory to make a useful contribution to the impeachment debates.[7] I was more struck by the opposite problem: the priority of a legalistic discourse in thinking about the constitutional problems associated with the impeachment and its antecedent scandals. Consumed with thinking about the Constitution as a system of judicially interpreted and enforced rules, constitutional theory has not systematically focused on the types of issues raised by the impeachment. Moreover, constitutional theorists most visibly participated in the process in offering their most legalistic advice, mustering traditional interpretive tools to define the phrase "high crimes and misdemeanors." That was probably a particularly unfortunate role for constitutional theory to be cast given that the meaning of the clause is stubbornly indeterminate and unlikely to yield a compelling interpretive answer to the question of what constitutes an impeachable offense. Rather than providing a fresh perspective on how politicians should think about their constitutional obligations in such situations, constitutional theorists simply became advocates within the terms of a well-established debate.

Thinking about the Constitution simply on a model of rules raises at least three kinds of difficulties, which can be briefly designated the problem of fidelity, the problem of propriety, and the problem of discretion. Each of these problems arises in the interstices of a constitutional theory of rules. They do not suggest that there is anything wrong with judicial review or constitutional law, or that constitutional theory should abandon its concern with those topics. They do, however, suggest that the judicial perspective on the Constitution is only a partial perspective and that the problems associated with the development of constitutional law do not exhaust the questions raised by constitutional practice. They each suggest the need for a theory of constitutional ethics to supplement our existing theories of constitutional law.

The problem of fidelity can be framed in multiple ways. Most narrowly, it can simply be integrated into the model of rules, as the editors of a recent *Fordham Law Review* symposium did when they asked, "What is the best conception of fidelity in constitutional interpretation?"[8] More broadly, however, the problem of fidelity extends well beyond the confines of constitutional interpretation and goes to the preconditions of the model of rules. Much of contemporary constitutional theory assumes that the constitutional rules matter and will be obeyed. The only question remaining is how best to interpret those rules. But obedience to the rules cannot be assumed. As any number of developing countries, from Latin America to the former Soviet Union, have discovered, simply promulgating an ideal set of legal rules is insufficient to establishing and maintaining a thriving political culture dedicated to the rule of law and constitutional principles.

Constitutional theory should not only be concerned with the content of the rules of the game but also with how the game is played. This suggests the need not only for a theory to guide the interpretation and enforcement of the rules, but also for a theory to guide political behavior within the rules. The economist James Buchanan calls this an "ethic of constitutional citizenship." Buchanan's "constitutional political economy" is grounded in a contractarian view of constitutionalism that puts particular weight on political constraints

and the judicial enforcement of prior rules. This very contractarian perspective, however, has also led Buchanan to emphasize the constitutional choices that citizens must make, and not just the legal interpretations that judges must make. As a consequence, "each one of us, as a citizen, has an ethical obligation to enter directly and/or indirectly into an ongoing and continuing constitutional dialogue that is distinct from, but parallel to, the patterns of ordinary activity carried on within those rules that define the existing regime."[9] Buchanan believes that there are implications of this point for political life within a constitutional regime, as well as for the relatively few moments of explicit constitutional choice. The "loss of constitutional wisdom" that results when citizens have a "loss of understanding and loss of interest in political structure" has consequences for living within a constitutional order as well as for designing one. In order for the constitutional regime to flourish, individuals cannot simply focus on making strategic choices within the rules. A constitutional ethics "requires that the individual also seek to determine the possible consistency between a preferred policy option and a preferred constitutional structure."[10] Buchanan is not entirely clear on whether this monitoring need in fact be done by the individual citizen or whether it can be effectively delegated to an institution such as the Supreme Court. But his remarks are at least suggestive when he warns against making strategic choices "in disregard for the effects on political structure" and behaving as if "the very structure of our social order, our constitution defined in the broadest sense, will remain invariant or will, somehow, evolve satisfactorily over time without our own active participation."[11]

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Constitutional fidelity may be both a matter of conscious choice and ingrained habit that requires the commitment of political actors other than just the judiciary. To put it another way, there must be a political foundation for constitutional fidelity. Fidelity is not just a problem of the getting the interpretive method right. It is a problem of building political support for both obeying and nurturing limits on political power. At the most basic level, elected officials must decide whether and when to obey judicial efforts to interpret and enforce the constitutional rules. This is not just a problem of dealing with the criminally minded who are willing to flaunt the law if they can get away with it. Despite its own occasional assertions to the contrary, the Supreme Court is not the sole guardian of the Constitution. Presidents and legislators have their own independent responsibilities to insure that the Constitution is upheld and its values implemented. In their eyes, the judiciary may be just as much of a potential threat to the constitutional order as elected officials. Presidents such as Lincoln have been faced with the difficult decision of how best to insure fidelity to the constitutional regime as a whole: by adhering to their own understanding of its substantive requirements or by deferring to the deeply flawed constitutional law being promulgated by the court.

Such short-term crises of conscience and institutional responsibility can give way to a longer-term problem, for the membership of the court is subject to political manipulation. Politicians need not engage in anything so transparent of Franklin Roosevelt's court-packing plan to remove the judicial obstacle from the political path. What Bruce Ackerman has called "transformative appointments" will do the job just as well. After having developed a normative and empirical theory of constitutional development that seems to invite such appointments, Ackerman himself appears to be rethinking their appropriateness.[12] His own theoretical dilemma emphasizes the need for constitutional theory to move beyond the problem of interpretation and examine the ethical responsibilities of various political actors within the constitutional system. By reintroducing institutional politics into normative constitutional theory, Ackerman has more or less explicitly called attention to the fact that constitutional fidelity raises questions about the willingness of political actors to be bound by inherited constitutional constraints and the possibility of being faithful to constitutionalism even while breaking from a given constitutional arrangement. Little progress has been made, however, in thinking about the normative puzzles raised by those questions.

The problem of propriety is raised by the fact that constitutional sensibilities cannot all be reduced to rules. Even if political actors are willing to respect the rules established by the Constitution, as interpreted and enforced by the courts, their actions may still be damaging to the constitutional system as a whole and contrary to important constitutional values. The model of rules emphasized by contemporary constitutional theory puts a premium on judicial enforcement. Constitutionalism is regarded as equivalent to constitutional law. But there may also be a set of conventions, norms and customs deriving from constitutional considerations that should constrain political actors but are nonetheless not judicially enforceable for any of a large number of reasons. The Constitution may still act as a set of constraints on government officials, but there may also be positive constitutional values that political actors are obligated to advance and not simply avoid violating.

Questions of constitutional propriety often operate in the political background, as most constitutional rules do. Being uncontested, they need not be made explicit or deliberately enforced. They are most likely to come into focus when they are violated or disagreements arise as to their content or future viability. George Washington established the constitutional "precedent" that presidents would

only serve two terms of office. As in so many other instances, Washington's example helped define how presidents should conduct themselves.[13] The conventional two-term limit alleviated the threat of a charismatic leader who could dominate the government for a generation and consolidate power in the executive. As with many conventions, it did not rely exclusively on the sensibilities of the president but was reinforced by an associated set of political institutions, first the subtle pressures of patrician elite and then the less-subtle restraints of strong political parties. It was the breakdown of the parties as effective political restraints on the president that necessitated the conversion of the constitutional convention into a constitutional rule. Other aspects of constitutionally appropriate presidential behavior have been subject to greater evolution over time. In conducting the ceremonial features of the presidency, Thomas Jefferson, for example, carefully distanced himself from what he regarded as the aristocratic excesses of his predecessors. In keeping with his vision of a more republican presidency, Jefferson walked to his inaugural, refused to go on a tour of the nation, replaced state dinners with informal dinner parties, and addressed Congress in writing rather than in person.[14] These precedents proved less enduring, as when Woodrow Wilson returned to the practice of delivering oral addresses to Congress in keeping with his vision of the president as an active leader.[15]

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Perhaps being less accustomed to thinking of presidents as constitutional actors, perhaps having less interest in matters of constitutional propriety than of constitutional law, we are less conscious than our predecessors of the constitutive aspects of the presidential behavior. The fund-raising scandals that followed the presidential campaigns of 1996 were primarily framed in statutory terms, but they also shed light on the nature and mores of our modern constitutional democracy.[16] The social and legal apparatus of the electoral campaigns are at least as constitutive of our current democratic system as is the First Amendment or the Electoral College. Tellingly, Richard Nixon was seen as threatening the sanctity of the presidential election not by stuffing ballot boxes or preventing citizens from reaching the polls but by spying on the campaign strategists of his opponents. The scandal that emerged over the possible use by the Clinton campaign of the Lincoln Bedroom as a fund-raising tool reflected our current constitutional sensibilities. On the one hand, the campaign's actions seemed distasteful and smacked of using public resources for private gain. On the other hand, the short-lived nature of the scandal reflected the contemporary core acceptance of the president as a partisan leader and fund-raising as an integral part of modern campaigning. Although the Clinton campaign of 1996 did not break the established rules of the electoral game as Nixon's plumbers did, it did flagrantly "game" them. In attempting to explain his own indelicate fund-raising practices, the vice president memorably offered that there was "no controlling legal authority" that prohibited his actions. The fund-raising scandals existed on the margins of our current sense of appropriate presidential conduct. They did not clearly violate existing conventions, but they have contributed to the growing sense of dissatisfaction with the campaign finance system and the potentially corrupting obligations that it imposes on elected officials.

The vice president's refrain foreshadowed the president's own tortured rationalizations of his testimony on the Lewinsky matter. The Lewinsky episode raises numerous potential questions of presidential propriety, but I want to focus on only one: the president's relationship to the criminal justice system. The combination of presidential intransigence and the existence of an aggressive independent counsel forced explicit consideration of a number of novel issues about that relationship. Presumably, the president like any other citizen is obligated to obey laws prohibiting perjury and other forms of obstruction of justice. More interesting is the question of how aggressively presidents should, within the bounds of the law, resist criminal investigations. Judge Richard Posner has cogently criticized Clinton for conducting virtual "guerilla warfare against the third branch of the federal government, the federal court system."[17] Posner happens to believe that the president did commit criminal offenses while seeking to hide his affair from private attorneys and federal prosecutors. But his implicit vision of appropriate presidential conduct is potentially more sweeping than that. Posner is also critical of the president for allowing his aides and allies to pillory the independent counsel's office in the press and foster public resentment of the legal process, and for allowing his attorneys to manufacture and litigate novel legal claims of various executive privileges, presumably as delaying tactics as much as for the slim chance that some might be accepted by the courts. In other words, presidents should be constrained by a sense of responsibility deriving from their constitutional office even when engaging in, arguably, "private" litigation. The president cannot behave like every other litigant. The enhanced power of the presidency imposes a

moral responsibility to refrain from using that power, for example, to heap public scorn upon a legal adversary. On the other hand, the symbolic significance of the presidency precludes some litigation strategies that might be available to a private citizen.[18]

Such considerations are not readily addressed within a theoretical model of constitutional rules. Issues of constitutional propriety suggest that government officials are not free to strategize so as to maximize their interests within an environment of legal constraints. The Constitution cannot be viewed simply as an obstacle to be overcome or circumvented. It also imposes positive duties that should be recognized in political practice.

A third difficulty with a constitutional theory exclusively concerned with the neutral interpretation of the law is the problem of discretion. Inherent in a constitutional theory that emphasizes judicially enforced constraints on political behavior is the existence of a realm of political discretion. There is a sharp bifurcation in most constitutional theories between those charged with interpreting and enforcing the constitutional rules (i.e., judges) and those obligated to live within those rules (e.g., elected officials). There is a general assumption that those who must simply live within the rules are not themselves concerned with the meaning of the Constitution but instead act out of extraconstitutional motives. The strongest justifications for judicial review are rooted in the belief that only judges are concerned with securing constitutional values.[19] As long as government officials refrain from encroaching upon one of the constitutional laws, constitutional theory has little or nothing to say about how they exercise their political choices. The Supreme Court has struck similar themes in its own opinions. In the famous *McCulloch* case, Chief Justice John Marshall emphasized that the Constitution empowered legislators to exercise discretion in making policy.[20] Beyond a few broad rules that marked the outer boundaries of government power, the Constitution left legislators free to choose whatever means with whatever rationale they thought best to advance the national interest.

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This same concept of legislative discretion was raised in the impeachment debates as well. The constitutional text specifies that the House has the "sole power of impeachment" and the Senate the sole power to try impeachments. It also specifies the preconditions for an impeachment (the commission of "treason, bribery or other high crimes and misdemeanors") and what will happen if a civil officer is impeached and convicted (he or she "shall be removed from office"). The Constitution lays out a procedure for impeaching a president and a rule to constrain the use of the impeachment power (by specifying the grounds of impeachment and the available punishments), but it does not impose a positive duty on the House to impeach or the Senate to convict. As a consequence, some of those who opposed the impeachment of President Clinton urged the House to exercise its "prosecutorial discretion" and decline to impeach even if the president had in fact committed impeachable offenses.[21] The concept of prosecutorial discretion is neither normatively desirable nor politically viable as an approach to the use of the impeachment power, and it seemed to be offered to the House with some tentativeness. The concept and its weaknesses are of broader interest, however, because it reflects an endemic problem with conceptualizing the Constitution simply as a system of rules.

The idea of prosecutorial discretion in House impeachment decisions suggests that the identification of impeachable offenses is a necessary but not a sufficient condition of an impeachment. As in the case of other constitutional rules, the "high crimes and misdemeanors" standard is said to impose constraints on government decisions but to leave legislators free to act as they wish within those constraints. Presumably, legislators are expected to look to nonconstitutional considerations such as political interest to guide their decision. We are therefore led to believe that legislators may uncover recognizably impeachable offenses committed by a president but vote against an impeachment in deference to the president being of the same party, the fear of negative electoral repercussions, or the promise of future benefactions from a grateful chief executive.

No members of Congress, however, could successfully use such a balancing test as an explicit justification for voting against an impeachment. Both politicians and citizens would recognize in this case that the Constitution imposes responsibilities as well as restrictions on legislators. The Constitution cannot simply enter into political calculations as a side constraint on possible outcomes. In the context of an impeachment, legislators must justify themselves in terms of the Constitution, its purposes and principles if not its explicit text. Not all political decisions require that degree of engagement with the Constitution, but some do and many require at least some engagement with constitutional principles. In such situations, government officials may not engage in an elaborate effort at constitutional interpretation in the mode that constitutional theorists have come to expect from their study of judicial review, but their concern with constitutional values is nonetheless real. A complete constitutional theory must account for the fact that political actors do not simply exercise discretion within a system of constraints. They are also motivated by the constitutional considerations and are impelled forward by them.

Recent constitutional theory has not provided a useful framework for recognizing, analyzing or guiding noninterpretive, principled deliberation on the Constitution. A significant and useful debate over the proper scope of judicial review and the best method of constitutional interpretation has been conducted under the auspices of constitutional theory over the past few decades. The primary motivation of this debate has been to provide legal principles to guide judges as they exercise their power to review legislation and develop the corpus of constitutional law. Not only does contemporary constitutional theory rarely look beyond the judiciary, but it has not given sufficient attention to modes of constitutional deliberation that do not take as their primary task the identification of constitutional rules. As a consequence, it ignores important aspects of our constitutional practice and necessary components of any viable constitutional system. Even worse, it leads constitutional theorists to mischaracterize the operation of the constitutional system as a whole, by making dubious assumptions about the political foundations and efficacy of constitutional law and the behavior of elected officials within the boundaries set by constitutional law.

Normative constitutional theory needs to broaden its scope. Constitutional theory has long been primarily a normative enterprise. As such, it has been concerned with producing interpretive methodologies for judges in order to guide the production of constitutional law. It should be equally concerned with elaborating constitutional principles for politicians to guide political practice, however. That is, there is a need for a theory of constitutional ethics. Surely such a project is as necessary and as "realistic" as efforts to influence judges as they conduct their government business. It would take seriously both the belief that the United States possesses a vibrant constitutional culture and the understanding that constitutionalism is not sustainable if it consists simply in the model of rules.

A constitutional theory focused on constitutional law at least has had the benefit of a clear institutional practice around which to organize itself. The scholarly discourse is only a step removed from that of the litigants and judges who actually produce constitutional law, and the work of the court has provided the raw material for scholarly development.[22] A theory of constitutional ethics now lacks the institutional focus, the ready-made research agenda, or the discursive model that the legal theory enjoys.

I would suggest at least two forms that such an enterprise might take. In the first instance, constitutional ethics derive from the consideration of what constitutes sustainable regime cultures. Just as some legal constitutional theories derive recommendations for constitutional law from what are regarded as fundamental tenets of liberalism or democracy, so precepts of constitutional ethics can be developed from the consideration of the empirical and normative preconditions of a thriving constitutional order.[23] Buchanan's notion of "constitutional citizenship," for example, does not depend on any particular constitutional framework. A commitment to constitutionalism as such necessitates fostering some such vision of the responsibilities of political actors. Fidelity to any particular constitutional regime will require that political actors accept responsibility for maintaining that regime and understanding its precepts.

A theory of constitutional ethics would be concerned with making the normative commitments embedded in those practices more explicit, while challenging political actors to better realize the possibilities of their own traditions and to grapple with the contradictions and competition within and across those traditions.

In addition to such a universalistic approach to a theory of constitutional ethics, principles of appropriate political behavior can be derived from the consideration of the existing constitutional regime. Such an internal approach to constitutional ethics would be concerned with interpreting existing social practices. As Ronald Dworkin has elaborated in the context of law, interpreting social practices in this sense would involve considerations of both fit and goodness.[24] The goal would be to identify the purposes, aspirations, available justifications and dominant practices inherent in the existing political system.[25] A theory of constitutional ethics would be concerned with making the normative commitments embedded in those practices more explicit, while challenging political actors to better realize the possibilities of their own traditions and to grapple with the contradictions and competition within and across those traditions. Such an approach to a theory of constitutional ethics would provide a thicker set of normative considerations than could be developed through the more universalistic approach alone. Moreover, by exposing the constitutional considerations already embedded in existing political practice, such an approach makes a direct connection with actual politics and highlights the empirical significance of the normative issues at stake. The components of the constitutional regime cannot be divorced from political practice, but rather emerge out of observable political behavior. Such an interpretive constitutional theory could both explain why the presidency was relatively weak in the 19th century and provide normative guidance as to how presidents should behave given those norms, or consider the appropriate status of public opinions polls in policy making given contemporary understandings of representative democracy.

A theory of constitutional ethics assumes that politics cannot be excluded from the constitutional order. Political actors not only take

the Constitution seriously, but the operation of the constitutional system is dependent on a certain constitutional fidelity on the part of political actors. We cannot, however, expect non-judicial actors to approach the Constitution in the same fashion as judges do. The interpretive task of identifying external constraints on political action is ill suited to most political decision-making. Moreover, such a thin approach to constitutionalism creates a number of political problems that would call into question the stability of the constitutional regime if other types of constitutional practices did not supplement it. A theory of constitutional ethics is needed to make sense of those other constitutional practices and to develop principles to help shape and guide them in the future.

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Endnotes

1. Donald S. Lutz, *Popular Consent and Popular Control* (Baton Rouge: Louisiana State University, 1980), 65–66.

2. E.g., Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990); George L. Haskins, "Law versus Politics in the Early Years of the Marshall Court," *University of Pennsylvania Law Review* 130 (1981): 1.

3. Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1947).

4. Edward S. Corwin, *The President: Office and Powers* (New York: New York University Press, 1940).

5. Richard E. Neustadt, *Presidential Power* (New York: John E. Wiley and Sons, 1960).

6. E.g., Friedrich A. Hayek, *Law, Legislation and Liberty,* vol. 1 (Chicago: University of Chicago Press, 1973), 94–144.

7. Richard A. Posner, *An Affair of State* (Cambridge: Harvard University Press, 1999), 230–240.

8. "Symposium: Fidelity in Constitutional Theory, Editors' Foreword," *Fordham Law Review* 65 (1997): 1247.

9. James M. Buchanan, *The Economics and the Ethics of Constitutional Order* (Ann Arbor: University of Michigan Press, 1991), 154.

10. Ibid., 156.

11. Ibid., 157.

12. Bruce Ackerman, *We the People,* vol. 2 (Cambridge: Harvard University Press, 1999), 393–418.

13. See also, Forrest McDonald, "Presidential Character: The Case of George Washington," in *The Presidency, Then and Now* (Lanham, Md.: Rowman & Littlefield, 1999).

14. See generally, Forrest McDonald, *The American Presidency* (Lawrence: University Press of Kansas, 1994), 250–253.

15. Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1987), 133.

16. On fund-raising and the presidential campaign of 1996, see generally Elizabeth Drew, *Whatever It Takes* (New York: Viking, 1998).

17. Posner, 152.

18. There is something problematic, for example, with a sitting president "taking the Fifth" in sworn testimony in a legal proceeding. Given that we expect our presidents to be above reproach, we expect them to cooperate fully with investigators in order to speed inquiries to their conclusion. If there is a conflict between the personal self-interest of the individual occupant of the office and the constitutional responsibilities of the presidency, we quite reasonably expect the latter to trump the former.

19. E.g., Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 57–71.

20. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407–416 (1819).

21. E.g., *Background and History of Impeachment: Hearings Before the Subcommittee on the Constitution of the House Committee on the Judiciary,* 105th Cong. (1998), 89 (statement of Cass Sunstein); *id.*, at 241 (statement of William Van Alstyne). But cf., Sunstein, "Impeaching the President," *University of Pennsylvania Law Review* 147 (1998): 300n79.

22. On the relationships between constitutional theory and legal practice, see J.M. Balkin and Sanford Levinson, "The Canons of Constitutional Law," *Harvard Law Review* 111 (1998): 963.

23. See also, Stephen L. Elkin and Karol Edward Soltan, eds., *A New Constitutionalism* (Chicago: University of Chicago Press, 1993).

24. Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 87–113, 225–258.

25. For one example of such an analysis, see Keith E. Whittington, *Constitutional Construction* (Cambridge, Mass.: Harvard University Press, 1999).