

YET ANOTHER CONSTITUTIONAL CRISIS?

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ABSTRACT

The recent presidential impeachment and the postelection controversy each led many to fear that the United States had either already entered or was about to enter a constitutional crisis. Such concerns seem overwrought. This Article will use those events as a foil for examining the nature of constitutional crises. The Article will distinguish two types of constitutional crises and consider several potential crises in American history, clarifying how crises occur and how they can be averted. Constitutional crises in the United States are rare in large part because of the robustness of the country's informal constitutional practices, reasonably good constitutional design, and relatively limited political disagreement.

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This is no social crisis. Just another tricky day for you.

Pete Townshend¹

Like local television newsmen who are quick to declare the latest rain shower to be a weather emergency, many have recently found that the words "constitutional crisis" come readily to their lips. During the height of the impeachment efforts directed against President Bill Clinton, there were over a thousand references in the media to a constitutional crisis in the United States.² Perhaps building on that momentum, there were nearly twice as many references to an American constitutional crisis during the legal disputes following the 2000 presidential election.³ Similarly, commentators readily perceived in both events the collapse of political order and a system in chaos.⁴ Even for many of those who did not believe that a constitutional crisis was already upon us in the midst of these events, they saw one looming on the horizon.

Perhaps, now that a little time has passed, the excess of such reactions to these recent events is already evident. Even at the time, the general public seemed to have demonstrated substantially greater patience and calm—and perhaps simple disinterest—than

1. THE WHO, *Another Tricky Day*, on FACE DANCES (Warner Brothers 1981).

2. I found 1026 sources making such references. Dow Jones Interactive, Publications Library, All Publications Database, at <http://www.dowjones.com> (last visited Feb. 15, 2001) (search for records containing "constitutional crisis" and "impeachment" between the dates of September 1, 1998 and February 28, 1999).

3. I found 1901 sources making such references. Dow Jones Interactive, Publications Library, All Publications Database, at <http://www.dowjones.com> (last visited Feb. 15, 2001) (search for records containing "constitutional crisis" and "Gore" between the dates of November 6, 2000 and December 15, 2000). Such numbers are only illustrative of the significance of the perception of a possible constitutional crisis in the United States. It should be noted that while possibly missing some similar references, such a basic search also captures instances in which multiple news organizations report a common source using the term, such as when Chief Justice Charles Wells of the Florida Supreme Court prominently warned of a constitutional crisis in his dissenting opinion in *Gore v. Harris*, 772 So. 2d 1243, 1263 (Fla. 2000) (Wells, C.J., dissenting), *rev'd*, *Bush v. Gore*, 531 U.S. 98 (2000). In addition, such a search does not distinguish the tone of reference, as when an article denies the existence of a constitutional crisis.

4. I found 755 sources making such references during the impeachment and 1980 sources making such references after the election. Dow Jones Interactive, Publications Library, All Publications Database, at <http://www.dowjones.com> (last visited Feb. 15, 2001) (search for records containing "chaos" and "impeachment" between the dates of September 1, 1998 and February 28, 1999, and "chaos" and "Gore" between November 6, 2000 and December 15, 2000).

the political class directly engaged in the struggle.⁵ The republic appears to have survived these events relatively unscathed. Still-fresh events abroad also put our own cries of constitutional crisis in sharp relief. Our “crises” appear rather mild compared to, for example, President Slobodan Milosevic’s refusal to concede defeat in the Yugoslavian elections, President Vladimir Putin’s crackdown on independent regional governors and media critics in Russia, President Alberto Fujimori’s arrest of congressional leaders in Peru, or President Boris Yeltsin’s armed conflict with the Russian Parliament. Perhaps such examples would suggest the need for a bit of morning-after sheepishness about our reaction to our own political upheavals. More fundamentally and more usefully, however, they may also suggest the need to consider constitutionalism and the workings of our constitutional system a bit more closely.

In particular, it would be useful to identify the features of a constitutional crisis. Doing so would help advance our understanding of constitutionalism generally and of American constitutionalism particularly. Although the possibility of crisis shows the constitutional system in extremis, it may also illuminate the more routine ways in which the constitutional system is preserved. The consideration of constitutional crises also suggests that such crises have been extraordinarily rare in the United States, especially at the national level. There seem to be two conflicting popular narratives regarding such matters. Most of the time, we seem to accept a narrative of constitutional stability with a single constitutional order extending seamlessly from the Founding period to the present.⁶ At the same time, the popular media, at least, seems prone to revert to a narrative of constitutional crisis when politics drifts outside the routine.⁷ In such moments, we seem quick to question the vitality of the American constitutional machinery and

5. In public opinion polls conducted in November and December of 2000, no more than seventeen percent of respondents, and often substantially fewer, thought the election fracas amounted to a “constitutional crisis.” See poll results collected by Karlyn H. Bowman, *The 2000 Election: What the Polls Said* (Feb. 2002) (unpublished manuscript), *available at* www.aei.org/ps/psbowman6.pdf.

6. A version of this narrative is appropriately critiqued in 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40-44 (1991).

7. *E.g.*, *supra* notes 2-4 and accompanying text.

uncomfortable with relying on its less familiar mechanisms. Given the historical durability of the U.S. Constitution and the relatively minor character of recent events, such doubts seem unwarranted. An excessive fear of the fragility of the constitutional system can be as damaging as a heedless assumption that the Constitution will always save us from ourselves. Distinguishing between false and genuine constitutional crises, and recognizing the causes of the latter, will perhaps help us steer a middle course.

Though many seem to think that they know one when they see one, the notion of a constitutional crisis is ill-defined. A primary goal of this Article is to give the concept somewhat better definition. The first section of the Article distinguishes two types of constitutional crises, briefly illustrates them, and places the Clinton impeachment and the 2000 presidential election controversy in context. The second section considers several prominent candidates for crisis status from American history. This section argues that most of these events should not be regarded as constitutional crises, but, more importantly, it helps clarify how crises can occur and how they can be averted. The final section considers the significance of these events to our understanding of constitutional crises and the relative success of the American constitutional experiment.

I. TWO TYPES OF CONSTITUTIONAL CRISES

Overviewing the concept of a crisis, one political scholar concluded, “[c]risis’ is a lay term in search of a scholarly meaning.”⁸ The varied use of the term denudes it of any real analytical value. There are relatively few efforts to specify the concept of a crisis. They are more often taken as “first-order realities,” “givens of history” that “do not call for particular identification or definition. ‘Everybody’ knows when one happens.”⁹ Perhaps especially in the context of international affairs, there is an apparently “natural

8. James A. Robinson, *Crisis*, in 3 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 510 (David L. Sills ed., 1968). The situation has hardly improved over time. The latest effort to create a comprehensive encyclopedia of the social sciences does not even include an entry for the term “crisis.” See INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES (N.J. Smelser & P.B. Bates eds., 2001).

9. Charles A. McClelland, *The Acute International Crisis*, 14 WORLD POL. 182, 183 (1961).

naming" of such events as the Cuban Missile Crisis or the Iran Hostage Crisis that belies the need for theoretical inquiry.¹⁰ Crisis often implies or is used synonymously with "panic, catastrophe, disaster, [or] violence."¹¹

Crises can be defined in different ways. Consistent with the etymological origins of the term and contemporary medical usage, a crisis can be identified with a turning point or decisive moment.¹² In the social arena, however, crises are not necessarily decisive and have a more negative connotation. Crises can also be understood as situations requiring decision or action and involving instability or threats to important values.¹³ As a consequence, "crisis confronts decision makers with potential consequences of profound importance," but also with substantial uncertainty and time pressures.¹⁴ Although the outcome of a crisis may be favorable or result in little alteration of the status quo ante, such crises have a negative connotation because they put important values under stress. Crises represent a disruption of the existing equilibrium, a breakdown of order.¹⁵ For example, a period of crisis may be a moment in which "old economic, political, and ideological arrangements are in decline, and alternative institutional arrangements exist only in inchoate

10. *Id.*

11. Robinson, *supra* note 8, at 510.

12. IV THE OXFORD ENGLISH DICTIONARY 27 (2d. ed. 1989); Robinson, *supra* note 8, at 510.

13. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 275 (10th ed. 1993); McClelland, *supra* note 9, at 189; Robinson, *supra* note 8, at 510-12.

14. Robinson, *supra* note 8, at 511-13. As Robinson notes, it is not simply the importance of the decision that creates a crisis, but also such considerations as how much control actors have over events. *Id.* at 510-13. This implies, for example, that crises can be asymmetrical. See *id.* The Iran Hostage Crisis, for example, was more likely to be experienced as a "crisis" in the United States than in Iran.

15. The concept of crisis has been similarly developed within Marxist critical theory. Claus Offe, for example, defines crises "as processes in which the structure of the system is called into question ... [that] endanger the identity of the system." These may result either from events that "lie 'outside' the boundaries determined by the system" and thus are "foreign to ... or destructive of that system," or from internally generated events "that violate the 'grammar' of social processes." CLAUS OFFE, CONTRADICTIONS OF THE WELFARE STATE 36-37 (1984). Similarly, Jurgen Habermas has developed the concept of crisis as arising "when the structure of a social system allows fewer possibilities for problem solving than are necessary to the continued existence of the system. In this sense, crises are seen as persistent disturbances of *system integration*." JURGEN HABERMAS, LEGITIMATION CRISIS 2 (1975) (footnote omitted).

form,"¹⁶ or when a period of international peace is disrupted by a moment of heightened conflict,¹⁷ or when economic stability suddenly gives way to deep depression¹⁸ or uncontrolled inflation.¹⁹

How might these concepts be applied to the notion of a constitutional crisis? The possibility of natural naming would seem to be unrealized in a constitutional context, since there appears to be no agreed-upon or enduring list of such events and there is an absence of historical events bearing the explicit name of crisis in American constitutional history, in contrast to American economic or political history. The modifier constitutional introduces its own ambiguities. An international crisis, for example, reflects a crisis within the international arena and a disruption of the international order, which suggests that crises become particularly constitutional when they threaten the constitutional roots of a political system. A political crisis becomes a constitutional crisis when not just a particular administration is put at risk, but the constitutional system itself is tested.²⁰ The concept of a crisis government is suggestive, and represents the interruption and temporary replacement of constitutional government by executive or military rule when constitutional governance becomes impossible.²¹ To the extent that constitutional crisis is used to mean more than a particularly

16. Kriss A. Drass & Edgar Kiser, *Structural Roots of Visions of the Future: World-System Crisis and Stability and the Production of Utopian Literature in the United States: 1883-1975*, 32 INT'L STUD. Q. 421, 423 (1988).

17. See McClelland, *supra* note 9, at 183.

18. Clearly the immediate subjective experience of those living through a political event is an inadequate guide to defining a constitutional crisis. Such contemporary feelings of crisis do not generally seem, in a constitutional context, to survive the test of time. The contemporary subjective sense of a constitutional crisis is neither a necessary nor a sufficient condition for identifying an actual constitutional crisis. See also HABERMAS, *supra* note 15, at 4 ("[A] contemporary consciousness of crisis often turns out afterwards to have been misleading. A society does not plunge into crisis when, and only when, its members so identify the situation.").

19. Juan J. Linz, *Crisis, Breakdown, and Reequilibration*, in THE BREAKDOWN OF DEMOCRATIC REGIMES 1, 54 (Juan J. Linz & Alfred Stepan eds., 1978).

20. Similarly a regime crisis results when the political system itself (or successive governments) seems incapable of responding to a problem, not simply when a particular government or administration fails. *Id.* at 50.

21. E.g., JOHN E. FINN, CONSTITUTION IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW, 15-22 (1991); Karl Dietrich Bracher, *Crisis Government*, in 3 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES, *supra* note 8, at 514; Linz, *supra* note 19, at 54.

emphatic sense of political trouble, the term seems to be used to signal the threat of a breakdown in the constitutional order.²²

Constitutional crises arise out of the failure, or strong risk of failure, of a constitution to perform its central functions.²³ This formulation is deceptively simple and, as we shall see, a number of more specific circumstances can fit within this broader framework. Although the particular functions of a constitution can be described in a variety of ways, constitutions are importantly concerned with establishing a government and with enshrining foundational political values.²⁴ For liberal constitutions, enshrining foundational political values will largely entail identifying the proper limits of government power, and the institutions of government will be designed with an eye toward making those limits politically effective.²⁵ A constitution is thrown into crisis when its prescriptive structure cannot be realized in practice or is significantly

22. There appears to be some ambiguity in usage as to when such a crisis actually occurs. Unlike other sorts of crises, the term constitutional crisis does not appear to recognize a distinct time boundary. Cf. McClelland, *supra* note 9, at 189 (defining an international crisis as "mark[ing] the time of a turning point in a conflict and a period when major decisions are likely to be made"). It is not always clear whether the mere threat of a breakdown in the constitutional order is sufficient to give rise to a "constitutional crisis," or whether the crisis itself can "threaten" or be "risked" but only emerges when the constitutional order actually does break down.

23. Stephen Griffin defines a constitutional crisis somewhat similarly, but he goes on to suggest that "[t]he designation of constitutional crisis may be appropriate also in situations when the apparently normal operation of the constitutional system produces a continual sense of political uncertainty and unease." STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM* 194 (1996). I do not believe that this extension is appropriate. Griffin adds this extension, in part, to account for those situations in which "there are indications that something is fundamentally wrong" but "matters do not necessarily reach a decisive moment." *Id.* Simple "unease" is at most the precursor to crisis, however, not a crisis itself. As Griffin's own analysis (of the "story of the constitutional system since the New Deal") suggests, political uncertainty and unease may persist for decades, even as the constitutional order continues to function. *Id.* at 194-201. Certainly, it does not seem to be an essential function of constitutions to eliminate political worry, and thus it cannot be regarded as a failure if political unease exists within a constitutional order.

24. As defined here, there can be a category of nonliberal constitutions. Although the semantics of nonliberal constitutionalism can be argued, it seems descriptively useful to recognize that nonliberal states may also be governed by constitutions that seek to maximize the consistency between government actions and the fundamental values of the particular (in this case, nonliberal) regime. Cf. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 855-59 (1962).

25. JOHN RAWLS, *POLITICAL LIBERALISM* 408-09 (1993).

inadequate to achieving its goals.²⁶ The imagined constitutional order may no longer be consistent with and unable to contain the politics on the ground.²⁷

Constitutional crises are, in the first instance, crises for and of the constitution itself. Given the importance of constitutions, a constitutional crisis is likely to be both a symptom and a cause of political crisis, but it is worth recognizing that the two are distinct. Political crises need not implicate the constitution, and constitutional crises need not have dramatic consequences for the political system or society broadly. Some failures in the constitutional machinery may have little or no significance for the daily lives of most Americans, or even for the routine business of most government officials. Constitutional crises, for example, need not become regime crises, threatening the conversion from a democratic regime to an authoritarian regime. Likewise, constitutional crises need not, from an external perspective, be regarded as normatively problematic. In some cases a constitutional crisis may even be regarded as a positive good, if the constitution in question leads to outcomes that are deeply unjust. This is, after all, the Madisonian defense of the Federalist subversion of the Articles of Confederation, which were seen as inadequate to securing justice and domestic tranquility.²⁸

We can speak of two different types of constitutional crises: operational crises and crises of fidelity. These two types of constitutional crises arise from different causes, are likely to follow quite different courses, and require distinct solutions. It should be recognized, however, that difficulties of one sort may lead to difficulties of the other, and the most severe crises are likely to involve difficulties of both sorts.

26. *Id.* at 353-54.

27. On this theme see generally WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* 46-83 (1993).

28. *THE FEDERALIST* NO. 40 (James Madison); see also FINN, *supra* note 21, at 40-44.

A. Crises of Constitutional Operation

Operational crises arise when important political disputes cannot be resolved within the existing constitutional framework.²⁹ An essential element of establishing a well-functioning government is the identification of procedures for making political decisions and resolving political disputes. A political system must assume the existence of disagreement about what substantive actions society must take; otherwise, there would be no need for politics at all. Political action must be taken in the presence of disagreement, and constitutions specify the procedures by which persistent disagreement is overcome and a political decision is made.³⁰ As a result of unforeseen circumstances or a simple design flaw, a constitution may fail to establish an authoritative mechanism for ending a political conflict.

Operational crises may be of two sorts, either formal or practical. A formal operational crisis arises when following all of the correct

29. The operational crisis category seems to encompass all three types of constitutional crises suggested by Robert Lipkin: failure to resolve political conflict, contradictory constitutional provisions, and constitutional indeterminacies. ROBERT JUSTIN LIPKIN, *CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM* 207 (2000). Lipkin seems to regard these all as types of constitutional crises because they involve the breakdown of the constitutional machinery and the inability to move forward politically without "revolutionary adjudication" that steps outside the bounds of the existing constitution. *Id.* For my purposes, however, Lipkin casts his net too widely. To the extent that existing political actors, such as the judiciary, can resolve apparent textual contradictions or indeterminacies without appeal to extraordinary measures, then they need not lead to constitutional crises. As I have elaborated elsewhere, I regard such constitutional constructions as necessary within any constitutional system and not a sign of constitutional failure. KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 3-15 (1999); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 5-15, 204-12 (1999). Constitutional indeterminacies do raise the possibility, however, that multiple actors may disagree as to how best to resolve the indeterminacy. Interpretive disagreement may lead to paralysis. A constitution could attempt to eliminate any indeterminacies, but in practice there will always be a need for constitutional interpretation, and therefore the potential for interpretive disagreement. One solution to this danger is the specification of an ultimate interpreter. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). This is not the only possible solution, however. Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998) (arguing that the judiciary shares constitutional interpretation with other political institutions and society at large).

30. One possibility is, of course, that disagreement over substantive policy may leave the status quo in place. This formal option may not always be a practically viable option, however.

constitutional procedures leads to multiple conflicting endpoints rather than to a single determinate outcome.³¹ At least in that circumstance, the Constitution produces disorder rather than order. If there is an election, it should be possible to determine who won and for a government to be formed. If there is a claim that an activity has been legally regulated, it should be possible to determine what is the law. If there is a claim that a government has authority over some place or persons, it should be possible to determine who is in charge. Constitutional crises occur when constitutions fail to provide adequate procedures for making such determinations. A practical operational crisis occurs when the constitutional government is incapable of rendering the political decisions or taking the effective political actions that are widely regarded as necessary at a given moment.³² Constitutions are intended to create effective, though limited, governments. Certainly no constitution is intended to be a suicide pact.³³ More generally, to sustain themselves governments must be capable of responding to the intense desires of important constituencies. Political crises will extend to a constitution itself if apparent constitutional imperfections in structure or law are thought to be responsible for

31. *E.g.*, Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 769 (2001) ("Here the law provides no clear answers [in the event that the House and Senate accept different slates of presidential electors from the same state]. At this point, a genuine constitutional crisis might have arisen. It is not clear how it would have been settled."); Elana Cunningham Wills, *Constitutional Crisis: Can the Governor (or Other State Officeholder) Be Removed from Office in a Court Action after Being Convicted of a Felony?*, 50 ARK. L. REV. 221, 225 (1997) ("It was this state of affairs that lead to Arkansas' constitutional crisis. Two individuals claimed the office of Governor for a brief period . . .").

32. Linz, *supra* note 19, at 50 ("Such crises are the result of a lack of efficacy or effectiveness of successive governments when confronted with serious problems that require immediate decisions."). Representative Brian Baird has recently suggested the existence of a constitutional design flaw that could disable the government, the "unlocked cockpit door in the cabin of the Constitution." Namely, the constitutional specification of elections as the mechanism for filling midterm vacancies in the House of Representatives may leave the government disabled if large numbers of congressmen were killed at once. Baird has proposed that "to make sure the Constitution is strengthened" to eliminate the "potential weakness of gap" before a constitutional crisis is actually triggered. Ben Pershing, *Rep. Baird: Fix Constitutional "Weakness," ROLL CALL*, Oct. 11, 2001; *see also* H.R.J. Res. 67, 107th Cong. (2001) (proposing amendment).

33. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."); *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that . . . [the Court] will convert the constitutional Bill of Rights into a suicide pact.").

the government's inability to respond adequately to a situation that seems to demand a response.³⁴

Some have argued that operational crises of both sorts are intrinsic to the constitutional separation of the executive from the legislature. In contrast to parliamentary systems, in which government authority is essentially unitary and executive leadership is dependent on the continued confidence of the legislature, presidential systems empower the executive and the legislature to act independently of one another and potentially to refuse to coordinate their actions.³⁵ Given the fixed term of presidential office and independent electoral mandate, it is possible that a president "can survive alongside hostile legislatures, leading to stalemates between the executive and the legislative branch. ... Under such conditions, no one can govern."³⁶ In the description of presidential systems by the British writer Walter Bagehot, "the legislature is forced to fight the executive, and the executive is forced to fight the legislative; and so very likely they contend to the conclusion of their respective terms."³⁷ By providing no democratic or constitutional means for resolving this sort of deadlock, such constitutions may be particularly prone to crises that can only be resolved by breaking from the constitutional rules, for example by military intervention or popular uprising, as has been the unhappy experience of a number of Latin American nations.³⁸ An analogous constitutional defect within parliamentary systems, however, is the creation of

34. *Supra* notes 18-21 and accompanying text. Such crisis situations are necessarily variable. Constitutions are supposed to incapacitate government in certain ways. For example, the First Amendment is intended to render Congress incapable of curtailing free speech, and the separation of powers is supposed to make the president less capable of engaging in foreign adventurism. Some incapacities may be unintended, however, and others may no longer be regarded as tolerable.

35. M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 104 (2nd ed. 1998); Adam Przeworski et al., *What Makes Democracies Endure?*, J. OF DEMOCRACY, Jan. 1996, at 39, 44-45.

36. Przeworski et al., *supra* note 35, at 45.

37. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION, AND OTHER POLITICAL ESSAYS* 87 (New York, D. Appleton 1877).

38. Juan J. Linz, *The Perils of Presidentialism*, J. OF DEMOCRACY, Winter 1990, at 52-54, 62-64; Przeworski et al., *supra* note 35, at 44-46; see also Alfred Stepan & Cindy Skach, *Constitutional Frameworks and Democratic Consolidation: Parliamentarianism versus Presidentialism*, 46 WORLD POL. 1 (1993) (describing executive-legislative conflict in democracies).

legislatures incapable of successfully forming a stable government.³⁹ The constitution of the French Fourth Republic suffered such an operational crisis, provoking the threat of a military coup and the advent of the Fifth Republic under Charles de Gaulle, and similar political fragmentation fed the collapse of the German Weimar Republic.⁴⁰ The defect need not be regarded as somehow inherent in the idealized constitutional design in such cases. Constitutions cannot be evaluated in the abstract. They exist in relation to a particular political situation, and fail and threaten to fail only in interaction with political events. A constitution may, however, either exacerbate or mitigate the problems of political life.

Such operational failures represent true constitutional crises, because they represent a failure of the constitution to perform its central function and appear to require extraconstitutional steps to overcome that failure.⁴¹ The formal mechanisms of constitutional governance, however, make certain assumptions about the informal practices and norms of political actors. Political actors often have control over decisions to exploit constitutional forms to drive the system into crisis. The constitutional system assumes that actors will instead generally choose to resolve their disputes within the existing forms rather than instigate crises.

The federal appointments process is an example of a point at which there exists formal potential for domestic operational failure. The textually specified mechanisms for filling executive and judicial offices would appear to be a “[c]onstitutional [s]tupidit[y],” a “constitutional accident waiting to happen,” if not for their appropriate background assumptions about how political actors will in fact behave in regard to those mechanisms.⁴² The Constitution

39. Although the debate between presidentialism and parliamentarianism is often framed in universal terms, it should be noted that a variety of particular constitutional structures are consistent with these basic political types. Individual crises of constitutional operation are probably better viewed as the product of specific constitutions than as generic products of the political types.

40. FINN, *supra* note 21, at 144-45 (analyzing the collapse of the German Weimar Republic); PHILIP WILLIAMS, *POLITICS IN POST-WAR FRANCE* (1954) (analyzing the collapse of French Fourth Republic); Roy C. Macridis, *Cabinet Instability in the Fourth Republic (1946-1951)*, 14 J. OF POL. 643 (1952).

41. See *supra* notes 23-27 and accompanying text.

42. Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 15, 15 (William N. Eskridge, Jr. & Sanford Levinson

specifies that the President alone may nominate executive and judicial officers, but can only appoint those officers with the "Advice and Consent," or confirmation, of the Senate.⁴³ There is no formal mechanism for resolving a dispute if an intransigent Senate were to refuse to confirm any of the nominations made by a determined president. Acting well within their clear constitutional prerogatives, the President and the Senate can fail to reach agreement on appointments and leave critical government offices unfilled. There are some partial remedies in this sort of situation, such as the continuance of existing personnel until replacements are confirmed or the redistribution of work to other officers already in place, but the basic possibility of a stalemate remains.⁴⁴ Indeed, variations on such stalemate scenarios have been played out in American history. The Reconstruction-era Tenure of Office Act barred the removal of executive officers until their replacements had been confirmed—an effort to change the default outcome in the appointments game and force President Andrew Johnson to nominate individuals more acceptable to the Republican Senate.⁴⁵ Johnson's impeachment was provoked by the President's effort to replace the Senate-approved Secretary of War with his own interim appointment.⁴⁶ Confirmation of President Bill Clinton's judicial nominations slowed to a crawl in the final years of his presidency, leading the President to declare a "vacancy crisis" on the federal bench.⁴⁷ More prospectively and less

eds., 1998). In his essay of that title, Amar is actually writing about the Electoral College and the possibility that "[o]ne day, we will end up with a clear loser President." *Id.* at 17. It is notable that the contributors to this volume did not choose to write about such formal operational defects in the Constitution as the appointments clause or the lack of a corresponding removal clause, or the presidential structure that many scholars of comparative politics regard as a fundamental constitutional design flaw, which is indicative of the fact that such flaws have generally been informally resolved in the United States.

43. U.S. CONST. art. II, § 2.

44. The Constitution also offers a more global formal remedy to such stalemates in the form of the impeachment power. U.S. CONST. art. I, § 3, cls. 6-7. In a true operational crisis created by the separation of powers, the legislature has the authority to make the final move to end the stalemate. *Id.* Of course, that power is difficult to exercise in practice, and may not be appropriate to all such situations.

45. Tenure of Office Acts, ch. 102, 3 Stat. 582 (1820), *amended by* ch. 154, 14 Stat. 430 (1867).

46. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 29, at 115-23, 141-51 (1999); *see also infra* text accompanying notes 167-68.

47. Peter Baker, *Clinton Says Republicans are "Threat" to Judiciary; Hill GOP Blamed for "Intimidation," Delays*, WASH. POST, Sept. 28, 1997, at A6. The current administration has

realistically, some called for the Senate to block all Supreme Court nominations of what they regarded as an illegitimate presidency in George W. Bush.⁴⁸ Fairly common American complaints of legislative gridlock, though overstated, point toward a related potential source of operational failure created by the constitutional structure of separation of powers, fixed terms of office, and shared legislative responsibility.⁴⁹

Although indicating how an operational constitutional crisis could emerge from the design of the formal Constitution, these cases also suggest how unlikely is a genuine operational crisis. The American government can sustain quite a bit of operational gridlock without breaking down. Presidential nominations are often rejected or delayed by the Senate. Congress and the president often fail to agree on new policies. What converts such routine disagreements into an operational crisis is the unwillingness of any of the requisite actors to compromise or back down, leading to either an operational failure within the government or the eventual replacement of one or both of the recalcitrant actors. In practice, political actors generally reach a compromise before such drastic outcomes occur. The presidential veto, for example, generally is employed as part of a bargaining strategy, not as a trump card.⁵⁰ In any case, the mundane operation of government is fairly resilient to such high-level political shocks. The anticipation of a timely, if not rapid, resolution of such interbranch disagreements postpones the arrival of an actual crisis. There is no bright line separating a

made similar declarations. Alberto Gonzales, *The Crisis in Our Courts*, WALL ST. J., Jan. 25, 2002, at A18. Politically motivated delays in the confirmation of judicial nominations is endemic to the modern American political system. See Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947-1998*, 46 AM. J. OF POL. SCI. 190 (2002).

48. Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb. 12, 2001, at 48; Andrew Koppelman, *Let Seats Go Empty: If Given the Chance, Bush Should Put Off Naming Justices Until a Second Term*, SUN-SENTINEL (Fort Lauderdale, Fla.), Dec. 18, 2000, at 23A.

49. See Lloyd N. Cutler, *To Form a Government*, 59 FOREIGN AFF. 126, 126-27 (1980) (analogizing the constitutional separation of powers to a parliamentary inability to form a government and criticizing "the structural inability of our government to propose, legislate and administer a balanced program for governing"); James L. Sundquist, *The Crisis of Competence in Our National Government*, 95 POL. SCI. Q. 183 (1980) (tracing a crisis of confidence in the U.S. government to a constitutional structure that prevents the government from being "made to work").

50. See generally CHARLES M. CAMERON, VETO BARGAINING (2000) (examining use of veto as bargaining strategy).

constitutional crisis of the operational sort from the usual standoffs associated with the separation of powers and political disagreement. The formal possibility of a crisis lurks behind such routine disagreements, even if it does not emerge.

It is notable that neither the Clinton impeachment nor the 2000 presidential election raised even such formal possibilities for constitutional crisis. Unlike the appointments power, for example, the impeachment power is placed in the sole authority of a single branch of government.⁵¹ The independent actions of the House and the Senate are conclusive of their respective constitutional responsibilities. Their actions are complete without the participation or consent of any other actor.⁵² Moreover, the default outcome in the case of failure to act is both clear and consistent with continued governmental operation. The House can impeach, or not. The Senate can convict, or not. The official in question is either removed and succeeded, or left in place. Impeachments are fully anticipated by and provided for in the constitutional structure.⁵³

51. U.S. CONST. art. I, § 3, cls. 6-7.

52. Of course, a successful impeachment and removal, especially of the president, does require the accession of the impeached official. *See id.* The president must be willing to recognize and comply with the congressional decision if a crisis is to be averted. It would be a crisis of fidelity, rather than of operation, if the president simply denied any congressional authority to remove him from office, perhaps on the grounds that he was "the people's president." But it is possible that a president might deny the constitutional authority of Congress to impeach and remove him from office on these particular grounds. He might deny that Congress has the sole authority to determine what constitutes high crimes and misdemeanors and assert a coordinate presidential authority to act on his own independent constitutional understandings. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 323 (1994) ("[U]nder a model of coordinate interpretive power, impeachment is not the ultimate trump card The impeachment scenario could be played out a step further: Congress impeaches and convicts; the President sticks to his guns (figuratively and perhaps literally) and refuses to leave, claiming that the impeachment is unconstitutional, too."). It is likewise possible that the Supreme Court might reverse its decision in *Nixon v. United States*, 506 U.S. 224 (1993), and claim the authority to resolve such disagreements over the correct interpretation of the constitutional impeachment power, lending its support to an official's refusal to comply with an impeachment. *But see* Paulsen, *supra*, at 299 ("The more realistic understanding of *Nixon* is that the judiciary *did* purport to exercise authority over Senate impeachment determinations; it merely exercised that authority in a manner that declined to overturn the Senate's judgment."). If it is accepted that actors other than the two houses of Congress have a coordinate authority to interpret the impeachment powers, then the possibility of a formal operational crisis is created.

53. There can, of course, be interpretive disputes regarding the impeachment power and such questions as who can be impeached and what constitutes impeachable offenses, but the

Given the enormity of the impeachment power, its actual exercise may signal a political crisis, but it neither signals nor creates this form of constitutional crisis. The House and the Senate, operating completely within their recognized constitutional authority, are sufficiently empowered to resolve any such political crisis without resorting to extraconstitutional measures.

The Founders were equally careful in creating the system of presidential election. The constitutional text clearly details the procedures by which such elections will be conducted and how a winner will be determined.⁵⁴ The system is, of course, not automatic, nor are its details completely specified in the Constitution. The constitutional rules governing presidential elections must still be interpreted and supplemented. But the Constitution also specifies the final political authorities for legislating the detailed electoral rules and for determining the electoral victor.⁵⁵ State electors are chosen in the manner that state legislatures direct,⁵⁶ and their electoral votes are accepted and counted by the House and Senate.⁵⁷ When those electoral votes are not sufficient to determine a winning candidate, the Constitution designates that the House has the final authority to select a president from among a specified set of candidates.⁵⁸ Any continuing disagreements about popular vote counts, electoral irregularities, or competing slates of electors would be resolved in Congress, and legislative procedures have long been

final authorities for resolving such disputes are well established—the two congressional chambers in exercising their respective powers.

54. U.S. CONST. art. II, § 1, cls. 2-3, *amended by* U.S. CONST. amend. XII.

55. *Id.* The constitutional specification of a final arbiter in this context is, in fact, far clearer than its specification of an ultimate interpretive authority for most other constitutional disputes, though the Supreme Court has stepped into the gap and asserted its own supremacy in most contexts. *See, e.g., Baker v. Carr*, 369 U.S. 186, 211 (1962) (political questions and separation of powers); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (equal protection).

56. U.S. CONST. art. II, § 1, cl. 2. The Florida Supreme Court thought the state legislature, in exercising its constitutional responsibility to set the manner for choosing electors, had essentially created a statute containing contradictory directives. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1231-34 (Fla.), *vacated by* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000). If so, then the legislature may have itself created the possibility of an operational crisis, though the court claimed the power to resolve it. *Id.* at 1240.

57. U.S. CONST. amend. XII.

58. *Id.*

in place for so doing.⁵⁹ Despite any uncertainty leading up to the final counting of ballots in Congress, and any popular unfamiliarity with this process, there was never any doubt as to where, when, and by whom the presidential election would ultimately be concluded. Formal constitutional authority to provide a final and authoritative settlement to a presidential election contest was securely lodged in a single institution,⁶⁰ the most democratically accountable department of the federal government. If the election ever created or threatened to create a constitutional crisis, it could not have been an operational crisis arising from the formal architecture of the Constitution.⁶¹

B. Crises of Constitutional Fidelity

Crises of constitutional fidelity arise when important political actors threaten to become no longer willing to abide by existing constitutional arrangements⁶² or systematically contradict

59. 3 U.S.C. § 5 (2000). This has led some to argue that the entire electoral dispute was a political question most properly resolved by Congress. *See, e.g.,* Laurence H. Tribe, *Erog v. Hsub and its Disguises: Free Bush v. Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170, 275-92 (2001). Even laying aside the vagaries of modern political question doctrine, the prior existence of litigation and judicial intervention in Florida and the evolution of modern voting rights and equal protection doctrine (with its heightened judicial supervision of elections and electoral disputes) certainly complicated the Supreme Court's situation.

60. Actually, the single institution charged with counting the presidential votes is not so clearly unified. The Twelfth Amendment specifies that the President of the Senate, which is the sitting Vice President of the United States, shall open and count the ballots in the presence of the House and Senate. U.S. CONST. amend. XII. The Constitution is ambiguous as to the precise relationship between the Vice President's counting of the ballots and the Congress in whose presence he does the counting. *See id.* The Constitution does not specify what procedures might be appropriate to challenge the conclusions of the President of the Senate. At the time of the 1876 election, for example, the House and the Senate were controlled by different political parties, raising the specter of a stalemate between the two chambers in the determination of who won the election. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* 575-82 (1988). The gap is filled by 3 U.S.C. § 15, which details the procedures for making and disposing of objections to the ballots.

61. *See* Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 677 (2001) ("Whether following politically contentious—but legal—procedures would constitute a constitutional crisis is not obvious . . .").

62. *See, e.g.,* Symposium, *The Prime Time Election, from Courtroom to Newsroom: The Media and the Legal Resolution of the 2000 Presidential Election*, 13 CARDOZO STUD. L. & LIT. 1, 75-76 (2001) (remarks by Sanford Levinson):

[T]he possibility remains not only that the House of Representatives would select a president, but that it would be done on the basis of a voting rule that

constitutional proscriptions.⁶³ Constitutional efficacy depends on the willingness of political actors to adhere to constitutional principles and procedures. Normal legislation seeks to regulate social actors and is undergirded by enforcement mechanisms located in the government and external to the social context being regulated. The sanctioning force of the government underwrites the law. By contrast, constitutions attempt to regulate the government itself and cannot rely on any external enforcement mechanism. Sanctions of violations of constitutional requirements must ultimately come from within the political system. Given that the government itself is the repository of effective sanctioning power, the primary sanction available for a constitutional violation is simply publicity of the violation, which centrally depends for its effectiveness on the continued general commitment to the constitutional provisions that are being violated. There are a variety of means of making such constitutional commitments credible, such as giving a court independent of the rest of the government a responsibility for enforcing the terms of a constitution, but the central dilemma of the self-executing nature of constitutions is inescapable.⁶⁴ There is a perpetual danger that political actors, potentially including judges or the citizenry, will not remain faithful to the putative constitution.⁶⁵

would make Vermont the equal of Texas, Montana the equal of California. I think this is a full-scale constitutional crisis waiting to happen I think there would be justified rioting in the streets

63. See, e.g., W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 83 (1993) ("The United Nations is in the midst of an unusual constitutional crisis. It was not caused by the Organization's historic ineffectiveness but, rather, by new expectations that parts of the Organization might be evolving into something far more effective and powerful than anticipated."); Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 527 (1997) ("The use of omnibus appropriations bills with non-germane riders has 'made a mockery of the President's ability to exercise the veto power' and 'corrupted the delicate structure of shared powers.' This fundamental shift has created a constitutional crisis.") (quoting Diane-Michele Krasnow, *The Imbalance of Power and the Presidential Veto: A Case for the Item Veto*, 14 HARV. J.L. & PUB. POL'Y 583, 584, 613 (1991)).

64. See GRIFFIN, *supra* note 23, at 14, 17-18; RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 113-14 (1999); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 5-6, 198-99 (1990); Peter C. Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137, 143-48 (1992).

65. The problem is more complicated than can be fully addressed here. It may be possible, for example, to compartmentalize and layer constitutional fidelity. It may be possible for

Constitutional fidelity does not require constitutional perfection. Constitutions are, to some degree, idealized representations of the political community.⁶⁶ Whether through mishap or willfulness, there are bound to be violations of any moderately constraining constitution. The mere fact of constitutional violations does not indicate a crisis of constitutional fidelity.⁶⁷ Constitutional violations cannot be routine in a true constitutional system. Regular constitutional violations suggest the inefficacy of a constitution. Occasional constitutional violations, subject to recognition and correction, simply suggest human fallibility. As Madison noted, if men were angels there would be no need for either government or constitutions.⁶⁸ But if men were wholly corrupt, or uncommitted to constitutional values, then mere paper barriers would be insufficient to prevent political abuses in any case.⁶⁹ Constitutions assume a genuine commitment to constitutionalism and a large measure of voluntary compliance.

Crises of fidelity undermine a constitution's ability to achieve its substantive goals of specifying and advancing a specific set of political values. Those political values may refer to either the means or the ends of government power, and a constitution will be equally concerned with identifying the appropriate means by which political ends will be pursued and with identifying and prioritizing the ends themselves.⁷⁰ Whereas an operational crisis calls into question a

specialized institutions, such as courts, to have greater fidelity to specific substantive constitutional commitments and for other institutions, such as executive officials, to have a broader fidelity to a constitution as interpreted by those more specialized institutions.

66. See Anne Norton, *Transubstantiation: The Dialectic of Constitutional Authority*, 55 U. CHI. L. REV. 458, 464-67 (1988).

67. I leave aside the difficult question of determining what counts as a constitutional violation. Interpretive disagreements may lead to disagreements over whether a constitutional violation has in fact occurred. The important point in that context, however, is that interpretive disagreement still implies a commitment to interpreting a specific constitution, and to constitutional fidelity.

68. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

69. See Guillermo O'Donnell, *Horizontal Accountability in New Democracies*, in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 29, 34-41 (Andreas Schedler et al. eds., 1999) (describing "delegative" democracies in which nonelectoral constraints on public power are regarded as an "unalloyed nuisance").

70. A constitution may specify those ends and means more or less thickly, however. Compared to many constitutions, the U.S. Constitution is especially thin in defining political ends and fairly thin in specifying appropriate means.

constitution's ability to establish political order, a crisis of fidelity calls into question a constitution's ability to establish a particular political order. Political actors may well challenge the authority only of specific constitutional provisions, but they may instead challenge the authority of a constitution as a whole. Important political actors may continue to accept the authority of, and express their fidelity to, a constitution as a whole, while still asserting that particular constitutional constraints, provisions, or rules are unjust, outdated, or otherwise unworthy of continued respect and without the authority to demand fidelity.

Crises of fidelity may be connected to the operational crises discussed above. The existence of an operational crisis may call into question the substantive value and legitimacy of a constitution, resulting in a crisis of fidelity. In a sense, this is what happened to the Articles of Confederation. Because the Articles provided no mechanism to force state compliance with national policy and required unanimous consent of the states to adopt any amendments, the persistent obstruction of individual states to reform eventually led nationalists to circumvent and replace the entire constitutional system with a new one.⁷¹ The inability of a constitution to overcome a political disagreement and authorize action when action is evidently needed may lead political actors to lose faith in the constitution itself, or at least aspects of it, and seek elsewhere the authority to act.⁷² An operational crisis may itself arise from a crisis of fidelity. If some important social or political actors are effectively

71. For a discussion of the loss of faith in the Articles from Madison's perspective see LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 43-75 (1995).

72. This seems to be the central element in Bruce Ackerman's theory of unconventional constitutional amendments. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). As with the Founding, Ackerman sees political leaders in Reconstruction and the New Deal as frustrated by the evident paralysis of the existing constitutional order and its inability to authorize their preferred political actions. See *id.* As a result, those actors effectively appeal over the head of the Constitution's Article V amendment process in order to discard, directly in the name of the sovereign people who are the foundation of the Constitution's own authority, the old constitutional provision and institute a new one in its place. See *id.* An apparent operational crisis leads to a fidelity crisis that produces a new constitution to which dominant political actors are willing to give their fidelity. This reconstruction of Ackerman's theory may be both empirically and normatively plausible, but it would not be able to sustain his insistence that such transformations are still internal to and authorized by the original constitutional order. See *id.* at 85-88.

operating outside the existing constitutional order, they may disrupt the normal workings of the system and eventually force others to abandon the established constitutional order as well.

Crises of fidelity may arise from a variety of other sources as well. Despite the nominal acceptance of a given constitution, a nation's commitment to that constitution may not be very deep or wide. When the base of support for a constitution is not very strong in the first place, the constitution may well be abandoned when it becomes inconvenient or when its strongest proponents lose political influence. For example, Bruce Rutherford has argued that the Egyptian support for liberal constitutionalism was always limited to the legal and judicial class, and liberal constitutionalism has faced crises of fidelity whenever the power of that constituency has waned.⁷³ Even if a constitution was fully embraced initially, subsequent political developments may lead to a crisis of fidelity. New political sensibilities may regard long-accepted constitutional provisions as substantively unjust, or a relatively stable constitutional structure may come to be regarded as outmoded in a new social or political environment. Some opponents of slavery, for example, simply became unwilling to continue to recognize the authority of a "covenant with death."⁷⁴ The actions of the state governments during the Confederation period increasingly led James Madison and others to lose faith in the justice and continuing authority of the Articles.⁷⁵ Somewhat differently, the urbanization of the Columbian population left the national legislature increasingly malapportioned and unresponsive to popular concerns, which fed armed rebellion and, eventually, extraconstitutional revision of the electoral system and political institutions.⁷⁶ If a constitution cannot readily be modified within the bounds of its own

73. Bruce K. Rutherford, *The Struggle for Constitutionalism in Egypt: Understanding the Obstacles to Democratic Transition in the Arab World* 47-58, 455-59 (1999) (unpublished Ph.D. dissertation, Yale University) (on file with the Yale University Library).

74. WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 228-48 (1977); see also J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703 (1997).

75. BANNING, *supra* note 71, at 76-107; JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 35-56 (1996); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 391-467 (1969).

76. Daniel L. Nielson & Matthew Soberg Shugart, *Constitutional Change in Columbia: Policy Adjustment Through Institutional Reform*, 32 *COMP. POL. STUD.* 313, 321-28 (1999).

procedures to reflect the new political consensus, it may instead suffer a crisis of fidelity as political actors challenge its legitimacy and authority.

Unfortunately, the existence of a crisis of constitutional fidelity can be even more difficult to establish than operational failure. Political actors are prone to accuse their opponents not simply of being mistaken or guilty of constitutional violations, but also of being illegitimate and unfaithful to a constitution. Especially when the accepted range of reasonable constitutional interpretations is wide, the distinction between reinterpretation and actual infidelity can be difficult to pin down, at least within a political system such as that of the United States where the symbolic authority of the Constitution is largely unquestioned. Charges of infidelity are likely to be common, but admissions of infidelity are likely to be few.

It also seems difficult to locate in recent events a serious prospect of a crisis of fidelity for the U.S. Constitution. In granting Congress the impeachment power, the Constitution imposes both procedural and substantive limits on its use. Procedurally, it requires a simple majority in the House to impeach⁷⁷ and two-thirds of the senators present to convict.⁷⁸ Substantively, the Constitution limits the grounds on which officials can be impeached⁷⁹ and the punishments that can be imposed upon conviction.⁸⁰ There is little question that all major political actors recognized and accepted the procedural features of the impeachment power, as well as the substantive limits on the Senate.⁸¹ Although the outcome of the Senate trial was never in doubt, and thus the issue was not seriously faced, it also seems very doubtful that President Clinton would have refused to leave office or questioned the authority of the Congress to judge the impeachment charges if convicted. The only real question is whether the House recognized the substantive limits on its power to impeach, or whether it simply made one of "various kinds of power plays during which legal rules may be invoked,"⁸² attempting a

77. U.S. CONST. art. I, § 2, cl. 5.

78. U.S. CONST. art. I, § 3, cl. 6.

79. U.S. CONST. art. II, § 4.

80. U.S. CONST. art. I, § 3, cl. 7.

81. There were some interpretive disagreements on the margins, however. *E.g.*, BRUCE ACKERMAN, *THE CASE AGAINST LAMEDUCK IMPEACHMENT* (1999).

82. O'Donnell, *supra* note 69, at 41.

"kind of coup."⁸³ Although there can be reasonable disagreement about whether the majority of the House was correct in its understanding of impeachable offenses, it does not seem plausible to claim that the House had reneged on its constitutional obligations.⁸⁴ The House majority not only expressed its commitment to adhering to the terms of the impeachment clause, but it made a credible effort to justify its actions under a plausible interpretation of that clause and refused to pursue some articles of impeachment in part because of doubts about whether those charges crossed the threshold of impeachable offenses.⁸⁵

The threat of a crisis of constitutional fidelity arising from the 2000 presidential election seems, in retrospect, similarly small. It is striking that there was some brief questioning of the legitimacy of an electoral vote winner who was not also a popular vote winner, despite the clear constitutional rule that only electoral votes matter, but such public doubts quickly dissipated.⁸⁶ One of the more interesting facets of the 2000 presidential election is the failure of the predicted crisis of fidelity upon the election of a "loser president" to come to pass.⁸⁷ The public fidelity to the Electoral College appears

83. Ronald Dworkin, *A Kind of Coup*, N.Y. REV. OF BOOKS, Jan. 14, 1999, at 61.

84. Keith E. Whittington, *"High Crimes" After Clinton: Deciding What's Impeachable*, 99 POL'Y REV. 27, 30-32 (2000).

85. *Id.* at 31.

86. See, e.g., *Bizarre Occurrences Raise Questions About System: Electoral College Could Face Fire*, FLORIDA TIMES-UNION, Nov. 9, 2000, at A15, available at LEXIS, News Library, Individual Publications File; Julian Borger, *Race for the White House: Constitution: Voters Open a Legal Can of Worms: System Left by Founding Fathers Faces a Profound Test*, THE GUARDIAN (London), Nov. 9, 2000, available at LEXIS, News Library, Individual Publications File; Todd Cooper & Henry J. Cordes, *Electoral College Criticized*, OMAHA WORLD-HERALD, Nov. 9, 2000, at 1, available at LEXIS, News Library, Individual Publications File.

87. Amar, *supra* note 42, at 15-17; see also Ann Althouse, *Electoral College Reform: Déjà Vu*, 95 NW. U.L. REV. 993, 1011-14 (2001) (reviewing JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENTS: A DEFENSE OF THE ELECTORAL COLLEGE* (1971); ALEXANDER M. BICKEL, *REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM* (1971); and LAWRENCE D. LONGLEY & ALAN G. BRAUN, *THE POLITICS OF ELECTORAL COLLEGE REFORM* (1972)). Although it would be difficult to know just how seriously public opinion poll respondents take the term "legitimacy," it is worth noting that a solid majority (fifty-nine percent) of the public regarded George W. Bush as the legitimate president even though Al Gore received more popular votes. TIME/CNN poll, Nov. 11, 2000, Roper Center, Public Opinion Online, LEXIS, News Library, RPOLL File. Even among the quarter of the voters who would still question Bush's legitimacy even if he won Florida by a narrow margin, less than half attributed any of their doubts to the Electoral College system itself, as opposed to the validity of the vote count, and only a fifth (or five percent of all voters) would base their

to be more robust than some academic commentators expected. There obviously has been substantial criticism of how the election itself was conducted and of how challenges to the election results in Florida were mounted by the candidates and handled by a variety of government officials. Such criticism, however, focused more on how the election was administered than on the constitutional provisions for a presidential election.

Similarly, there have been serious doubts raised as to whether various government officials, including the majorities of the Florida and United States Supreme Courts,⁸⁸ were faithful to their constitutional responsibilities during the course of the postelection struggle, though such criticisms do not seem to have permanently damaged the U.S. Supreme Court.⁸⁹ Although the Court has come

doubts entirely on the Electoral College system, Pew Research Center poll, Nov. 14, 2000, Public Opinion Online, LEXIS, News Library, RPOLL File. *See also* Bowman, *supra* note 5; James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000*, at 3-4 (Jan. 17, 2002) (unpublished manuscript), at http://csab.wustl.edu/perceived_legitimacy_american_political_institutions.html.

88. *See generally* HOWARD GILLMAN, *THE VOTES THAT COUNTED* (2001). Over sixty percent of the public had less confidence in the judicial system as a whole after the election controversy. David S. Broder, *Courts Risk Public Image in Election Case*, WASH. POST, Dec. 12, 2000, at A35.

89. Gore was quick to accept the U.S. Supreme Court's authority over the election controversy. David Von Drehle et al., *Anxious Moments in the Final Stretch: High Court Stepped in and Wrote Stirring Finish*, WASH. POST, Feb. 3, 2001, at A1. Nearly three-quarters of the public favored Gore's move, ABC/WASH. POST poll, Dec. 14, 2000 Public Opinion Online, LEXIS, News Library RPOLL File; only seventeen percent of the public "[did] not accept" the Court's decision, CNN/USA TODAY poll, Dec. 18, 2000, Public Opinion Online, LEXIS, News Library RPOLL File; and most simply felt "relieved" by the outcome, CNN/USA TODAY poll, Dec. 18, 2000, Public Opinion Online, LEXIS, News Library, RPOLL File. A majority of the public favored the Court's intervention in the controversy, fifty-four percent to thirty-nine percent, CBS/NY TIMES poll, Nov. 29, 2000, Public Opinion Online, LEXIS, News Library, RPOLL File; a majority looked favorably on the Court immediately after the Court's actions, fifty percent to thirty-one percent, LA TIMES poll, Dec. 17, 2000, Public Opinion Online, LEXIS, News Library, RPOLL File; and within weeks of the Court's actions a large majority of the public continued to look favorably on the Court, sixty-eight percent to twenty-one percent, Pew Research Center poll, Jan. 11, 2001, Public Opinion Online, LEXIS, News Library, RPOLL File. Gallup approval ratings for the Court were largely unchanged after the Court's actions, at fifty-nine percent approval in January 2001, compared to sixty-two percent approval in August 2000. Wendy W. Simmons, *Election Controversy Apparently Drove Partisan Wedge Into Attitudes Towards Supreme Court*, Gallup News Service, Jan. 16, 2001, available at <http://www.gallup.com/poll/releases/pr010116.asp>. Most of the general public (sixty-two percent), if not legal commentators, credited the Court with deciding *Bush v. Gore* on the legal merits. Gibson et al., *supra* note 87, at 9. A potentially more troubling difficulty for the Court, if it persists, is the partisan polarization of its public support after *Bush v. Gore*.

in for criticism for its actions, the claims of constitutional crisis during the postelection contests were not directed at the judiciary and quickly faded away after the Court's actions.⁹⁰ It was widely and readily accepted that the Court's ruling was authoritative, even if mistaken, and that Congress had the final authority over the outcome of the election.⁹¹ It seems difficult to imagine that, given the uncertainty surrounding the correct outcome in Florida, the congressional authority to resolve the issue in favor of either candidate would have been rejected as illegitimate. Under any circumstances, President Clinton would have surrendered power and the congressionally determined winner of the electoral votes would have been inaugurated on January 20th. Regardless of the criticisms of this electoral cycle, the constitutionally specified electoral process will remain in place and authoritative until altered by an Article V amendment. No major political actor has challenged the legitimacy of the constitutional rules for selecting the president, though some have questioned whether various and contradictory officials correctly followed those (and derivative) rules in this particular election. There were sharp disagreements as to what constitutional fidelity required, as there often are, but little chance that anyone was going to embrace infidelity as appropriate in this situation.

It is nonetheless possible that the Constitution did suffer a substantive crisis of fidelity and that the Supreme Court's intervention in the postelection dispute both reflects and obscures that crisis. The Constitution specifically grants the House and the Senate, seated together, the authority to count the votes of the presidential electors and determine which candidate has the majority.⁹² Although the media cries of constitutional crisis were not very specific, it is possible such concerns were motivated particularly by this provision of the Constitution and the role of the Congress in settling disputes over federal elections.⁹³ It is possible

Id. at 14-15; Herbert M. Kritzer, *Into the Electoral Waters: The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32 (2001); Simmons, *supra*.

90. *See supra* note 89.

91. *See id.*

92. U.S. CONST. amend. XII.

93. *Id.*; *see also* U.S. CONST. art. I, § 5, cl. 1 (stating that "[e]ach House shall be the Judge

that by its actions the Court obscured an actual crisis of fidelity to that provision, and indeed it is possible that the Justices themselves were motivated by either such a perception of developing crisis or their own lack of fidelity to the constitutional procedures that raised the prospect of a polarized and narrowly divided partisan federal legislature declaring the victor in a disputed presidential election.⁹⁴ This would seem consistent with the general public distrust of Congress, which appears likely to be shared by at least some of the Justices.⁹⁵ It is possible that the Founders' delegation of the power to monitor and resolve electoral disputes to a democratic body is no longer accepted as appropriate and authoritative, and is in fact a dead letter, at least in the case of presidential elections. Indeed, the trend in more recently democratized nations is toward the establishment of independent election commissions to administer elections and determine the results.⁹⁶ Congress may, in fact, only serve as a rubber stamp in such situations for decisions that are more authoritatively rendered elsewhere, such as in the Supreme Court. It is notable that the Court in this case acted on its own authority, not on a delegated congressional authority as did the election commission of 1877.⁹⁷ Relative to Congress, the Court generally has better standing with the American public.⁹⁸ Consistent with that general tendency, during the dispute sixty-one percent of the public said that it would prefer to see the election

of the Elections, Returns, and Qualifications of its own members").

94. This may be an underappreciated consequence of the unanticipated development of political parties in the United States. The drafters of the Constitution did not expect political parties to form and become the central vehicle for organizing politics in a republican government, and thus did not foresee that Congress would be structured by partisanship rather than by free-floating deliberation. RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* 40-73 (1969). Rather than serving as an independent arbiter of presidential elections, a legislature with a partisan majority choosing the winner of a partisan presidential race is more likely to appear to be judging its own case.

95. See generally JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY* (1995); Jeffrey Rosen, *A Majority of One*, N.Y. TIMES, June 3, 2001, § 6 (Magazine), at 32. See also Larry D. Dramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 137-169 (2001).

96. Robert A. Pastor, *A Brief History of Electoral Commissions*, in *THE SELF-RESTRAINING STATE*, *supra* note 69, at 77-80.

97. The Democratic candidate, Samuel Tilden, opposed the creation of an independent commission as "an abandonment of the Constitution," though he eventually acceded. FONER, *supra* note 60, at 579.

98. Jackie Calmes, *Citizens' Faith in National Core Remains Sound*, WALL ST. J., Dec. 14, 2000, at A9.

controversy resolved by the U.S. Supreme Court, compared to only seventeen percent favoring Congress.⁹⁹ Such a conclusion can only be speculative, and given the rarity of such election disputes the matter may be of little practical importance. Even if such a crisis of fidelity was developing after the 2000 elections, by the time such an event recurs this provision of the Constitution may have been amended, the standing of Congress may have improved, or Congress may be able, through a variety of devices such as a special election commission, to act nonetheless on its authority. As this possibility indicates, a constitution may go out in a crisis of fidelity with either a whimper of irrelevance or a bang of repudiation. Sensing the possibility of the latter, the Justices and others may have reached for the former.

II. CONSTITUTIONAL CRISES IN THE UNITED STATES

There is no ready list of constitutional crises in American history, and I will not attempt to provide a comprehensive inventory of potential crises here. There are, however, a number of fairly obvious candidates for inclusion in such a list, and they are worth considering somewhat more closely. In reviewing a few of these candidates in this section, I argue that actual constitutional crises have been exceedingly rare, and perhaps even singular, at the national level. Ultimately, it is less important how such historical events are best categorized than what light they might shed on general workings of constitutionalism. My primary concern in this section is to examine exactly how these historical events have tested the constitutional system.

A. *Secession as a Constitutional Crisis*

At least one event in American history clearly amounted to a constitutional crisis—the secession of eleven states in 1860-1861. Secession and the subsequent civil war and reunification were, of course, crises in a variety of other senses as well. Secession potentially threatened the continued existence of the United States

99. Broder, *supra* note 88, at A35.

itself, and the war was a substantial social, economic, and political crisis that had revolutionary implications for the character of the American nation. The Constitution, as well as the nation, was tested by these events and was in some ways transformed in the process.¹⁰⁰

Challenges and amendments are not constitutional crises. More important, for present purposes, is the possibility that the Constitution failed to order important political events during this period. The Constitution as a whole did not collapse. To an impressive degree, the Constitution continued to operate in the North. The United States government was still constituted by the U.S. Constitution, and the Constitution still prescribed the foundational rules of the political game. Congress still met; elections were still held. Even so, a variety of constitutional constraints were at least stretched, and probably broken, as the government struggled with the consequences of secession.¹⁰¹ Constitutional controversies and “problems” erupted everywhere over the next decade.¹⁰² The secession crisis was a constitutional crisis in both of the senses described above.

Perhaps most obviously, secession was a crisis of fidelity, though of a peculiar sort. In seceding, the southern states declared their independence from the federal union governed by the U.S. Constitution and denied the continued authority of the Constitution over their territories or citizens.¹⁰³ For a substantial portion of the country, the U.S. Constitution was no longer regarded as politically authoritative and no longer ordered political activities on the ground.¹⁰⁴ The constitutional arrangements that, for example, specified that a president would be chosen by a majority of the electoral votes were no longer regarded as acceptable in the aftermath of the election of 1860,¹⁰⁵ and mere amendment was no

100. It may also be said that the Constitution was, in some ways, implicated in these events. Arthur Bestor, for example, argued that the Civil War was a constitutional crisis precisely because of the “configurative effects” of the Constitution in producing the Civil War. Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 69 AM. HIST. REV. 327, 328-30 (1964).

101. JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (rev. ed. 1964).

102. *Id.*

103. MARSHALL L. DEROSA, *THE CONFEDERATE CONSTITUTION OF 1861: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM* 7-17 (1991).

104. *Id.*

105. See MARK E. BRANDON, *FREE IN THE WORLD* 147 (1998) (“If, from the standpoint of

longer regarded as adequate to restore Southern fidelity to the Constitution, especially after the firing on Fort Sumter.¹⁰⁶ The authority for state secession was, of course, deeply contested at the time, and obviously rejected entirely by the Lincoln administration.¹⁰⁷ But there is no question that secession, whether understood as a revolutionary natural right of political communities or a constitutionally reserved right of the states,¹⁰⁸ sought to overthrow and replace the existing constitutional arrangements in the seceding states.¹⁰⁹ Even when claiming that their actions were not explicit violations of the U.S. Constitution, the secessionists' reliance on state popular conventions was an appeal to a political authority more fundamental than that of the Constitution and acting beyond the terms of the Constitution.¹¹⁰

The secession of the Southern states in 1860-1861 represented a peculiar sort of crisis of fidelity for the U.S. Constitution, however, precisely because the secessionists remained so faithful to their own understanding of the prior constitutional order. Even as they broke from the old constitutional union, the seceding states formed a new union under a written constitution that nearly replicated the U.S. Constitution.¹¹¹ The crisis of fidelity in the South was less with the text of the U.S. Constitution itself than with the larger polity that was constituted by that text and the adequacies of constitutional protections given the political character of that polity.¹¹² The crisis of fidelity for the U.S. Constitution in the South was transitional to the restoration of the South's idealized constitutional order in the form of the Constitution of the Confederate States of America.

political process, Lincoln's election became what the Constitution 'meant,' many in the South were unwilling to accept such a meaning.").

106. On efforts to pass a Thirteenth Amendment that would have protected slavery see HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 40-47 (1973); DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, at 146-52 (1996).

107. HYMAN, *supra* note 106, at 50-64.

108. BRANDON, *supra* note 105, at 167-99 (discussing constitutional justification for secession); RANDALL, *supra* note 101, at 12-24 (same).

109. DEROSA, *supra* note 103, at 7-17.

110. *Id.* at 15-37.

111. For a useful analysis of the C.S.A. Constitution see *id.*

112. *Id.* at 15-17.

If secession was a constitutional crisis of fidelity in the South, it threatened the possibility of a crisis of fidelity in the North. The reality of secession and subsequent civil war led some to see fundamental flaws in the Constitution and to doubt its continued viability. After all, if the object of the Constitution "was to hold the States of this Union together," then the war demonstrated its failure.¹¹³ As one prominent commentator put it, the war was a "trial of the Constitution," and it was by no means evident that the Constitution would survive the test.¹¹⁴ When the Constitution "is for the first time subjected to the test of a severe ordeal, its defects are becoming manifest."¹¹⁵ Sidney George Fisher argued, "If the Union and the Government cannot be saved out of this terrible shock of war constitutionally, *a* Union and *a* Government must be saved unconstitutionally."¹¹⁶

Despite such doubts, however, such a crisis of fidelity never fully developed in the North, or at most passed quickly. Elections continued to be held; Congress and the courts continued to operate. Foreign observers remained more likely than native ones to conclude that the "Constitution was dead."¹¹⁷ Notably, Lincoln grounded his own actions in constitutional arguments, denouncing those who recognize "no fidelity to the Constitution, no obligation to maintain the Union."¹¹⁸ Although in his special message to Congress Lincoln suggested a defense of necessity for his actions after the firing on Fort Sumter, including most notably the suspension of habeas corpus, his more fundamental argument was that "all was believed to be strictly legal"¹¹⁹ and consistent with the "war power of the Government."¹²⁰ After some initial hesitation, arguments were

113. Edwin Lawrence Godkin, *The Constitution and Its Defects*, 99 N. AM. REV. 117, 123 (1864).

114. SIDNEY GEORGE FISHER, *THE TRIAL OF THE CONSTITUTION* (Leonard W. Levy ed., Da Capo Press 1972) (1862).

115. *Id.* at v-vi.

116. *Id.* at 199.

117. HYMAN, *supra* note 106, at 105. For discussion of the doubts about the adequacy of the Constitution in the wake of secession see generally *id.* at 99-123.

118. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 600 (Roy P. Basler ed., 1946) [hereinafter LINCOLN: SPEECHES].

119. *Id.* For a discussion of the necessity argument see SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS 186-96 (1984).

120. Lincoln, *supra* note 118, at 598.

quickly developed to demonstrate that “the Constitution was adequate for conditions of war as well as peace.”¹²¹ Before the test of the Civil War, “the adequacy of the Constitution to the exigencies of government and the preservation of the Union, ha[d] not hitherto been exhibited and proved in practice, nor fully asserted and insisted on by its friends, even in theory.”¹²² Americans had been “unconscious of the sleeping powers of the Constitution.”¹²³ The rediscovery of those sleeping powers, however, allowed continued fidelity to the Constitution throughout the war. As the Supreme Court concluded afterward:

The Constitution of the United States is a law for rulers and people, equally in war and in peace for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.¹²⁴

Secession may also be understood as a constitutional crisis of operation. The text of the Constitution was silent on the question of secession, and it provided no clear mechanism for resolving the contested question of whether and how states could secede from the Union. To Southern secessionists, continued participation in the Union was strictly voluntary and the states could simply withdraw their representatives from the United States government and declare their independence.¹²⁵ To lame-duck President James Buchanan, secession was unconstitutional, but no branch of the

121. HYMAN, *supra* note 106, at 128; *see also id.* at 124-40.

122. Timothy Farrar, *Adequacy of the Constitution*, 21 NEW ENGLANDER 51, 52 (Philadelphia, C. Sherman, Son & Co., Printers 1862).

123. DANIEL AGNEW, OUR NATIONAL CONSTITUTION 11 (1863).

124. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866).

125. 1 JEFFERSON DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 142-49 (New York, D. Appleton & Co. 1881); 1 ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 477-522 (Philadelphia, National Publishing Co. 1868). This also raises the interesting possibility of a formal operational crisis under the original Constitution as the state legislatures could simply refuse to select senators and deny the Senate a quorum. Alexander Hamilton recognized this formal possibility, but argued that the staggered terms of the senators and the self-interest of the states made its realization unlikely. THE FEDERALIST NO. 59, at 364-65 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

federal government had the power or authority to do anything about it.¹²⁶ By contrast, to his successor, President Abraham Lincoln, the president had “an imperative duty ... to prevent, if possible, the consummation of such attempt to destroy the Federal Union”¹²⁷ and a constitutional obligation to take care that the “laws of the Union be faithfully executed in all the States.”¹²⁸ Regardless of which constitutional understanding of the relationship between the states and the Union is substantively best, it is clear that those understandings were sharply contested in 1860-1861 and the Constitution did not provide adequate means for settling that controversy. No particular constitutional interpreter could be regarded as authoritative from the perspective of all the parties in the dispute.¹²⁹

The operational crisis evoked by Southern secession points to an underlying difficulty of the American constitutional system. Although the secession crisis was unique, the constitutional complexity of secession is a problem that is common to a system grounded in theories of popular sovereignty. Popular sovereignty is the traditional foundation stone of American constitutionalism, as evidenced by the use of popular conventions to draft constitutional texts and some mechanism of popular consultation to ratify them in the United States.¹³⁰ The idea of popular sovereignty is profoundly disruptive of the constitutional order, however. A basic feature of popular sovereignty is its informality, its existence outside of the normal constitutional forms.¹³¹ The appeal to the popular sovereign is the appeal to the “people out-of-doors.”¹³² But once “out-of-doors,” the people are also hard to recognize. It is the constitutional forms

126. James Buchanan, Letter to the House of Representatives (Jan. 8, 1861), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 654, 656-58 (James D. Richardson ed., 1897); James Buchanan, Fourth Annual Message to the Senate and House of Representatives (Dec. 3, 1860), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra*, at 626, 634-36.

127. Lincoln, *supra* note 118, at 595.

128. Abraham Lincoln, First Inaugural Address (March 4, 1861), in LINCOLN: SPEECHES, *supra* note 118, at 579, 583.

129. Compare a contemporary Canadian case, in which the secession question was referred to the Supreme Court for resolution. *Re Secession of Quebec* [1998] 2 S.C.R. 217 (Can.).

130. On state practices see G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 23-26, 73-75 (1998).

131. See HARRIS, *supra* note 27, at 201-04.

132. WOOD, *supra* note 75, at 319.

of representation that give shape to the people, and yet the ideal of popular sovereignty recognizes the possibility of an even more authoritative representation of the people than that embodied in the institutions of government. The result is a failure of, or a crisis in, the rule of recognition.¹³³

Any constitutional system grounded in popular sovereignty risks crisis in determining the authoritative source of law. Unsurprisingly, Lincoln and the Secessionists disagreed over what should count as an authoritative expression of the popular will in 1860-1861. The Secessionists appealed to the same device that had ratified the U.S. Constitution, state popular conventions, as the appropriate device for declaring their independence from the Union.¹³⁴ Lincoln, in contrast, noted that the Constitution, like every other "organic law," had no provision "for its own termination," and therefore the Union could be dissolved only "by some action not provided for in the instrument itself."¹³⁵ He regarded the Constitution and federal law as still binding and supreme within the seceding states until he was "in some authoritative manner, direct[ed] the contrary."¹³⁶ Of course, the seceding states believed that the President had already received directions in an authoritative manner, but Lincoln derided the secession conventions as merely "some assemblage of men" giving a "farcical pretense of taking their State out of the Union"¹³⁷ and asserted that "it may well be questioned whether there is, to-day, a majority of the legally-qualified voters of any State ... in favor of disunion."¹³⁸ The conventions and the elections in the South "can scarcely be considered as demonstrating popular sentiment."¹³⁹ Such challenges to any particular representation of the will of the sovereign people are inescapable.¹⁴⁰ The Federalist supporters of the U.S.

133. On the rule of recognition see H.L.A. HART, *THE CONCEPT OF LAW* 94-110, 147-54 (2d ed. 1994).

134. 1 DAVIS, *supra* note 125, at 70, 208, 220.

135. Lincoln, *supra* note 128, at 582.

136. *Id.* at 583.

137. Lincoln, *supra* note 118, at 603.

138. *Id.* at 606.

139. *Id.*

140. See EDMUND S. MORGAN, *INVENTING THE PEOPLE* (1988) 233 (discussing the "ambiguities of popular sovereignty, its paradoxes and contradictions, especially as embodied in the mystery of representation"). Lincoln and the secessionists disagreed about the contours of the sovereign people, as well as about what might count as an authoritative representation

Constitution were fortunate that the Continental Congress chose to embrace, rather than resist, their assertion of the authority to speak in the name of "We the People."¹⁴¹ In many subsequent cases, those holding political power chose to reject, often vigorously and violently, the claims of the people out-of-doors.¹⁴² The state of Rhode Island, for example, faced just such a constitutional crisis of operation when two separate constitutional conventions met in 1841, resulting in two competing state constitutions and eventually the formation of two competing state governments, each claiming the constitutional authority to govern and denouncing the other as treasonous.¹⁴³ One response to this problem, as it was particularly exposed during the Civil War, was the attempted development of an authoritative legal literature seeking to impose constraints on the popular sovereign and constitutional conventions,¹⁴⁴ countering the "disorganizing dogma"¹⁴⁵ of "political aspirants, party aggressions, and unscrupulous innovators."¹⁴⁶

of it. The secessionists adopted the compact view of the Union, in which the people of the individual states were sovereign. Lincoln adopted the nationalist view, in which the people of the nation as a whole were sovereign. This disagreement also points to the potential of federalism to create constitutional crises. Although it is clear that the Constitution and federal laws made pursuant to it are the supreme law of the land, it is substantially less clear where the boundaries lie between federal and state authority. As a consequence, it is possible for the state and federal governments to both claim the same ground and assert their supremacy over it. Without a generally recognized arbiter to resolve the dispute, federal and state officials, acting fully within their constitutional authority as they understand it, may reach deadlock, or potentially armed conflict. The British writer Walter Bagehot thought the Civil War only exposed "the sinister influence of the imperium in imperio" inherent in federalism. HYMAN, *supra* note 106, at 107 (quoting WALTER BAGEHOT, BAGEHOT'S HISTORICAL ESSAYS 357 (Norman St. John-Stevan ed., 1966) (1861)).

141. 1 ACKERMAN, *supra* note 6, at 34-64 (describing new lawmaking processes and substantive solutions created by the Founding Federalists, Reconstruction Republicans, and New Deal Democrats in the name of "We the People").

142. Christian G. Fritz, Legitimizing Government: The Ambiguous Legacy of the People's Sovereignty, 1776-1860 (Sept. 23, 2000) (unpublished manuscript, on file with the author).

143. For accounts of this crisis, see GEORGE M. DENNISON, THE DORR WAR (1976); ARTHUR MAY MOWRY, THE DORR WAR (1901).

144. JOHN A. JAMESON, THE CONSTITUTIONAL CONVENTION (New York, C. Scribner 1867).

145. *Id.* at 296.

146. HYMAN, *supra* note 106, at 123 (quoting 3 W. Barry, *American Political Science*, in OLD AND NEW 303, 303-04 (1871)).

B. Reconstruction and the Separation of Powers

Like popular sovereignty and federalism, the constitutional separation of powers potentially creates ripe ground for operational crises. One likely candidate for an example of such an operational crisis emerged just a few years after secession. I do not believe such a crisis point was in fact reached, but the example of Reconstruction and the struggle between the Republican Congress and President Andrew Johnson is instructive nonetheless.

Presidential systems are defined by the separate elections of the legislature and the head of the government (the president) and by the fixed term of the president.¹⁴⁷ The United States is the classic example of such a system, and indeed is the longest enduring democratic presidential system in the world.¹⁴⁸ Although such systems are often discussed in terms of the separation of powers, that terminology can be misleading, because the American Founders, at least, "created a government of separated institutions *sharing* powers."¹⁴⁹ It is the overlap in powers that creates checks and balances, but this overlap can also create the potential for operational crises. To the extent that independent institutions or actors genuinely share power, then the possibility exists that they will fail to coordinate their actions, resulting in paralysis. Because presidents hold office independently, and continue to hold office regardless of the degree of their legislative support, coordination failures are politically possible. Divided partisan government has even become endemic in late-twentieth-century United States, although serious gridlock, let alone an operational crisis, does not seem to have resulted.¹⁵⁰

147. Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in *THE FAILURE OF PRESIDENTIAL DEMOCRACY: COMPARATIVE PERSPECTIVES* 3, 6 (Juan J. Linz & Arturo Valenzuela eds., 1994); Scott Mainwaring, *Presidentialism, Multipartism, and Democracy: The Difficult Combination*, 26 *COMP. POL. STUD.* 198, 202-03 (1993).

148. Linz, *supra* note 147, at 5.

149. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER* 33 (1960). Neustadt's point can be overstated, however, if it is taken to minimize the distinctions between different political institutions. For demurrals, see CHARLES O. JONES, *THE PRESIDENCY IN A SEPARATED SYSTEM* 15-16 (1994); HARVEY C. MANSFIELD, JR., *AMERICA'S CONSTITUTIONAL SOUL* 115-27 (1991); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 41-45 (1987).

150. MORRIS FIORINA, *DIVIDED GOVERNMENT* (2d ed. 1996) (analyzing modern divided government); DAVID R. MAYHEW, *DIVIDED WE GOVERN* (1991) (concluding that divided government does not cause legislative gridlock). Partisanship can be a crude measure of

Lincoln was assassinated mere days after Robert E. Lee surrendered his army to the United States.¹⁵¹ Lincoln's successor, Andrew Johnson, was left to deal with the divisive issue of the appropriate terms of peace.¹⁵² Johnson was a "war Democrat" and U.S. Senator from Tennessee, who chose not to return to his home state when it seceded in 1861.¹⁵³ After serving as military governor of Tennessee after it was recaptured by Union troops, Johnson was asked to be the vice-presidential candidate for the 1864 elections on the National Union ticket, which was part of Lincoln's general political strategy of building a bipartisan coalition behind the war effort.¹⁵⁴ Although Johnson regarded secession as mere treason, and had no fondness for the planter elite who dominated Southern politics,¹⁵⁵ his goal was "to restore the glorious Union" and bring the states "to their original relations to the Government of the United States" as quickly as possible.¹⁵⁶ By the time Congress returned to session in December 1865, the President was prepared to declare the South pacified and the Thirteenth Amendment successfully ratified, and to recognize the newly elected governments and federal representatives of the Southern states.¹⁵⁷

The Republican Congress expected a more extensive social and political "Reconstruction" of the defeated South and refused to seat

presidential support, however, especially in a system of loosely disciplined parties such as the United States. DAVID W. BRADY & CRAIG VOLDEN, *REVOLVING GRIDLOCK* (1998) (arguing that gridlock is caused by ideological division rather than partisan division); KEITH KREHBIEL, *PRIVOTAL POLITICS* (1998) (same); Paul Frymer, *Ideological Consensus within Divided Party Government*, 109 POL. SCI. Q. 287 (1994). Moreover, the American two-party system tends to secure at least a large fraction of the legislative seats for a president's party, even if not an absolute majority. HAROLD W. STANLEY & RICHARD G. NIEMI, *VITAL STATISTICS ON AMERICAN POLITICS* 198, 237-39 (2001). Even after Watergate, the president's party retained thirty-three percent of the seats in the House of Representatives, and since 1968 the average share of the House seats held by the president's party has been forty-seven percent. In multiparty systems, the share of seats held by the presidential party can be much lower. *Id.*; Mainwaring, *supra* note 147, at 214-19.

151. ERIC L. MCKITTRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 17-18 (1960).

152. *Id.* at 15-41.

153. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION*, *supra* note 29, at 113.

154. *Id.* at 113-14.

155. *Id.* at 113.

156. Andrew Johnson, Speech of 22d February, 1866, in *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION* 58 (Edward McPherson ed., 1871).

157. FONER, *supra* note 60, at 176-226.

the Southern delegations.¹⁵⁸ Relations between Congress and the President quickly degenerated as Johnson vetoed the primary Reconstruction legislation, attacked congressional leaders as “laboring to destroy” the Union and the “fundamental principles of this Government,” and encouraged obstruction of Reconstruction in the South.¹⁵⁹ After a bitter midterm election, in which, for the first time a president actively campaigned against members of Congress, Republicans won overpowering support in Congress, leaving the Democrats with just twenty-five percent of the seats in the House.¹⁶⁰

The size of the Republican majorities in Congress insured that the President would have no control over legislation, leaving Johnson with an unmatched record of fifteen overridden vetoes.¹⁶¹ In terms of legislation, the constitutional mechanisms operated without difficulty. Congressional Reconstruction required extensive administrative capacity, however, and that made it vulnerable to obstruction from a hostile chief executive. In his conviction that congressional Reconstruction was contrary to the basic principles of the Constitution, Johnson tested the limits of presidential obstruction by using his constitutional powers and executive discretion to subvert the effects of those policies. The President ignored congressional test oath requirements in appointing former Confederates to federal offices and provisional state offices, while readily extending pardons to former Confederates.¹⁶² He ended the confiscation of the property of former Confederates, which also had the effect of undercutting the work of the Freedman’s Bureau.¹⁶³ Hitting at congressional policy and Republican Party patronage, Johnson removed a number of unsupportive federal officials.¹⁶⁴ Proclaiming that peace had been restored to the South, he ordered the end of military trials of civilians and the release of military prisoners.¹⁶⁵ Congress responded in turn by reducing the statutory delegation of presidential discretion in the implementation of

158. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION*, *supra* note 29, at 114.

159. Johnson, *supra* note 156, at 61.

160. See FONER, *supra* note 60, at 261-71; MCKITRICK, *supra* note 151, at 421-49.

161. *PRESIDENTIAL VETOES 1989-1994*, at viii-ix (Gregory Harness ed., 1994).

162. MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 39-40 (1973).

163. *Id.* at 37-38, 41-43.

164. *Id.* at 46-49.

165. *Id.* at 44-45.

Reconstruction, imposing martial law in the South, prohibiting the transfer of military personnel and requiring that military orders go through General U. S. Grant, and barring the removal of civilian executive branch officials without Senate approval of replacements.¹⁶⁶ Efforts to impeach the President finally succeeded in March 1868, after Johnson defied Congress by attempting to remove his holdover Secretary of War from office without Senate approval.¹⁶⁷ In doing so, the President finally gave his enemies the specific act and arguable abuse of office that could justify impeachment.¹⁶⁸

The battles over Reconstruction demonstrated the relative powers of the two elected branches of the government and the capacity of a president to hamper at least certain kinds of congressional policies. Johnson's vocal opposition to Congress certainly impeded the progress of Reconstruction, not least by encouraging resistance in the South.¹⁶⁹ It did not, however, result in a constitutional crisis. Congress was inexperienced both in engaging in such a huge political undertaking and in dealing with an antagonistic chief executive. In a rapidly developing situation, Congress nonetheless did learn to counter presidential moves and gradually limited the damage the President could inflict, even prior to the impeachment that effectively ended presidential resistance to congressional goals.¹⁷⁰

Far from resulting in governmental paralysis, the disagreement between the two branches did not prevent Reconstruction from moving forward. There were persistent fears on both sides that extraconstitutional steps would be taken to end the struggle. Republicans feared that Johnson would use the military against them in a presidentially led coup d'état.¹⁷¹ Johnson in turn feared that Congress might attempt to suspend him from office, even prior

166. See MCKITRICK, *supra* note 151, at 473-85; WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 29, at 121-22.

167. BENEDICT, *supra* note 162, at 95-125; MCKITRICK, *supra* note 151, at 494-509.

168. For a consideration of the justification for Johnson's impeachment see WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 29, at 140-52; Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422, 426-50 (2000).

169. See *supra* note 158-67 and accompanying text.

170. See *supra* note 166 and accompanying text.

171. BENEDICT, *supra* note 162, at 45.

to impeachment and trial, and he received assurances from Grant that the army would prevent that from happening.¹⁷² Some of Johnson's speeches even seemed to suggest the President feared that Lincoln's fate would be his own as well.¹⁷³ The important point is that neither eventuality occurred or was seriously contemplated. Neither side looked outside the Constitution for tools to put an end to its opponent. Congress employed its legislative powers to hem in the President, and eventually employed its impeachment power to attempt to remove him.¹⁷⁴ In finally attempting to remove the President from office, the Republicans adhered to the constitutional rules. Not only did Congress not pursue some option other than the constitutionally prescribed route of impeachment to remove the President, they waited until Johnson's actions plausibly justified an impeachment, and they allowed him to serve out his term when he was acquitted in the Senate.¹⁷⁵

C. The Progressive State and the Constitution Besieged

In the 1930s, the Constitution, as it was understood by the Supreme Court, was "besieged."¹⁷⁶ Soon after an overwhelming reelection, a president whose program was embattled within the

172. William A. Russ, Jr., *Was There Danger of a Second Civil War During Reconstruction?*, 25 MISS. VALL. HIST. REV. 39, 47-48 (1938).

173. See, e.g., Johnson, *supra* note 156, at 61 ("Have they not honor and courage enough to effect the removal of the presidential obstacle otherwise than through the hands of the assassin? I am not afraid of assassins . . .").

174. See *supra* notes 166-68 and accompanying text.

175. Richard Nixon was the first president since 1848 to be elected to office with the opposition party still controlling both chambers of Congress. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 29, at 160. Perhaps unsurprisingly, the administration quickly looked for ways of advancing its agenda without having to rely on Congress. *Id.* As Chief of Staff H.R. Haldeman explained the administration's thinking, "I don't think Congress is supposed to work with the White House—it is a different organization, and under the Constitution I don't think we should expect agreement." STANLEY I. KUTLER, THE WARS OF WATERGATE 128 (1990) (quoting H.R. Haldeman); see also RICHARD P. NATHAN, THE ADMINISTRATIVE PRESIDENCY 1-56 (1983). In seeking out alternative courses of action, the administration took prior developments in the presidency to new heights, and in a new context. Congress and the courts responded by hemming in presidential discretion. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 29, at 168-206. As in the case of Johnson, the Nixon episode led to substantial constitutional conflict, and eventually to constitutional change, but not to crisis. See generally *id.* at 158-206.

176. HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993).

judiciary proposed an unprecedented “reform” of the courts that would have the effect of giving the administration a voting majority on the Supreme Court. Amidst popular and congressional outcry, but also substantial support, the plan was eventually defeated. In the midst of the controversy, however, the Court decisively reversed course and gave its approval to the expansive use of government power to manage economic activity. The result was a “constitutional revolution.”¹⁷⁷

The conflict between President Franklin Roosevelt and the Supreme Court over the New Deal may be another likely candidate for an American constitutional crisis.¹⁷⁸ At an operational level, the Supreme Court’s then-unprecedented rate of nullification of federal statutes—including statutes that were at the center of the President’s legislative program—could be regarded as threatening governmental paralysis in the face of economic crisis. The standoff certainly pitted two of the three branches of the federal government against one another¹⁷⁹ on fundamental issues and with no clear mechanism for overcoming the impasse short of concession by one side or the other. The structure of American judicial review, however, tends to minimize the degree of paralysis created by such judicial opposition to the initiatives of the other two branches. Compared to a system of abstract constitutional review, in which the constitutional court often becomes in effect an additional legislative chamber that must be satisfied before a proposal can become law,¹⁸⁰ American judicial review is fairly slow and uncertain in its exercise. The government often can act before the Supreme Court has an opportunity to rule on the constitutionality of those actions, and even a negative judicial decision may simply start an interbranch dialogue of revision and reconsideration that may

177. EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* (1941).

178. See, e.g., Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 33 (2001) (describing “the constitutional crisis of 1937”); Neil S. Siegel, *State Sovereign Immunity and Stare Decisis: Solving the Prisoners’ Dilemma within the Court*, 89 CAL. L. REV. 1165, 1196 n.93 (2001) (discussing “the constitutional crisis in the 1930s and the dramatic post-1937 withdrawal”) (quoting Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 64).

179. Or, one branch against the other two, as the Court was invalidating the policies adopted by both Congress and the President.

180. See, e.g., ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* 209-21 (1992).

extend over years or decades.¹⁸¹ Rather than shutting the government down, a hostile judiciary may simply force the government to adjust. The structure of judicial review is more likely to shackle government than paralyze it. The New Deal case itself is indicative of this tendency. In the first decades of the twentieth century, the Court was not a monolithic obstacle to progressive reform. It accepted some controversial policies even as it rejected others.¹⁸² Even in the context of the administration's first term and in cases in which the Court did reject the administration's handiwork, the obstacles that the Court raised apparently were not insurmountable, given a bit more legislative care than was often demonstrated during the rush of the first Hundred Days.¹⁸³ Even one of the most visible judicial defeats for the President, the invalidation of the National Industrial Recovery Act, came only after the Act had been in operation for several years—long enough to show itself to be a political and policy embarrassment that likely would have been discarded in any case.¹⁸⁴ Though the holdover independent judiciary hampered the new Democratic majority,¹⁸⁵ it could hardly freeze the government.

Regardless of the actual effects of the Court's actions, Roosevelt clearly perceived the Court to be a threat to his goals and took unprecedented steps to break the impasse. The call for emergency

181. See NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES* 149-50 (1996) (stating that judicial decisions help to fuel ongoing constitutional decision making that is also shaped by nonjudicial forces); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* 231-74 (1988) (arguing that courts are engaged in a "continuing [constitutional] colloquy" with political institutions and society at large).

182. See generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998) (detailing the complexity of the Court's constitutional jurisprudence in the 1920s and 1930s); see also Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913).

183. CUSHMAN, *supra* note 182, at 34-40.

184. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). On the failure of the National Recovery Administration (NRA), an administration designed to regulate business pursuant to the National Industrial Recovery Act, see ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 19-146 (1966). In particular, Hawley notes: "By the time the Supreme Court handed down its decision in the Schechter case in late May 1935, the NRA had already lost most of its popularity and support. . . . The whole thing, Roosevelt confided to Francis Perkins, had been an 'awful headache.'" *Id.* at 130.

185. For analysis of such conflicts as being inherent features of the constitutional design see Robert A. Dahl, *Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

measures to overcome the political deadlock is an expected feature of a crisis of constitutional operation. When political disputes cannot be resolved within the constitutional framework, political actors may look outside that framework for the means to achieve their desired ends. Although unprecedented, and constitutionally undesirable, the Court-packing plan did not exceed the constitutional powers of the elected branches. Rather than placing the Justices under arrest, disbanding the Court under military threat, or even ignoring judicial decisions,¹⁸⁶ the President proposed that Congress adopt legislation that was well within its textually granted and historically exercised powers.¹⁸⁷ Although Roosevelt's proposal to increase the size of the Court was unusual in having the effect of allowing him to "pack" it with his own allies,¹⁸⁸ the basic power of Congress to alter the total number of Justices on the Supreme Court cannot be questioned.¹⁸⁹ As an exercise of legislative power, the Jeffersonian repeal of the Judiciary Act of 1801¹⁹⁰ and the elimination of Federalist judges was certainly a constitutionally closer call than Roosevelt's proposed expansion of the judiciary and creation of new Democratic judges.¹⁹¹ Moreover, far from acting on his own initiative, Roosevelt turned to the normal legislative process established by the Constitution, with its inherent potential to frustrate the presidential will. If the Court-packing plan signaled a constitutional crisis, the crisis did not lie in some dysfunction in the operation of the Constitution. Rather, the Court-packing plan might have indicated that the President no longer took constitutional constraints seriously, that the Constitution was suffering a crisis of fidelity.

186. Although this last possibility may itself provoke an operational crisis, it is possible that it should not appropriately be viewed as itself an extraconstitutional step. See, e.g., Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993).

187. Franklin D. Roosevelt, *The President Presents a Plan for the Reorganization of the Judicial Branch of the Government* (February 5, 1937), in 6 PUBLIC PAPERS AND ADDRESS OF FRANKLIN D. ROOSEVELT 52 (Samuel I. Rosenman ed., 1941) [hereinafter ROOSEVELT PAPERS].

188. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 114-37 (1995).

189. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 11-12, 47-52, 72-77 (1928).

190. Act of Apr. 29, 1802, Ch. 31, 2 Stat. 156.

191. On the repeal, see RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS* 36-52 (1971); WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION*, *supra* note 29, at 44, 58-59.

The possibility of a crisis of constitutional fidelity during the 1930s would appear to be a real one. The viability of constitutional constraints depends upon the willingness of important political actors to respect them. The economic dislocations associated with turn-of-the-century industrialization had been putting continuing pressure on inherited constitutional commitments to limited government, federalism, and strong property rights, and the onset of the Great Depression could be expected to test the robustness of those commitments.¹⁹² The standard narrative of the Supreme Court backing down in the face of Roosevelt's political attack in 1937 and subsequently revolutionizing constitutional law so as to accommodate the New Deal and the growing state strongly suggests a crisis of fidelity, as external political pressure triumphed over the judicial enforcement of constitutional constraints.¹⁹³ Although the President and his supporters may have used constitutionally provided tools to mount their challenge to the Court, their success in forcing a judicial retreat might still have meant a substantive break with the constitutional past and the failure of the old Constitution.¹⁹⁴

The New Dealers themselves, of course, did not claim to be abandoning the Constitution or rejecting any of its provisions. Appearances to the contrary, the New Dealers asserted that they were in fact saving the Constitution from its supposed caretakers. One version of this claim held that the New Dealers were simply recovering the Constitution as John Marshall understood it, and that it was the Justices of the *Lochner* Court who had abandoned constitutional verities and broken from their constitutional faith.¹⁹⁵

192. In 1911, for example, Justice Horace Lurton complained of the "restless tugging against the bonds of the law and the yoke of the Constitution." Horace H. Lurton, *A Government of Law or a Government of Men?*, 193 N. AM. REV. 9, 9 (1911). Five years earlier, Chief Justice Walter Clark of North Carolina had observed that the Constitution was "reactionary." Walter Clark, *Some Defects in the Constitution of the United States*, Address Before the Law Department of the University of Pennsylvania (April 27, 1906), in 54 U. PA. L. REV. & AM. L. REG. 263, 265 (1906); see also MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* 189-216 (1986).

193. See, e.g., ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 117-20 (2d ed. 1994); see also CUSHMAN, *supra* note 182, at 228 nn.8-9 (citing a list of sources).

194. On the different forms of constitutional failure, see BRANDON, *supra* note 105, at 20-21.

195. For description and critique of this "myth of recovery," see 1 ACKERMAN, *supra* note 6, at 42-50.

In this reading, the New Dealers were more faithful to the Constitution than were the Justices. Justice Oliver Wendell Holmes had been particularly prominent in laying the groundwork for this claim in his dissent in *Lochner*, where he denounced the majority for deciding the case based not on the Constitution but on "an economic theory" that the Justices happened to support.¹⁹⁶ If the Justices had confused their political preferences for the Constitution, then it could be no constitutional crisis for the administration to force the Court back onto constitutional grounds, and Roosevelt repeatedly condemned the Court in just these terms.¹⁹⁷ Unfortunately, this argument is not very plausible. As a burgeoning revisionist literature has demonstrated, the Court that stood against the New Deal had been articulating long-standing constitutional principles, and no invocation of the nationalism of John Marshall would have been sufficient to sustain the Progressive innovations of the early twentieth century.¹⁹⁸ The Constitution inherited from the eighteenth and nineteenth centuries, not runaway judges, created the obstacles to the New Deal.

If the Constitution was saved from such a crisis of fidelity, it was saved by the rise of Realist discourse. The Realist embrace of a "living Constitution" was the rhetorically linked but conceptually distinct second approach to defending the New Dealers' constitutional fidelity.¹⁹⁹ From a Realist perspective, the New Deal's difficulty was not so much with judges legislating from the bench as with judges adhering to a socially antiquated understanding of

196. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

197. *E.g.*, Franklin D. Roosevelt, A Fireside Chat Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), in 6 ROOSEVELT PAPERS, *supra* note 187.

198. *See, e.g.*, 8 OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 (1993); GILLMAN, *supra* note 88, at 61-145; Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293 (1985); Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975).

199. *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 198-236 (2000); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 218-40 (1997).

constitutional requirements.²⁰⁰ The problem of constitutional fidelity can be resolved in either of two ways: by strictly adhering to the original commitments of the constitutional text or by reinterpreting those commitments to allow activities that were previously thought to be proscribed.²⁰¹ The relatively demanding amendment procedures for the U.S. Constitution called into question, for many, the Constitution's adaptability to the dramatically changing social conditions of the turn of the century.²⁰² A reconsideration of constitutional interpretation promised a more flexible and adaptable Constitution without the necessity of any formal alteration of the text.

In his Bull Moose incarnation, Theodore Roosevelt declared his desire to treat "the Constitution as a living force for righteousness" and "for applying the Constitution to the issues of to-day."²⁰³ Such a Progressive approach to constitutional interpretation was embraced by President Franklin Roosevelt to help explain his critique of the Court and the justification for the New Deal. In his first inaugural address, President Roosevelt proclaimed, "Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form."²⁰⁴ Against the more despairing views of many of his allies, the President had continued faith in the adaptability of the Constitution.²⁰⁵ In defense of his proposal for judicial reform, FDR explained that his constitutional studies had convinced him that the "vital need is not an alteration of our fundamental law, but an increasingly enlightened view with reference to it."²⁰⁶ The text should be given a "liberal interpretation" so as to be an "instrument of progress."²⁰⁷ A "reinvigorated, liberal-minded Judiciary"²⁰⁸ would "bring to the Courts a present-day sense

200. See *infra* text accompanying notes 204-10.

201. See WHITE, *supra* note 199, at 198-236; Gillman, *supra* note 199, at 218-40.

202. See, e.g., DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS 188-94 (1996).

203. Theodore Roosevelt, A Charter of Democracy, Address Before the Ohio Constitutional Convention, in 100 THE OUTLOOK 390, 391 (1912).

204. Franklin D. Roosevelt, Inaugural Address (Mar. 4, 1933), in 2 ROOSEVELT PAPERS, *supra* note 187, at 11, 14-15.

205. KAMMEN, *supra* note 192, at 259.

206. Franklin D. Roosevelt, The Annual Message to the Congress (Jan. 6, 1937), in 5 ROOSEVELT PAPERS, *supra* note 187, at 634, 639.

207. *Id.*

208. 6 ROOSEVELT PAPERS, *supra* note 187, at 133.

of the Constitution."²⁰⁹ A crisis of constitutional fidelity could be, and was, avoided by the simple expedient of determining that "a present-day sense of the Constitution" could not only sustain the New Deal but could also be adequate to the political needs of the twentieth century.²¹⁰ This expedient could not prevent some from charging that the New Deal was unfaithful to the original Constitution.²¹¹ It could, however, prevent those charges from sticking politically and preserve the general belief that constitutional forms and substance were still relevant, vital, and binding. In urging interpretive flexibility in regard to the Constitution, Roosevelt was not simply making a cynical ploy. He was drawing on intellectual trends among legal Progressives that had been building and deepening over the course of decades and that were well-accepted within his own brain trust.²¹²

III. AVOIDING CONSTITUTIONAL CRISES

Identifying the varieties of constitutional crises may help us identify the ways in which constitutional crises are avoided. This is not to say that a constitutional crisis is necessarily a bad thing, to be avoided at all costs. Constitutions are only instrumental goods, a mere "picture of silver" for the "apple of gold," as Abraham Lincoln put it on the eve of the Civil War.²¹³ It may be perfectly appropriate to put an unjust or inadequate constitution into crisis in order to force reform or revolution. At various times in American history, dissenters from the established political order have seen the virtue in constitutional crisis. The Federalists thought radical constitutional reform was inevitable if the American experiment in democracy and independence was to be sustained.²¹⁴ Both abolitionists and Southern fire-eaters questioned the value of continued constitutional union.²¹⁵ The Left at the turn of the century

209. *Id.* at 127.

210. *Id.*

211. Gillman, *supra* note 199, at 224-23.

212. KAMMEN, *supra* note 192, at 271-78; WHITE, *supra* note 199, at 167-236, 269-301; Gillman, *supra* note 199, at 224-38.

213. Abraham Lincoln, Fragment: The Constitution and the Union (1860 est.), in LINCOLN: SPEECHES, *supra* note 118, at 513.

214. *See supra* note 75.

215. PAUL C. NAGEL, ONE NATION INDIVISIBLE 255-58 (1964).

doubted that the Constitution was fit for an industrialized democracy.²¹⁶ Nonetheless, constitutional crises create their own problems, and certainly it seems preferable that they at least be avoidable.

Crises of constitutional fidelity and the rejection of the substantive commitments of a constitution are largely avoidable if those commitments are few.²¹⁷ A constitution that is not very binding is unlikely to cause political actors to chafe under its constraints. This also seems consistent with a variety of theories of constitutional interpretation of our existing Constitution that stress the essential arbitrariness and impermanence of substantive values and the relative centrality and stability of procedural values.²¹⁸ Somewhat differently, the New Dealers were convinced that the Constitution had been written to be a "layman's document" that empowered rather than hindered the democratic will.²¹⁹ To borrow from John Marshall, if a constitution is to endure for ages to come and not become an object or cause of crises of human affairs, it should be written and interpreted broadly.²²⁰ Such a constitution may bend rather than break under the pressure of social and political change, minimizing the costs of maintaining the constitutional faith.

Such constitutional adaptation comes at a price, however, and only exchanges one threat to constitutional fidelity for another. To the extent that an important goal of constitutionalism is the definition and protection of fundamental political values, a loose constitution sacrifices that goal. The unwillingness to commit strongly to a particular set of values deprives a political system of some of the particular virtues of constitutionalism. In doing so, a loose constitution may avoid the threat of becoming rigid and outdated only to succumb to the threat of being unable to protect

216. KAMMEN, *supra* note 192, at 285-316.

217. A similar point can be made regarding operational crises. If constitutional procedures and structural features are relatively few or loose, then political actors may, in many cases, be able to escape operational crises through the exercise of their own authority.

218. *See, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (urging judicial review only on the basis of procedural values).

219. Franklin D. Roosevelt, *The Constitution of the United States Was a Layman's Document, Not a Lawyer's Contract*, Address on Constitution Day (Sept. 17, 1937), in 6 *ROOSEVELT PAPERS*, *supra* note 187, at 359, 362.

220. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

important values or resist momentary political whims.²²¹ By being insufficiently binding, a loose constitution may tolerate governmental abuses and democratic excesses. Those who would prefer to see substantive commitments more strongly protected from government power may challenge the moral authority of such a constitution, as Madison and other Federalists did when the Articles of Confederation seemed to impose too few restrictions on local legislative majorities.²²² The opposing sides of the antebellum slavery debate illustrated the twin pressures on constitutional fidelity, as both sides questioned the value of a Constitution that was perceived to be too accommodating to the other.²²³ In avoiding one threat of constitutional infidelity, a loosely fitting constitution may at the same time minimize the need for explicit constitutional revision, potentially shifting the responsibility for reflecting on constitutional commitments from more popular political institutions to less-accountable decision makers such as judges.²²⁴

Even recognizing these concerns, a loose constitution with relatively thin substantive commitments can still matter to politics while commanding fidelity.²²⁵ Rather than attempting to mark out firm boundaries on government, a constitution may instead seek only to identify important values to be realized within the political system itself. The constitutional system may be substantively meaningful to the extent that it sustains a common discourse and tradition. Rather than firmly taking some topics off the political agenda, a constitution may attempt to place some topics onto the

221. A loose constitution may also encourage defection since a primary mechanism for sustaining constitutional fidelity is the expectation that others will also be faithful. To the extent that a constitution is loose, it becomes increasingly difficult to know what "fidelity" will mean to other actors and thus to know how they will behave politically. See Ordeshook, *supra* note 64, at 150.

222. See *supra* notes 68-72 and accompanying text.

223. See *supra* notes 125-46 and accompanying text.

224. In comparison to other constitutions, the U.S. Constitution is short, textually broad, and rarely amended. TARR, *supra* note 130, at 23-25 (comparing the U.S. Constitution with U.S. state constitutions); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 246, 247-53 (Sanford Levinson ed., 1995) (same).

225. On one conception of the "thin constitution," see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 9-14 (1999). Tushnet's vision of the Constitution is substantially thinner than my own, however. See Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509, 532-42 (2000).

political agenda, encouraging political actors to deliberate on and take account of certain recognized values. Rather than trumping politics, a substantively rich constitution may engage politics. The relatively timeless, higher-law dimension of the U.S. Constitution is particularly prominent, but the American constitutional system is also dependent on the political construction and reconstruction of constitutional meaning and values over time.²²⁶ Constitutional faith is sustained and rejuvenated through politics.

Just as political engagement with the Constitution is essential to avoiding crises of fidelity, so the informal operation of the constitutional system is crucial to avoiding and defusing potential operational crises. The Constitution sometimes provides a formal, final authority for resolving political disputes. In some instances, such a final authority has been inferred from the constitutional text to settle disputes over constitutional meaning, as in the case of judicial review and supremacy. Operational conflicts are often worked out informally, however, without turning to such final, formal devices. Of course, informal practices and norms are often backed by the formal powers that structure the relationship among political actors. Nonetheless, these informal practices importantly supplement a formal constitution and should be taken into account.

The obvious presence of operational conflicts that are embedded in the basic features of a formal constitution can obscure the informal practices that provide solutions to those conflicts.²²⁷ Political parties, for example, help overcome collective action problems within Congress and help structure the relationship between Congress and the President, as well as provide some continuity of interest in political action and cooperation. Norms of senatorial courtesy in the presidential selection of local officials and

226. See generally WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 29; Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning*, 33 POLITY 365 (2001). Recognizing this broader informal constitution of norms and values, as well as the formal constitutional text, also requires recognizing the periodic reconsideration and reconstruction of that informal constitution. Over time, the effective constitution can therefore be expected to go through many "crises," in the more neutral sense of turning points. But there is a real danger for the continued success of constitutionalism in confusing such benign constitutional crises with the more pathological constitutional crises considered here and usually meant by the term.

227. See Fred W. Riggs, *The Survival of Presidentialism in America: Para-constitutional Practices*, 9 INT'L POL. SCI. REV. 247 (1988).

senatorial deference to the presidential selection of high-level executive officers increase the efficiency with which the government is staffed and reduce tensions over appointments. Even less institutionalized is a political culture committed to resolving conflicts and negotiating compromises to overcome deadlocks. The backdrop of such shared political understandings can expand the tolerance of the constitutional system to operational conflicts. Political actors can exploit constitutional and political institutions for advantage, relatively secure in the understanding that the system as a whole is resilient and that conflicts will ultimately be resolved. Thus, advocates of state nullification of national protective tariffs could expect their efforts to lead to a negotiated settlement of the conflicting political demands rather than an operational stalemate that would subvert the Constitution.²²⁸ Though nullification was innovative and did not invoke any formal process for overcoming the conflict between claims of national and state authority,²²⁹ state representation in the Senate provided a natural forum for an interstate compromise. Similarly, the government shutdown in the midst of the 1995 budget battles reflected negotiating strategies rather than a failure of constitutional design.²³⁰ The difference between extended political conflict and actual constitutional crisis turns crucially on the intentions, expectations, and commitments of the individuals who exercise the

228. The nullifiers may have overestimated the likelihood of a negotiated settlement. President Jackson regarded nullification as treason and threatened to occupy South Carolina by military force and hang those who supported nullification. Andrew Jackson, Letters to J.R. Poinsett, Esq., in *THE STATESMANSHIP OF ANDREW JACKSON AS TOLD IN HIS WRITINGS AND SPEECHES* 20, 23 (Francis N. Thorpe ed., 1909). Advocates of secession likewise underestimated the willingness of the U.S. government to resort to force and sustain an extended war. *See supra* notes 125-29 and accompanying text.

229. A key theoretical architect of state nullification, John C. Calhoun, did argue that the constitutional amendment process provided a formal vehicle for arbitrating the dispute between an individual state and the federal government and a way to "overrule" the state's constitutional objection and resolve the controversy. *E.g.*, 11 JOHN C. CALHOUN, *THE PAPERS OF JOHN C. CALHOUN* 278, 634-36 (Clyde N. Wilson ed., 1978).

230. Interestingly, I found only twenty-seven references to a constitutional crisis during the 1995-1996 budget standoff and partial government shutdown, and most of those were simply quoting statements by House Minority Leader Richard Gephardt and House Ways and Means Chair Bill Archer. Dow Jones Interactive, Publications Library, All Publications Database, at <http://www.dowjones.com>. (last visited June 10, 2001) (search for records containing "constitutional crisis" and "government shutdown" between the dates of Nov. 1, 1995 and Feb. 28, 1996).

formal powers established by the Constitution. The very expectation on the part of political actors that a constitution will survive into the future helps ensure that a constitution does survive.²³¹ The expectation that others will adhere to the constitutional rules dissuades actors mired in political disagreement from quickly turning to extraconstitutional solutions to their problems. A long history without military intervention in political disputes encourages all sides to continue discussion and maintain constitutional forms rather than make a preemptive strike of turning to coercion. The expectation that there will be future elections encourages political losers to abide by the results of the current election and discover "more to gain from continuing to live with the ... constitutional order than by attempting to upset it."²³²

The American constitutional system is sustained by three key factors that minimize the threat of crisis. The first is a relatively good constitutional design. The Constitution is far from perfect, and some flaws became obvious almost immediately. The Constitution failed to provide for an explicit means of removing executive officials, for example, or for adding territories. The unexpected and undesired formation of political parties created unforeseen complications for the constitutional design, as did the relatively greater population growth in the North and Western expansion.²³³

231. HARDIN, *supra* note 64, at 138 ("The long survival of the Constitution and the government it spawned gives force to the expectations we have that it will continue to survive and the strength of those expectations is among the chief of the reasons that it probably will continue to survive."); *see also* BRANDON, *supra* note 105, at 164 ("A working constitution, then, is a kind of trick people play on themselves. ... If people believe the Constitution works, it can (but need not) work."); Ordeshook, *supra* note 64, at 147 ("If each person believes that the other will abide by [a constitutional arrangement], both persons will have an incentive to act accordingly. Thus, their agreement is self-enforcing.").

232. HARDIN, *supra* note 64, at 137; *see also* Guillermo O'Donnell, *Illusions About Consolidation*, J. DEMOCRACY, Apr. 1996, at 34; Przeworski et al., *supra* note 35, at 43-44. *But see* J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 743 (1994) ("Democracy was on borrowed time, and most Japanese knew it. For just that reason, rational politicians increasingly adopted endgame tactics."). The question of whether there is "more to gain" from sticking with the existing constitutional order than from overturning it is also context dependent. In generally prosperous circumstances, few could expect to benefit from encouraging, participating in, or tolerating serious constitutional irregularities or disruptions. In dire economic circumstances, however, the costs of political instability are substantially reduced and political systems become unstable. Przeworski et al., *supra* note 35, at 39-43.

233. *See* Mark A. Graber, *The Civil War as a Constitutional Failure* (Sept. 3, 1998) (unpublished manuscript, on file with author).

Nonetheless, despite these and other miscalculations, the constitutional text has proven to be fairly resilient. Such basic features as the distribution of powers within the national government and between levels of government have proven to be generally effective but flexible enough to accommodate political development. By the standards of both the American state constitutions and foreign constitutions, the U.S. Constitution is relatively difficult to amend.²³⁴ Nonetheless, in comparison with other constitutions the terms of the U.S. Constitution are also fairly imprecise, allowing for reconsideration, adjustment, and growth without threatening the integrity of the basic document. The Founders managed to avoid some of the deficiencies that have proven fatal to other, similar constitutional texts. In some instances, the Founders were simply lucky. The coincidence of congressional and presidential elections, for example, increases the likelihood that the President will be supported by a large fraction of the elected legislators, if not an actual majority.²³⁵ Presidential systems in other nations have proven particularly brittle when confronted with the partisan fragmentation of the legislature.²³⁶ In other instances, the Founders made wise decisions.²³⁷ Given their distrust of executive power, for example, the Founders created a relatively weak presidency with limited legislative power. An expansive executive decree authority has been an important source of conflict, stalemate, or dictatorial transition in presidential systems elsewhere.²³⁸

The American constitutional system additionally benefits from a common and relatively strong constitutional culture. To a striking degree, political actors in the American system accept the importance of constitutionalism. Disagreements emerge over the meaning and requirements of constitutionalism, not over the appropriateness of constitutionalism itself.²³⁹ Moreover, even the

234. Lutz, *supra* note 224, at 257-65.

235. Matthew Soberg Shugart, *The Electoral Cycle and Institutional Sources of Divided Presidential Government*, 89 AM. POL. SCI. REV. 327 (1995).

236. Mainwaring, *supra* note 147; Scott Mainwaring & Matthew S. Shugart, *Juan Linz, Presidentialism, and Democracy: A Critical Appraisal*, 29 COMP. POL. 449, 465-67 (1997); Przeworski et al., *supra* note 35, at 44-45; Stepan & Skach, *supra* note 38 *passim*.

237. Even in some of these instances, however, the Founders benefited from some of the unintended consequences of their decisions. See *supra* note 235 and accompanying text.

238. Mainwaring & Shugart, *supra* note 236, at 463-65.

239. See, e.g., KAMMEN, *supra* note 192, at 219-54; SAMUEL P. HUNTINGTON, AMERICAN

historical disagreements over constitutionalism in the United States have occurred within a relatively narrow range. Constitutional failures are likely to occur precisely when the constitutional culture is no longer robust or shared. Mark Brandon has compellingly argued that the gradual development of two distinct constitutional cultures in the antebellum United States contributed to the eventual Civil War.²⁴⁰ Though the constitutional cultures in both the North and the South were derivative of the original U.S. Constitution and liberal democratic foundations, they were nonetheless increasingly distinct and in tension with one another.²⁴¹ Somewhat differently, Bruce Rutherford has usefully observed that the instability of the Egyptian constitutional system is grounded in the fact that Egypt has not one but multiple, incompatible constitutional traditions.²⁴² In Egypt's case, only one of those constitutional traditions is liberal democratic, and the three distinct constitutional traditions are most identified with different political institutions rather than with different geographic regions of the country, as was the case in the United States.²⁴³ A shared constitutional culture helps keep political disagreements from expanding into foundational, constitutional disagreements and helps provide the common ground upon which political disagreements can be resolved.

The United States also benefits from a relatively limited polarization in its politics. Constitutions can only do so much. If a political system is under too much stress, then it is bound to give way to crisis, regardless of the constitutional arrangements.²⁴⁴ Keeping political disagreements within constitutional bounds

POLITICS 1-60 (1981).

240. BRANDON, *supra* note 105, at 139-66.

241. *Id.*

242. Rutherford, *supra* note 73, at 445-69.

243. *Id.* Similarly, the Latin American nations have inherited a sustained and distinctive vision of an unencumbered and powerful executive charged with securing the public good that is at odds with liberal constitutional traditions. BRIAN LOVEMAN, *THE CONSTITUTION OF TYRANNY passim* (1993) (describing the historical constitutional foundations of "regimes of exception" in Spanish America); Guillermo O'Donnell, *Delegative Democracy*, J. DEMOCRACY, Jan. 1994, at 55.

244. Constitutional arrangements may be more or less brittle in the face of stress, however. The United States may be particularly fortunate in its historic socioeconomic circumstances, because presidential systems may be suited to a somewhat narrower range of environments than are other political systems. See *supra* notes 35-38.

depends on a willingness of political actors to regard the maintenance of the constitutional bounds as ultimately more important than the political disagreement. Just as the important political actors must be willing to accept the possibility of electoral defeat if democracy is to prevail, they also must be willing to accept that some political outcomes are out of bounds if constitutionalism is to prevail. If the political cleavages within society are too great or economic conditions too bleak, however, this basic precondition for constitutional maintenance is unlikely to be met. For some at both extremes of the slavery debate, it was better to dissolve the Union and break the constitutional bonds than tolerate the other side of the debate.²⁴⁵ For leaders in many nations, it is more important to vindicate national power, advance ethnic or class interests, address economic difficulties, or the like than to be hampered by constitutional requirements.²⁴⁶ The liberal consensus literature undoubtedly overstated the degree of consensus and underestimated the degree of complexity in American politics and history.²⁴⁷ Nonetheless, the consensus theory was built on the important observation that politics in the United States have often been less polarized than politics elsewhere. Part of the Constitution's survival, as Louis Hartz asserted, undoubtedly derives from the fact that "fundamental value struggles have not been characteristic of the United States."²⁴⁸ The Constitution almost certainly benefits from that relative absence of fundamental political conflict more than it contributes to it.

Recent events, and the reaction to them, should remind us that constitutional maintenance is a political concern. It is valuable for political actors to be reminded that constitutions must in fact be maintained, and that constitutional stability cannot simply be assumed. To the extent that appropriate constitutional cultures and

245. See *supra* note 74 and accompanying text.

246. See, e.g., *supra* notes 76, 240-43 and accompanying text.

247. For works challenging the liberal consensus narrative see, for example, DANIEL T. RODGERS, *CONTESTED TRUTHS* (1987); ROGERS M. SMITH, *CIVIC IDEALS* (1997); WOOD, *supra* note 75; James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987).

248. LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 85 (1955). Hartz observes that when such fundamental value struggles have occurred, the Constitution has been notably unsuccessful in containing them. *Id.*; see also *id.* at 9 (the "removal of high policy to the realm of adjudication implies prior recognition of the principles to be legally interpreted").

informal constitutional practices help sustain constitutionalism and particular constitutions and prevent constitutional crises, then political actors must take care that such cultures and practices are maintained and strive in their own actions to adhere to and reproduce them. Those constitutional foundations are more likely to be made apparent when political routines have been disrupted and political presuppositions have been contested.

At the same time, however, it can be damaging to the constitutional system to panic too easily about the possibility of crisis. The overuse of such language can lead to at least two important difficulties. First, it obscures the language itself. If minor and even not-so-minor political conflicts are labeled as constitutional crises, then we lose the ability to adequately distinguish real constitutional crises. The full range of constitutional experience is flattened out and misidentified. The political struggles that are to be expected within any constitutional system, and that in fact may be essential aspects of political life under a written constitution,²⁴⁹ may be lost from our constitutional learning. Crying wolf too often may lead us to fail to recognize and respond appropriately when true constitutional crises threaten. Equally problematic, however, we may overreact to the normal complexities and struggles of political life.

That possibility leads to the second difficulty with the overuse of the crisis language: Cries of crisis can themselves feed political and constitutional irregularities. Constitutional crises, and the threat of constitutional crises, require extraordinary responses from political actors. If the constitutional order is breaking down, then the barriers to any given political actor stepping out of the constitutional order are diminished. Indeed, political actors may think it necessary to claim new powers and go outside their usual constitutional authority in order to respond adequately to the extraordinary events that occur when the constitutional mechanisms are not properly functioning. A constitutional crisis justifies extra-constitutional, and perhaps even unconstitutional, actions, and a rhetoric of constitutional crisis can itself lead to a constitutional crisis.²⁵⁰ It is also notable that the rhetoric of crisis is often used to

249. See WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 29.

250. Moreover, to the extent that constitutional stability is grounded in a web of self-

justify the accumulation of political power, frequently to the executive.²⁵¹ Crisis rhetoric is meant to shorten the patience for deliberation and the tolerance for dissent and uncertainty. In Latin America, for example, the declaration of a constitutional crisis has often paved the way for executive or military leaders to displace legislatures and lay aside the normal rule of law.²⁵² The challenge to the normal constitutional order is unlikely to be so dramatic in the United States, but expectation of a constitutional crisis can nonetheless be problematic. In the case of the American 2000 presidential election, the perceived threat of constitutional crisis would be particularly likely to favor George Bush. To the extent that the postelection controversy threatened a constitutional crisis, then Florida executive officials or legislators, or even the U.S. Supreme Court, would be amply justified in attempting to bring the controversy to a rapid close by any means necessary, which would benefit the early leader in the vote tallies.²⁵³ Likewise, it justifies

enforcing expectations, the widespread belief in impending constitutional crisis and instability can become a self-fulfilling prophecy. If, for example, political actors become convinced that others are bent on "stealing" an election, then they have every incentive to take extraordinary steps themselves toward securing victory.

251. TULIS, *supra* note 149, at 174-81.

252. LOVEMAN, *supra* note 243, at 11-31; Nielson & Shugart, *supra* note 76, at 322-28.

253. Less than a month after the Supreme Court put an end to the 2000 presidential election dispute, Chief Justice Rehnquist pondered the appropriateness of Justices serving on extrajudicial bodies such as the 1876 election commission. Although noting the dangers of political acts by members of the judiciary, the Chief Justice mused "the argument on the other side is that there is a national crisis, and only you can avert it. It may be very hard to say 'no.'" William H. Rehnquist, Remarks of The Chief Justice to the John Carroll Society 16, 18 (Jan. 7, 2001) (unpublished manuscript, on file with author). Although noting that the Democratic justices of the time were furious over the Republican victory, Rehnquist concluded that "Hayes was a better President than some of his detractors predicted, and the nation as a whole settled down to a more normal existence." *Id.* The country had avoided "a serious crisis." *Id.* Justice Scalia made similar remarks in a speech of his own a few months after the decision. Explaining that the Court's reputation is not "some shiny piece of trophy armor," he thought it was "working armor and meant to be used and sometimes dented in the service of the public." *Nation*, ST. LOUIS-POST DISPATCH, May 24, 2001, at A12. Justice Kennedy is reported to have remarked in a meeting with a group of visiting Russian judges in response to a question about the decision, "Sometimes you have to be responsible and step up to the plate." The reporter observed that Kennedy "prized order and stability. Chaos was the enemy." He concluded, "Any imminent constitutional 'crisis' was only in the imagination of the Justices." David A. Kaplan, *The "Accidental President,"* NEWSWEEK, Sept., 17, 2001, at 28. Of course the Justices were not alone in imagining a constitutional crisis, but the basic claim that the Justices were responding to fears of a constitutional crisis, and not an actual one, is plausible. See also Jeffrey Rosen, *The Reckoning Is In, and the Supreme Court Loses*, N.Y. TIMES,

the intervention of actors, such as the state legislature or the federal courts, who might otherwise not be expected to play a role in an election contest.²⁵⁴ Unsurprisingly, the dissenting opinion of the Florida Chief Justice, which was widely regarded as a road map for U.S. Supreme Court intervention, prominently threatened that the Florida majority would cause a constitutional crisis.²⁵⁵ A lack of faith in the capacity of political actors to struggle over and maintain the constitutional inheritance may well make the Constitution more fragile, not less.

July 17, 2001, at A19.

A number of commentators have embraced a similar necessity defense of the results in *Bush v. Gore*, 531 U.S. 98 (2000). *E.g.*, Robert H. Bork, *Sanctimony Serving Politics: The Florida Fiasco*, 19 NEW CRITERION 4, 6 (2001); Gary C. Leedes, *The Presidential Election Case: Remembering Safe Harbor Day*, 35 U. RICH. L. REV. 237 (2001); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 54-55; Sunstein, *supra* note 31, at 758, 768-69. Such a view of the Court's role within the American political system would not be unique or uniquely modern. *See* Keith E. Whittington, *The Road Not Taken: Dred Scott, Constitutional Law, and Political Questions*, 63 J. OF POL. 365 (2001).

254. The fear of constitutional crisis may also lead actors to withdraw from a controversy that they might otherwise enter. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 862 (1992) (referring to the "constitutional crisis of 1937" to justify judicial deference to existing precedent).

255. *Gore v. Harris*, 772 So. 2d 1243, 1263 (Fla. 2000) (Wells, C.J., dissenting), *rev'd*, *Bush*, 531 U.S. at 98:

I have a deep and abiding concern that the prolonging of judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis. I have to conclude that there is a real and present likelihood that this constitutional crisis will do substantial damage to our country, our state, and to this Court as an institution.

See also Brief for Petitioners at 14 n.7, *Bush*, 531 U.S. at 98 (No. 00-949) (noting that "Chief Justice Wells expressed his concern that the majority's prolongation of 'this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis.'").

