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Constitutional Crises

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## **Constitutional Crises**

Sanford Levinson and Jack M. Balkin<sup>1</sup>

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<sup>1</sup> W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair of Law, University of Texas Law School, and Professor of Government, University of Texas at Austin; Knight Professor of Constitutional Law and the First Amendment, Yale Law School. We are extremely grateful to a number of law schools that gave us the opportunity to present different versions of this article while it was very much a work-in-progress. In chronological order, they are the Georgetown University Law Center, the Michigan and Quinnipiac law schools, the legal history workshop at the Harvard Law School, and the University of Minnesota Law and Vanderbilt Law School. We also benefited from responses by Keith Whittington, Mark Tushnet and Adrian Vermeule.

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### **Constitutional Crises**

"We must never forget that it is a constitution we are expounding . . . , a constitution, intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.<sup>2</sup>

[I]n truth, among the institutions of Rome, . . . the dictatorship deserves our special admiration. . . . [W]ithout some such safeguard a city can hardly pass unharmed through extraordinary dangers. . . . [E]very republic ought to have some resource of this nature provided by its constitution. . . . When a republic is not provided with some safeguard such as this, either it must be ruined by following constitutional forms, or else, to save it, these must be broken through. But in a republic nothing should be left to be effected by irregular methods. . . .<sup>3</sup>

#### I. INTRODUCTION: "CONSTITUTIONAL CRISIS" EVERYWHERE?

The Constitution of the United States was written against the background of perceived crisis.<sup>4</sup> It is therefore no surprise that the language of "crisis" has never been absent from discussions of American politics or American constitutionalism. It would be remarkable indeed if a country that has unceremoniously ignored an existing constitution, the Articles of Confederation, in order to propose and ratify a radically different one; engaged in civil war; suffered a series of economic depressions; fought two world wars (and several other major conflicts); and expanded from the eastern seaboard to the mid-Pacific

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<sup>2</sup> *McCulloch v. Maryland*, 17 U.S. 316, 407, 415 (1819)(emphasis in original)

<sup>3</sup> NICCOLO MACHIAVELLI, *DISCOURSES ON LIVY*, Book I, Chapter 34.

<sup>4</sup> A classic account, although supplanted by later scholarship is John Fiske's *THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783–1789* (1888). It well captures the view of proponents of the new Constitution of the desperate need to replace the Articles of Confederation with the new Constitution.

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and Caribbean Sea,<sup>5</sup> could fail to test the limits of constitutional government and generate the kind of struggles over power that produce claims of “crisis.” Harry Jaffa’s justly praised book on the pre-Civil War Constitution—which tried unsuccessfully to honor the demands of freedom and slavery alike-- is aptly titled *The Crisis of the House Divided*. A classic article by Arthur Bestor is titled simply “The American Civil War as a Constitutional Crisis.”<sup>6</sup> And that crisis, of course, was resolved by a great war (and subsequent Reconstruction) that generated more than its own share of constitutional struggles,<sup>7</sup> including, of course, the disputed presidential election of 1876.<sup>8</sup>

The American constitution, then, was born in crisis, and tested in crisis. The difficulty, however, is that the language of crisis is ubiquitous, applied to controversies great and small. There is hardly a disagreement in American law, however slight, that someone will not label a “constitutional crisis.” Recently, *New York Times* columnist Bob Herbert described with alarm a proposed California referendum that would allocate the state’s electoral votes by share of the popular vote. The predictable effect would be to eliminate the Democrats’ advantage in California and hand the Republican candidate a sum of electoral votes roughly equivalent to those of Ohio. Adoption of this proposal, Herbert solemnly warned, “could become a constitutional crisis,”<sup>9</sup> by which he presumably meant that costly litigation and particularly heated arguments would follow.<sup>10</sup>

Or consider Chief Justice John Roberts’ 2007 New Year message on the state of the American judiciary. It was devoted to an “issue [that] has been

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<sup>5</sup> See, e.g., SANFORD LEVINSON AND BARTHOLOMEW SPARROW, EDS., *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803-1893* (2005).

<sup>6</sup> 69 AM. HIST. REV. 327 (1964).

<sup>7</sup> See, e.g., BRUCE ACKERMAN, *2 WE THE PEOPLE: TRANSFORMATIONS* (1998).

<sup>8</sup> The most exhaustive treatment of this election is CHARLES FAIRMAN, *FIVE JUSTICES AND THE ELECTORAL COMMISSIONS 1877* (1988).

<sup>9</sup> Bob Herbert, “In 2008, Bush v. Gore Redux?” *New York Times*, Sept. 22, 2007, A27. available at

[http://www.nytimes.com/2007/09/22/opinion/22herbert.html?\\_r=1&hp&oref=slogin](http://www.nytimes.com/2007/09/22/opinion/22herbert.html?_r=1&hp&oref=slogin).

<sup>10</sup> The Constitution states that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors....” United States Constitution, Article II, Section 1 (emphasis added). For an illuminating analysis, see Richard L. Hasen, *When “Legislature” May Mean More Than “Legislature”*: Initiated Electoral College Reform and the Ghost of Bush v. Gore, 35 HASTINGS CONST. L. Q. 599 (2008). Professor Hasen argues that one should read “legislature” to refer to a particular state’s “legislative process,” which can include popular initiative and referendum, rather than a very particular institution called “a state legislature.”

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ignored far too long and has now reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary.” What was this momentous issue threatening the very future of the Republic? It was “the failure to raise judicial pay.”<sup>11</sup> Roberts’s language was greeted with widespread ridicule, but it remains noteworthy that someone so well-known for his skills of effective advocacy would think the term useful.

And whether or not the September 11 terrorist attacks “changed everything,” one thing has surely not changed: Once again government officials and their supporters are repeatedly telling us that we are living in an era of crisis, facing an emergency situation that requires strong measures and drastic action; in the meantime, their critics respond that we face a constitutional crisis precisely because of the extraordinary and arguably unconstitutional measures used to meet the presumptive emergency.<sup>12</sup>

In fact, there is nothing new about the promiscuous use of the term “crisis” to describe constitutional conflicts of every size. An important 2002 article by Keith Whittington<sup>13</sup> noted that almost 3000 articles in the press used “constitutional crisis” in reference either to the impeachment of Bill Clinton (1026) or the controversy surrounding the 2000 election (1901).<sup>14</sup> One wonders what Whittington’s count might have been had he examined references to the 1986 Iran-Contra episode<sup>15</sup> or, a decade earlier, the Watergate scandals.<sup>16</sup> A survey of the New York Times from 1933 onward discovered that the term was frequently used in the 1930’s, but less frequently between 1937 and 1950.<sup>17</sup> Interestingly enough, the *Times* published very little about “constitutional crises” in the United States in the first half of the 1960s—the banner years of the Civil Rights Movement—though the term started appearing more around 1967. As one might readily predict, there was a substantial spike in 1973, coinciding with

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<sup>11</sup> John Roberts, 2006 Year-End Report on the Federal Judiciary, available at [www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf](http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf)

<sup>12</sup> See, e.g., Sanford Levinson, *The Deepening Crisis of American Constitutionalism*, 40 GA. L. REV. 890 (2006).

<sup>13</sup> Keith E. Whittington, *Yet Another Constitutional Crisis*, 43 WM. & MARY L. REV. 2093 (2002)

<sup>14</sup> *Id.* at 2094 nn. 2 and 3.

<sup>15</sup> See, e.g., THEODORE DRAPER, *VERY THIN LINE: THE IRAN CONTRA AFFAIRS* (1991).

<sup>16</sup> See, e.g., MICHAEL A. GENOVESE, *THE WATERGATE CRISIS* (1999).

<sup>17</sup> Eric Lomazoff, “More than Just ‘Alliterative Crunch’? Examining Newspaper Use of the Term ‘Constitutional Crisis’ In Modern American History,” Harvard Government Department, January 2004 (copy of manuscript in possession of authors).

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Watergate. Other spikes, as Whittington's work suggests, appear in 1998 and 2000 because of the Clinton impeachment and the disputed presidential election.

People generally use the term "constitutional crisis" to describe periods when institutions of government are clearly in conflict. But the mere existence of conflict, even profound conflict, cannot be the definition of crisis. Government institutions are always in conflict. Every year the Supreme Court hears cases, and the losers usually proclaim that the Court has grievously overstepped its boundaries. Constitutional conflicts, when they do arise, are often resolved relatively quickly. Or, if they drag on for years, like the debate about school prayer or abortion, they rarely threaten the foundations of constitutional government.<sup>18</sup>

Indeed, the American system of government was based on the idea that different branches, and the states and the federal government, would continually balance and check each other. Inevitably, this means that they will disagree and oppose each other. If we were to say that every such confrontation were a crisis, then we would have to conclude that the American Constitution was designed to place the country in a state of perpetual crisis. To the contrary: our constitutional system was designed to allow for often heated conflicts, like those about abortion or race relations, and to keep them within the boundaries of ordinary politics. Conflict in a constitutional system is not a bug, it is a feature.

Given that conflict between political actors is the norm and not the exception in American constitutional life, the idea of constitutional crisis must be far narrower. We therefore reject the notion that any situation in which institutions or actors are at loggerheads constitutes a crisis. Rather, we must reserve the term for a more special class of situations.

Moreover, one must be careful to distinguish between constitutional crises and merely political crises. Many observers believed that Richard Nixon created a constitutional crisis when he fired Watergate special prosecutor Archibald Cox in October 1973. But Cox was, after all, a member of the Executive Branch notionally headed by the President, and Nixon's argument that he had the authority to dismiss Cox was scarcely frivolous. Nixon famously refused to disclose the contents of the Watergate tapes to Cox's successor, Leon Jaworski, but, of course, he complied with the Supreme Court decision ordering such

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<sup>18</sup> To be sure, they might produce acts of civil disobedience (consider the abortion clinic bombings of the 1980s as an example). However, these do not constitute a constitutional crisis unless the violence becomes far more widespread.

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disclosure<sup>19</sup> and, unlike Andrew Johnson or Bill Clinton, left the office before the impeachment process ran its full course. From this perspective, Watergate was more a political crisis than a constitutional one. Nevertheless, it could easily have become a constitutional crisis at several points if Nixon had publicly stated (which he never did) that he sought deliberately to go beyond his powers under the Constitution. The closest Nixon came was his attorney's hint that he would obey only a "definitive" decision of the Supreme Court,<sup>20</sup> and Nixon's own assertion, many years later, that when the President orders something, it is not illegal.<sup>21</sup>

Similarly, impeachment *by itself* does not constitute a "constitutional crisis," even though commentators may often speak in those terms<sup>22</sup> Nixon's proposed impeachment and Clinton actual impeachment were surely political crises for the respective presidents, and one of them actually had to give up his four-year lease on the White House. But it is difficult to detect a "constitutional crisis" in Republicans' use of procedures specifically written into the Constitution-- the Impeachment Clause of Article II-- to require Clinton to stand trial. Lawyers, to be sure, argued vociferously about whether Clinton's (mis)conduct constituted a kind of "high crime and misdemeanor," but such arguments, no matter how loud and long, do not a constitutional crisis make.

Perhaps the election of 2000 was different. One reason that Whittington used the dispute over the 2000 election as an occasion to measure the frequency of the use of the term "crisis" was that the term was in the air in those days. The certiorari petition of then-Governor George W. Bush to the Supreme Court urged it to resolve the election controversy because "absent a decision by this Court, the election results from Florida could lack finality and legitimacy. The consequence may be the ascension of a President of questionable legitimacy, or a constitutional crisis."<sup>23</sup> Needless to say, this argument was successful.<sup>24</sup> Some persons doubted

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<sup>19</sup> See *Nixon v. U.S.*, 418 U.S. 683 (1974).

<sup>20</sup> See Philip Shabecoff, "St. Clair Silent on Obeying the Court," *New York Times*, July 24, 1974, quoted in Keith Whittington, *Political Foundations of Judicial Supremacy* 194 (2006).

<sup>21</sup> Transcript of David Frost-Richard Nixon Interview, *N.Y. Times*, May 20, 1977, at A16, quoted in PAUL BREST ET AL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 285 (5<sup>TH</sup> ed 2006).

<sup>22</sup> JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 112 (2007)(arguing that "the president's enemies ratcheted up the controversy into a constitutional crisis.").

<sup>23</sup> See Petitioner's Brief for a Writ of Certiorari before the U.S. Supreme Court in *Bush v.*

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the authority of the Justices of the Florida Supreme Court to order recounts of disputed ballots in the 2000 election; others were outraged by the U.S. Supreme Court's claimed authority to overrule the Florida Supreme Court, suspend the recounting of votes and thus ensure the ascension of George W. Bush to the Presidency. In each situation, opponents of such actions accused the actors in question of "usurpation" and of precipitating a "constitutional crisis." Yet Al Gore almost immediately treated the Supreme Court decision as juridically valid much, to the dismay of many of Gore's supporters. Bush's inauguration on Jan. 20, 2001, took place without serious incident. To adopt recent terminology suggested by Adrian Vermeule and Eric Posner, the conflict over the election, however freighted, was merely an example of a "constitutional showdown" between different actors that was relatively quickly resolved. Whatever its elements of *sturm und drang*, it did not rise to the level of a "constitutional crisis."<sup>25</sup>

People have evoked the expression "constitutional crisis" so often that it is in danger of becoming synonymous with almost any deeply felt sense of conflict or urgency, as illustrated by Chief Justice Roberts' plaintive cry that he deserves a higher salary. Perhaps it has become no more than a marker of emotional intensity, the equivalent of pounding the table and otherwise marking one's degree of being upset about some state of affairs in the world. Yet, we think that the term can serve as a useful analytical tool.

The secret, we shall, argue, is to think about crisis not in terms of constitutional *disagreement* but in terms of constitutional *design*. Disagreement and conflict are natural features of politics. The goal of constitutions is to manage them within acceptable boundaries. When constitutional design functions properly-- even if people strongly disagree with each other and threaten each other-- there is no crisis. On the other hand, when the system of constitutional design breaks down, either because people abandon it or because it is leading them off of the proverbial cliff, disagreements and threats take on a special urgency that deserves the name of crisis. In this essay we offer a typology of different types of constitution crises based on this insight. We think the that the

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Palm Beach Canvassing Board, available at [http://washingtonpost.findlaw.com/supreme\\_court/briefs/00-836/00-836.pet.aa.html](http://washingtonpost.findlaw.com/supreme_court/briefs/00-836/00-836.pet.aa.html).

Judge Richard Posner offers a version of this argument in his vigorous defense of the Court's intervention, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001).

<sup>24</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>25</sup> Adrian Vermeule and Eric Posner, *Constitutional Showdowns*, 156 U. Pa. L. Rev. 991 (2008).

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differences between them should matter greatly to students of constitutional law and students of constitutional design.

We argue that a constitutional crisis refers to a turning point in the health and history of a constitutional order, and we identify three different types of constitutional crises. The first two types were identified by Machiavelli in the quotation that begins this article: Type One crises arise when political leaders believe that exigencies require public violation of the constitution. Type Two crises are situations where fidelity to constitutional forms leads to ruin or disaster. Type Three crises involve situations where publicly articulated disagreements about the Constitution lead political actors to engage in extraordinary forms of protest beyond mere legal disagreements and political protests; people take to the streets, armies mobilize, and brute force is used-- or threatened-- in order to prevail. If a central purpose of constitutions is to make politics possible, constitutional crises mark moments when constitutions threaten to fail at this central task.

This definition of “crisis”—which focuses on the ability of the constitutional system to channel and defuse difficulties and conflicts—is the most analytically coherent, and it makes the most sense of the origins of the word. Traditionally (and etymologically) the word “crisis” refers to a turning point or decisive moment in the health of an individual, and by metaphorical extension, the body politic. Crises represent a breakdown in a previous balance or equilibrium, a disturbance to important values and to the existing order that will ultimately resolve in one direction or another.<sup>26</sup> A constitutional crisis, then, is a potentially decisive turning point in the direction of the constitutional order, a moment at which the order threatens to break down, just as the body does in a medical crisis.<sup>27</sup> It may lead back to a slightly altered status quo, i.e., a crisis averted. The fever provoking a medical crisis breaks, and the patient returns to her prior condition little the worse for wear. On the other hand, the conclusion of a crisis may indeed be an important transformation in the forms and practices of power, or in the most extreme cases, the dissolution of the existing constitutional order and the creation of a new order in its place. The ultimate medical crisis, after all, is death, as demonstrated most spectacularly in our lifetime by the demise of the Union of Soviet Socialist Republics or the dissolution of

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<sup>26</sup> See the excellent discussion in Whittington, *supra* n. 13, at 2097.

<sup>27</sup> Throughout our discussion we assume that the participants understand that they are facing a crucial moment. One can, of course, engage in retrospective analysis and argue that decisions blithely accepted *should* have been recognized as “crisis,” but nobody recognized this at the time.

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Yugoslavia.<sup>28</sup>

Generally speaking, failures of constitutional government, and therefore, constitutional crises, which portend them, are bad things. But it may not always be so. There are certainly times when constitutional instability is better than stability. It all depends on the justice or injustice of the regime—or its sheer ability effectively to function in providing basic governmental goods—and the possibilities for improvement (or worsening). Still, whether one prefers or fears constitutional instability, it is worth identifying what makes something a crisis in the first place.

### II. CRISES VERSUS EMERGENCIES

We begin with an important—but easily overlooked—distinction between crises and emergencies. Emergencies can precipitate constitutional crises, but they are neither necessary nor sufficient causes. One can have emergencies without constitutional crises. Devastating forest fires in California or flooding of the Mississippi River certainly constitute emergencies, but neither constitutes a threat to the national constitutional order. Instead, they offer the opportunity for both national and state officials to demonstrate the ability of existing governmental institutions to respond adequately.<sup>29</sup> Whenever political forces in the country are more or less unified in meeting an emergency—for example in wartime, or in dealing with national disasters—there is emergency without a perception of constitutional “crisis.” When the Federal Reserve Board responds to sudden economic downturns or the Treasury Department responds to global liquidity

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<sup>28</sup> Indeed, one might surmise that *federal* political systems are more prone to crises precisely because almost by definition such systems have the central task of maintaining a union of what may be quite diverse sub-national entities. Moreover, the existence of a strong form of federalism may both invite and institutionally make much easier that particular crisis known as secession. See Sanford Levinson, “Is Secession the Achilles Heel of ‘Strong’ Federalism?” in JORG FEDTKE AND BASIL MARKESINIS, EDS, *PATTERNS OF REGIONALISM AND REGIONALISM; LESSONS FOR THE U.K.* 207 (2006).

<sup>29</sup> Of course, if government officials prove inadequate to meet the emergency, this may lead to power struggles and then to crisis. One reason offered for the inadequate response of the Bush Administration during Hurricane Katrina was the Administration’s ostensible respect for federalism and the prerogatives of the Louisiana Governor regarding control of the national guard. If that were truly so, it would be an example of what we will describe below as a “Type Two” crisis, where fidelity to the Constitution leads to disaster. It is also possible, that doing nothing out of respect for federalism can be a way of placing responsibility (and therefore blame) on the shoulders of others.

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problems or crises in currency markets, few people now regard their actions as generating a constitutional crisis, but that is in part because, following the struggles over the New Deal, the contours of their power are largely settled.

Emergencies are *perceptions of urgency* caused by facts on the ground or the way that people perceive those facts. (Emergencies may be precipitated by acts of God, unwise policies, foreign threats, demographic events, new technologies or a combination of all of the above) Constitutional crises, by contrast, are *conflicts about the legitimate uses of power* by persons or institutions. When constitutional authority is challenged, we may have a constitutional crisis on our hands, not because there is emergency or even quite extraordinary action, but, rather, because there is a dispute between constitutional actors about the nature of the emergency and the legitimate way to respond to it.

Abraham Lincoln's resupply of Fort Sumter, his failure to call Congress into special session once the South left the Union, his suspension of habeas corpus while Congress was absent, and his emancipation of the Confederacy's slaves as an emergency measure may or may not have produced constitutional crises that fall into our three categories. But if any of them did, it was not merely because the United States was in peril, but rather because not everyone agreed that Lincoln had the powers he claimed for himself to meet the needs of the time.<sup>30</sup> Lincoln's misplaced trust in General George McClellan's military judgment created significant problems for the Union, but no one suggested that this raised a constitutional problem similar to the unilateral suspension of habeas corpus.<sup>31</sup>

Nevertheless, it should now be obvious why claims of emergency often lead to constitutional crises: Claims of exigent circumstances may lead political actors to claim the right to exercise greater powers or—what is frequently the case—to act unilaterally. As Marshall suggested in *McCulloch*, it is precisely the “various crises of human affairs” that encourage political officials to “adapt” the

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<sup>30</sup> James G. Randall's famous book *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (1<sup>st</sup> ed. 1926) discusses, for the most part, problems of claimed overreach by an energetic executive in time of war. But they were “constitutional problems” only when one views them from the standpoint of another constitutional actor who disputed the executive's asserted powers.

<sup>31</sup> Of course, from Lincoln's perspective suspending habeas was not overreach but simply the performance of his constitutional duties to save the Union, comparable to his undoubted powers as Commander-in-Chief to replace McClellan with someone Lincoln deemed a more effective general.

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Constitution to allow potentially controversial actions. If no one with any institutional authority to oppose the actor, or no mass movement, objects, there is no *constitutional* crisis, even if there is significant change, or even revolution. More commonly, however, political actors who oppose the claims of power, the claims of emergency—or both—may try to block the claimants, route around them, hold them accountable, or force them to compromise.<sup>32</sup> As with the tango, it usually takes at least two (opposed) constitutional interpreters to create a constitutional crisis.

Just as there can be emergency without a constitutional crisis, constitutional crises can occur in contexts that no one would identify as an “emergency.” The most obvious example is when a governor, disgraced by scandal, or duly impeached and convicted, refuses to leave office. There may be no emergency that requires that the chief executive leave—other than the need to have the forms of law obeyed—but the governor’s refusal to vacate may produce a crisis.<sup>33</sup> Similarly, disputes where two different groups claim to be the legitimate government of the state—think of the 19<sup>th</sup> century Dorr Rebellion in Rhode Island as an example—may not constitute emergencies, but they are likely to constitute crises.

*McCulloch v. Maryland* provides yet another example.<sup>34</sup> By the time the case was decided in 1819, Congress’s ability to charter a bank was no longer highly controversial, as Richard Ellis has recently demonstrated.<sup>35</sup> What *was*

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<sup>32</sup> Conversely, there can be a constitutional crisis (what we call Type Two) if people do not try to adapt the constitutional system to meet serious problems.

<sup>33</sup> Elliot Spitzer’s momentary delay in leaving the New York Governorship in the wake of a sex scandal produced the March 11, 2008 *New York Times* headline: “Resignation by Spitzer Not Likely Today; State in Limbo.” Available at <http://www.nytimes.com/2008/03/11/nyregion/11cnd-spitzer.html?hp>. A state of political limbo may be tolerable if it is relatively brief and there are no emergencies that require a governor to act; in other circumstances, however, it may cause serious problems for the state.

<sup>34</sup> Indeed, the very first paragraph of Marshall’s rhetorical *tour de force* evokes the potential presence of crisis: “[The dispute between Maryland the United States Bank] must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature.” *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819).

<sup>35</sup> RICHARD E. ELLIS, *AGGRESSIVE NATIONALISM : MCCULLOCH V. MARYLAND AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC* (2007). James Madison himself, after all, had signed the bill chartering the Second Bank of the United States, dramatically reversing his notable constitutional opposition to the Bank in 1791. See BREST ET AL, *supra* note 21, at 29-32 (5th ed. 2006) for Madison’s speech in

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bitterly controversial, however, was whether the individual states retained their power to tax whomever they liked, including instrumentalities of the federal government.<sup>36</sup> Marshall famously held that they did not in the second part of *McCulloch*, arguing that “[t]he power to tax is the power to destroy.”<sup>37</sup> These, it turned out, were fighting words. Agents of the state of Ohio, unconvinced by Marshall’s logic, broke into the Chillicothe branch of the Bank of the United States and seized approximately \$100,000 of Bank funds in order to cover the taxes allegedly due the State. Although Ohio ultimately submitted to the reaffirmation of *McCulloch* in *Osborne v. Bank of the United States*,<sup>38</sup> we can fairly say that the state of Ohio had provoked a constitutional crisis because it publicly stated that it would not obey the Supreme Court and it resorted to force to demonstrate its disagreement. (Thus, it would be either a Type One or Type Three crisis.) At the same time, the controversy did not arise out of an emergency situation. Ohio’s action was not justified on the grounds of emergency, but rather by claims that the Court had not sufficiently acknowledged its retained powers as a sovereign state.

Indeed, assertions of power in the *absence* of perceived emergencies may be the most likely to generate perceptions of “crisis.” Where a “state of emergency” is widely acknowledged, officials within the political system— often it is the executive— have the incentive and will to act forcefully and energetically to meet a problem. Only later will more detached analysts declare that that perception was as much caused by panic as by a rational assessment of the threat,

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opposition to the First Bank; *id.* at 37 for Madison’s decision to sign the bill establishing the Second Bank. Almost everyone save for a relatively few “Old Republicans” conceded the legitimacy of the Bank. And, interestingly enough, the defense of the Bank was based far more on its general utility than as a “necessary and proper” response to a state of emergency: it was widely believed that American recovery from the ravages of the War of 1812 would be facilitated by the Bank.

<sup>36</sup> Taxation, of course, was one of the most fundamental attributes of sovereignty. To be sure, the Constitution explicitly limited that power with regard to taxes on imports and exports, See U.S. Constitution, Article I, Section 10, but one might easily infer from this explicit exclusion that sovereign states otherwise presumptively retained their rights of taxation.

<sup>37</sup> Marshall did not note that the *prohibition* of the power to tax can also operate as an implicit destruction of a political entity that depends on tax revenues for its survival; nor, as Ellis demonstrates, did he even come close to explaining exactly why a congressional charter turned an 80%-privately owned, profit-seeking bank into an instrument of the national government.

<sup>38</sup> 22 U.S. 738 (1824).

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and that the solutions chosen might have been irrelevant or even counterproductive. If no one—or, perhaps more accurately, no one within the class of “respectable” politicians, jurists, or commentators, or a well-regarded mass movement or social organization—objects to the exercise of power to meet the emergency, there is no constitutional crisis; all the relevant stakeholders who might raise substantial objections are going along.

This more or less describes the detention of Japanese Americans and resident aliens during World War II. To be sure, some members of the ACLU objected, as did, apparently, Attorney General Francis Biddle in private counsel to President Roosevelt. Eventually, three members of the United States Supreme Court dissented from the President’s policy in 1944. Nevertheless, when Roosevelt signed the relevant Presidential orders in early 1942, there were few “respectable” voices objecting to this display of national power. The national American Civil Liberties Union, for example, cast its lot with the President and chose not to challenge the validity of the detentions.<sup>39</sup> Attorney General Biddle did not convey his doubts to the public; more to the point, there was no significant opposition in Congress, or, for that matter, from editorialists or pundits. Roosevelt’s policy was supported by such denizens as California Attorney General Earl Warren and Walter Lippmann, one of the leading commentators of the day. The Japanese internment was an extraordinary personal crisis for the victims of American policy, and a rank injustice, but it did not constitute a constitutional crisis for the nation at large at the time. Even when the government seriously violates people’s rights-- as it has done throughout our history in times of normal politics as well as in times of emergency-- this does not necessarily mean that the system of constitutional government has failed. That is because one point of a constitutional system is to keep disputes about what people’s rights are within the boundaries of ordinary politics. Sadly or not, constitutional governments can do a great deal of evil without provoking a constitutional crisis.<sup>40</sup>

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<sup>39</sup> See Peter Irons, *Justice at War : The inside Story of the Japanese American Internment* (1983).

<sup>40</sup> It is not even clear that the Japanese internment is now regarded in retrospect as a constitutional crisis, despite the fact that the United States, through legislation signed by President Ronald Reagan, formally apologized and gave symbolic financial reparations to the victims of the injustice. One of us (Levinson) was at a conference at the University of Chicago some years ago at which former Attorney General Edwin Meese was a participant addressing limits, if any, on the national government in addressing national security threats. Responding to my question from the audience about the meaning of

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### III. Type One Crises: Declaring a State of Exception

So far we have argued that constitutional crises comprehend a very small subset of the many different cases in which constitutional actors find themselves in conflict, and we have also distinguished crisis from emergency. In this section, we begin to offer a typology of constitutional crises. What makes them crises, and not simply conflicts or disagreements is that, in each case, the basic functions of constitutionalism—to channel conflict into everyday politics, and thus provide for political stability, have failed. Just as a patient reaches a medical crisis when his or her constitution gives out, so too the polity faces a turning point when its political constitution can no longer do the work that constitutions are designed to do.

Type One crises are perhaps the easiest to grasp: political leaders publicly claim the right to suspend features of the Constitution in order to preserve the overall social order and to meet the exigencies of the moment. They justify the assertion of extra-constitutional powers because extraordinary events that require that they rise to the challenge of the times.<sup>41</sup> In Type One crises, actors point to serious problems and have the political will to resolve them but they believe that they have only limited constitutional power to realize their goals within the constitutional scheme. Hence they self-consciously exceed what they believe to be their constitutional authority in the name of the state. As with James Madison in Federalist 40, they are prepared to seek the “approbation” of the people that would, if given “blot out antecedent errors and irregularities.”<sup>42</sup> Almost inevitably, such arguments take on a plebiscitary, even Caesarist, dimension, as leaders seek support and absolution from a public that is presumed, at the end of the day, to treat constitutional fidelity as secondary to the achievement of higher purposes and larger goals.

This idea has a long history, going back to ancient Rome, which sought to avoid the problem through its conception of “constitutional dictatorship.”<sup>43</sup> In the Anglo-American tradition John Locke spoke with approval of “prerogative powers,” which he defined as the power “to act, according to discretion, for the

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President Reagan;s willingness to sign the congressional statute that apologized and provided reparations, Meese emphasized that at most it was a recognition that an injustice was done to the victims of the detention, *not* an admission that *Korematsu* had been wrongly decided as a constitutional matter.

<sup>41</sup> Whittington calls these crises of “fidelity,” Whittington, *supra* note 13, at 2109-10.

<sup>42</sup> Quoted in BREST ET AL. *supra* note 21, at 21.

<sup>43</sup> See CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP* (1948).

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publick good *without the prescription of the Law, and sometimes even against it.*"<sup>44</sup> Even more to the point, perhaps, is James Madison's comment in Federalist No. 41 that "[i]t is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself *necessary usurpations of power*, every precedent of which is a germ of unnecessary and multiplied repetitions."<sup>45</sup> Madison could easily have quoted Locke on the idea of "prerogative power" for a similar view. More recently, the German philosopher (and apologist for Hitler's rise to power) Carl Schmitt argued that ordinary constitutional norms could and should be suspended in time of emergency, for "[t]here exists no norm that is applicable to chaos."<sup>46</sup> And the Italian philosopher Giorgio Agamben has argued that "the state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics."<sup>47</sup>

Nevertheless, few American political leaders and have forthrightly confessed that they seek to exercise Lockean prerogative powers or invoke a Schmittian state of exception. No American President has ever publicly admitted to out-and-out suspension of the Constitution because of exigencies of the situation. Instead our leaders have either kept their activities secret or publicly offered controversial interpretations of the Constitution to legitimize their actions. This was true of Abraham Lincoln; it is certainly true of George W. Bush. To be sure, these claims of constitutional fidelity have been widely disputed. Former Supreme Court Justice Benjamin Curtis, for example, bitterly accused Lincoln of overreaching in the name of emergency.<sup>48</sup> And one could literally fill a book

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<sup>44</sup> John Locke, *Two Treatises on Government* 392-93 (Peter Laslett ed., 1967)(1690)(emphasis added). It is worth comparing Locke's theory of prerogative to Machiavelli's approving discussion of the Roman dictatorship. What Machiavelli admired about the dictatorship was precisely what distinguished it from Locke's prerogative power. The Roman dictatorship was institutionalized, requiring a particular process before the dictatorship could begin, and ending it at a specified time. Naming a dictator might signal an emergency, but, by definition, it did not constitute a "constitutional crisis," precisely because the Roman constitution provided for the institution. What concerned the republican theorist Machiavelli was the rise of an *extraconstitutional* dictatorship in cases where the constitution lacked a procedure for appointing a dictator and ending the dictator's reign.

<sup>45</sup> *The Federalist* No. 41, AT 270 (James E. Cooke ed., 1961).

<sup>46</sup> CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE THEORY OF SOVEREIGNTY* 13 (George Schwab trans., MIT Press 1985)(reprinting 1934 ed.), quoted in Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 721.

<sup>47</sup> Giorgio Agamben, *State of Exception* 2 (Kevin Attell trans., 2005).

<sup>48</sup> Benjamin R. Curtis, ed., 2 A MEMOIR OF BENJAMIN ROBBINS CURTIS 306-334 (1870),

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with criticisms of the Bush Administration's theory of the President's powers under Article II.<sup>49</sup> But bitter criticism, even if we think it is justified, does not a Type One crisis make.

Thomas Jefferson may have come closest to asserting prerogative power. In private, at least, he admitted that he was never really comfortable with the notion that the United States could more than double its size through the Louisiana Purchase without formal constitutional amendment. Jefferson famously wrote, in an 1810 letter, that “[a] strict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.”<sup>50</sup> Jefferson, however, never *publicly* stated his doubts or claimed that he, as President, had the right to make exceptions to the existing legal order.

Nor, for that matter, did Jefferson explain even in private why the Louisiana Purchase would meet stringent tests of “necessity.” The Purchase, which obviously went far beyond the initial aim of securing New Orleans and control over the Mississippi River, was an outstanding, almost literally incredible, *opportunity* to gain massive amounts of territory and secure larger borders; but it was not an act that was necessary to meet some imminent threat. The only “emergency” immediately facing Jefferson in 1803 was the possibility that Napoleon would withdraw his remarkable offer—or even convey it to another power—unless the United States acted quickly. If another imperial power might have taken Louisiana, the purchase might well have been prudent in order to avoid long-term difficulties for the fledgling republic. In any case, Jefferson’s

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relevant parts reprinted in BREST ET AL., *supra* n. 21, at 280-281.

<sup>49</sup> For an explication of that theory, see JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2006); for criticism by a former Bush Administration insider, see JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007). For considerably more vehement criticism, see CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* (2007); ERIC LICHTBLAU, *BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE* (2008).

<sup>50</sup> Letter from Thomas Jefferson to John Colvin, Sept. 20, 1810, reprinted in Philip Kurland and Ralph Lerner, eds., 3 *THE FOUNDERS' CONSTITUTION* 127-128 (1987), available at [http://press-pubs.uchicago.edu/founders/documents/a2\\_3s8.html](http://press-pubs.uchicago.edu/founders/documents/a2_3s8.html).

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Secretary of the Treasury, Albert Gallatin, had none of Jefferson's qualms about constitutionality; he saw the acquisition of Louisiana as an unproblematic use of the Treaty Power. Ultimately, Jefferson himself chose to swallow his doubts, and he cautioned one of his allies in Congress simply to remain silent about constitutional difficulties.<sup>51</sup>

Similarly, Abraham Lincoln came close at times to making a Schmittian argument in private correspondence: "I felt that measures," he once wrote, "otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."<sup>52</sup> Here Lincoln recognizes that constitutions are ultimately instruments to preserve a pre-existing nation. To achieve this over-arching purpose, political actors may sometimes ignore the Constitution when it becomes dysfunctional. Even so, Lincoln never *publicly* proclaimed that he had exercised a "right" to ignore constitutional limits in order to achieve the good of the country.

As a practical matter, American constitutional history after George Washington's inauguration has produced no unequivocal examples of Type One crises. That is because Type One crises require political leaders to admit publicly (and perhaps even proudly) that they are going outside of the law to preserve the country. The lack of such Type One crises should not be surprising. After all, there is normally nothing to be gained, and much to be lost, politically, by a leader's admitting to constitutional infidelity. As with other forms of infidelity, secrecy is likely to appear a far better strategy. More to the point, our tradition of constitutional interpretation allows such flexibility in making constitutional arguments that no President ever need have to admit that he or she is disobeying the Constitution. The modern Presidency is well equipped with a Justice Department and an Office of Legal Counsel, usually containing the cream of the finest legal talent in the country, busily justifying the President's actions. Moreover, sympathetic commentators and pundits in the mass media are usually only too happy to explain why what the President is doing is both legal and for the greater good of the nation, often invoking Justice Jackson's famous trope that

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<sup>51</sup> DAVID MEYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 230 (1994).

<sup>52</sup> Letter of Abraham Lincoln to Sen. Albert Hodges, April 4, 1864, in 2 ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1856-65, AT 585 (Don E. Fehrenbacher ed., 1989), quoted in Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1260 (2004)..

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the Constitution is not a “suicide pact,”<sup>53</sup> implying that it can (and should) always be interpreted to avoid such a dire result.

Along these lines, the Bush Administration has repeatedly suggested that it would be suicidal to require the President to obey either domestic or international laws that conflict with its own best judgments about how to conduct the “global war on terror.” Far from claiming a mandate to ignore the Constitution, though, Administration officials have contended that Article II, properly understood, vests the President with the whole of “the Executive power” (as opposed to the limited and enumerated power “herein granted” to Congress in Article I); this grant contains inherent authority that neither Congress nor international law can override. Why should a President ever admit that he is outside the law when so many people both in and out of the government—including federal judges as well as law professors—are so eager to assert that he is well within it?<sup>54</sup>

If Presidents feel that they must go outside constitutional boundaries, they are far more likely to try to keep their actions secret and their options open. Franklin Roosevelt’s presidency offers several examples. During the Great Depression, President Roosevelt temporarily removed U.S. currency from the gold standard. In the Gold Clause Cases,<sup>55</sup> each decided 5-4, the Supreme Court avoided invalidating the President’s actions, although it suggested that he lacked the powers he claimed. There is good evidence that FDR was prepared to defy a Supreme Court order overturning his suspension. Several years later, when the Supreme Court heard the case of the Nazi Saboteurs, *Ex Parte Quirin*,<sup>56</sup> Roosevelt made clear in secret that he would execute the spies whatever the Court decided to do. In both cases, Roosevelt kept his options open but did not provoke a public constitutional crisis, which certainly would have occurred if he had announced that he would defy the Court in either case.

FDR’s apparent disregard of statutes requiring American neutrality in the

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<sup>53</sup> *Terminiello v. Chicago*, 337 U.S. 1, 37 (Jackson, J., dissenting), *See also* RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

<sup>54</sup> For federal judges, see, most notably, Justice Thomas’s dissent in *Hamdi*, 542 U.S. 507, \_\_ (2004).

<sup>55</sup> *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 240 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); and *Perry v. United States*, 294 U.S. 330 (1935).

<sup>56</sup> 317 U.S. 1 (1942).

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years up to the Second World War offers yet another example.<sup>57</sup> While the “Lend Lease” program with Great Britain was publicly debated, FDR also engaged in secret activity that, if it had become known, might well have triggered a constitutional crisis. According to Robert Sherwood, who served as a liaison between Roosevelt and British Security Coordination: “FDR never for a moment overlooked the fact that his actions might lead to his immediate or eventual impeachment.... [H]e had this independent responsibility which devolves upon the Chief Executive to defend the nation in the way he thinks best. Each time he regularized one of his actions though, events forced him into yet another action that might result in impeachment.”<sup>58</sup> These remarkable decisions did not become public for many years after Roosevelt’s death. We do not regard them as Type One constitutional crises because the President did not publicly disobey the law and nobody knew enough to challenge him.

Even so, we do not deny the logical possibility of “secret” constitutional crises. One example would be where Congress believes that the President has violated the law in secret and takes steps to stop him, also in secret. However, if a power struggle of this nature emerges, it is very likely that at some point it will come out in the open. Of course we can also imagine a situation where a coup occurs completely in secret, a new leader is publicly proclaimed, and nobody resists. In that case there has been a revolution, but not, strictly speaking a constitutional crisis.<sup>59</sup>

Indeed, the last Type One crisis in American history may have occurred in Philadelphia in 1787, when proponents of the new Constitution deliberately ignored their limited mandate from Congress and, more importantly, the requirements of Article XIII of the Articles of Confederation, that any amendments be approved by the state legislature of every one of the thirteen states within the Confederation. The later provision effectively gave Rhode

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<sup>57</sup> See, e.g., the extensive discussion in ROBERT JACKSON, *THAT MAN* (John Barrett, ed. 2004), at \_\_\_. Schlesinger offers his own analysis in Arthur M. Schlesinger, Jr., *War and the Constitution: Abraham Lincoln and Franklin D. Roosevelt*, in LINCOLN THE WAR PRESIDENT: THE GETTYSBURG LECTURES, (Gabor S. Boritt, ed.) 145-178, 162-164 (1992). He concedes the “strained” nature of Jackson’s argument, based on statutory construction and not on any notion of “inherent” powers as Commander-in-Chief. Interesting enough, Schlesinger defends Roosevelt far more as “a defensible application of the Locke-Jefferson-Lincoln doctrine of emergency prerogative” than as a scrupulous adherence to constitutional niceties. *Id.* at 164.

<sup>58</sup> WILLIAM STEVENSON, *A MAN CALLED INTREPID: THE SECRET WAR* 254 (1976)

<sup>59</sup> We are indebted to University of Minnesota professor Heidi Kitrosser for asking about the possibility of “secret” constitutional crises.

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Island a veto over any proposed constitutional changes. Although the delegates' debates occurred in secret, once they emerged from their deliberations they publicly proclaimed their proposed Constitution to the country and avidly sought its adoption in violation of Article XIII.

Responding to claims of the limited powers of the Philadelphia conventioners, Virginia Governor Edmund Randolph told his fellow delegates on June 16<sup>th</sup>, 1787, "There are great seasons when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk it." Perhaps our favorite quotation remains that of Alexander Hamilton, addressing the Convention on the same day: "To rely on & propose any plan not adequate to these exigencies, *merely because it was not clearly within our powers*, would be to sacrifice the means to the end."<sup>60</sup> We have always loved the use of the word *merely* in this sentence, as if legal limits were capable of being treated like a troublesome gnat to be crushed. Hamilton, a brilliant lawyer, might have been suggesting legal ambiguity through his use of the term *not clearly*; but it would be difficult indeed to show any indeterminacy at all in Article XIII and its statement that any "alteration" of the Articles shall "be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State." What part of "every State" could Hamilton have found "unclear"? At most one could argue that the delegates deemed the Articles had been dissolved (even though they were declared "perpetual") and that the ratification of the new Constitution was nothing less than a new regime, a political revolution, an important political event that, nonetheless, raises no serious problems of constitutional fidelity because there was no constitution (or other body of law) to be faithful to. This is the view taken by our friend and colleague Akhil Reed Amar.<sup>61</sup>

By contrast, another friend and colleague, Bruce Ackerman, argues that the creation of the Constitution *did* violate fidelity to the Articles.<sup>62</sup> Similarly, Ackerman argues that the Fourteenth Amendment did not comply with the requirements of Article V.<sup>63</sup> Republicans secured two-thirds support in the House and Senate only by excluding the elected officials representing the southern states. These were states that President Andrew Johnson had recently recognized

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<sup>60</sup> Quoted in BREST ET AL., *supra* note 21, at 21.

<sup>61</sup> See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005). If the Articles had ceased to apply, then there was no "illegality" occurring in Philadelphia or in the subsequent ratification process.

<sup>62</sup> See BRUCE ACKERMAN, *2 WE THE PEOPLE: TRANSFORMATIONS* 32-68 (1998).

<sup>63</sup> *Id.* at 99-252.

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as restored and returned to the Union; indeed these same states had been counted as sufficiently legitimate to support the ratification of the Thirteenth Amendment.<sup>64</sup> Moreover, when it became obvious that unreconstructed southern state governments would reject the Fourteenth Amendment and thus make it impossible to achieve the constitutionally-mandated three quarters of the states (27), the Republican majority in the “rump” Congress imposed military reconstruction and created new state governments predicated on black suffrage and instructed them to ratify the Fourteenth Amendment if they ever wished to see their elected representatives and senators take their seats in Congress.

Ackerman argues that most, if not all of this violated the Constitution. Nevertheless, unlike the Philadelphia delegates, the Reconstruction rump Congress of 1866 claimed that it was acting in perfect conformity with the Constitution (and Professor Amar, for one, agrees with this assessment). It justified kicking out Southern Congressmen and Representatives under its authority to judge the qualifications of its members, and it justified military Reconstruction under its Article IV obligation to guarantee the states a Republican Form of Government. And, when Congress attempted to rid the country of President Andrew Johnson, it did so *within* the framework of the Impeachment Clause rather than claiming Cromwellian powers to dispatch the reigning quasi-monarch.<sup>65</sup> If crisis there was, it did not involve a party proudly going outside the constitution but a dispute between actors about whether they had complied with constitutional obligations. (That is, it would not be a Type One crisis, but a Type Three).

#### IV. TYPE TWO CRISES: EXCESSIVE FIDELITY TO A FAILING CONSTITUTION

Type One crises are usually easy to discern precisely because relevant decisionmakers will admit, perhaps defiantly, that they are going beyond constitutional limits for the public good. Type Two crises, present the opposite situation. They occur when all relevant actors comply with their widely accepted constitutional duties and roles, but following the accepted understandings of the Constitution fails to resolve an existing political crisis or leads to disaster.<sup>66</sup> (Thus, one might say that Type Two crises arise in situations where the Constitution really *is* a suicide pact.) Type Two crises involve failures of constitutional structures that the relevant actors do not dispute or attempt to

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<sup>64</sup> See U. S. CONSTITUTION, Art. I, sec. 3 (repealed by Amendment XVII).

<sup>65</sup> Though this may be unfair to Cromwell and his supporters, because they argued vigorously that King Charles was in violation of the tacit “constitution” that limited the power of the monarch particularly with regard to the exaction of taxes.

<sup>66</sup> Whittington calls these “operational crises,” Whittington, *supra* note 13, at 2101.

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escape. If Type One crises feature actors who publicly depart from fidelity to the Constitution, Type Two crises arise from *excess* fidelity, where political actors adhere to what they perceive to be their constitutional duties even though the heavens fall.<sup>67</sup>

Such crises are no doubt rare, but one important example might be the actions (or, more properly, non-actions) of Lincoln's immediate predecessor, James Buchanan, widely thought to be one of our worst presidents. In the period from Lincoln's election in November 1860 until his inauguration on March 4, 1861, Buchanan, who retained all the legal prerogatives of his office, sat idly by while state after state in the South seceded from the Union.<sup>68</sup> He believed, and

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<sup>67</sup> Not all difficulties with the Constitution rise to the level of serious threats to the constitutional system. Many features of our constitutional system are inconvenient or unfair, but they do not threaten the continuation of the Constitution or the nation. The Twenty Second Amendment prevents competent presidents from serving a third term, even in time of war or national danger. The natural born citizen clause of Article II keeps talented persons from serving as President. The equal representation of states in the Senate biases national policy away from the interests of the majorities. The electoral college skews how presidential candidates run campaigns and how they govern in pursuit of reelection. The rules for picking presidents and vice-presidents if the electoral college does not produce a winner are convoluted and could someday lead to political stalemate and what we call a Type Three crisis. Finally, the amendment provisions of Article V of the Constitution are very difficult to meet and could prove useless in an emergency. These features of the Constitution may be unwise, even "stupidities." See SANFORD V. LEVINSON AND WILLIAM N. ESKRIDGE, *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* (1998). But they do not by themselves create a Type Two crisis. Nevertheless, as we discuss *infra*, various features of the Constitution can prove dysfunctional in context and create crisis if circumstances change sufficiently. If these circumstances were predictable in advance, we could say that the crisis was "latent."

As we shall discuss more fully in our treatment of what we call Type Two constitutional crises, the seeds of a constitutional crisis can exist for many years in the background of political life, becoming salient only when events demonstrate that the existing constellation of political forces is inadequate to meet the needs of everyday governance. When this happens, crisis seems to emerge suddenly. But in fact the causes of the current difficulty may have been set in motion long ago. These latent or hidden crises are the greatest test of a constitutional system, and they are of the utmost importance to students of constitutional design.

<sup>68</sup> The Type Two crisis was prolonged and exacerbated by the long but constitutionally required hiatus between the November election and the March inauguration. It is worth noting that although Lincoln disagreed with Buchanan about whether the Constitution allowed the President to resist secession, he did not suggest that he could take office

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strongly argued in a December 6, 1860 message to Congress, that the seceding states had violated the Constitution. However, he also believed that the Constitution did not give the national government the power to prevent secession by using force. As Buchanan eloquently put it, “The fact is that our Union rests upon public opinion, and can never be cemented by the blood of its citizens shed in civil war. If it can not live in the affections of the people, it must one day perish. Congress possesses many means of preserving it by conciliation, but the sword was not placed in their hand to preserve it by force.”<sup>69</sup>

Buchanan’s views of his own constitutional power reduced him to the role of an onlooker, unable to do anything more than present reasoned arguments why the Southern States were mistaken in believing that Lincoln’s election truly threatened them. This was the opposite of a collision of forces. Rather, it was a President who sincerely believed that the Constitution did not allow him to deal with the most urgent problem facing the nation. More to the point, both Buchanan and his Southern adversaries agreed that the Constitution afforded him no remedy. From their joint perspective, if Buchanan acted to stop the South he would foment a Type One crisis, for he would have gone well beyond his constitutional powers.

If Buchanan had different views about secession and acted to halt the exit of Southern states, he would have generated a Type Three crisis, which is exactly what happened after Abraham Lincoln took the reins of power. That is how Type Two crises become Type Three: necessity leads political actors to change their minds about what the Constitution permits, or it produces new leaders with different views. Of course, even if one agreed with Buchanan’s reading of his own limited powers under Article II, one might still maintain that if there was ever an occasion for a Schmittian (or Lockean or Hamiltonian) understanding of presidential prerogative, it was the secession crisis of 1860-61. That is how Type Two crises become Type One: if political actors do not believe that the Constitution provides the necessary resources to meet a threat to the nation, they may feel an irresistible urge to transcend constitutional limits.

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earlier than March 4<sup>th</sup> even though he no doubt believed that Buchanan’s scruples were literally destroying the Union. Nor, seventy years later, would Franklin Delano Roosevelt argue that he should take office early because the exigencies of the Great Depression. As a matter of fact, the 20<sup>th</sup> Amendment made Roosevelt’s the last inauguration to take place on March 4—it now occurs on January 20<sup>th</sup>. Even so, the present hiatus of “only” ten weeks between election day in November and inauguration in January may still be too long in some circumstances.

<sup>69</sup> See BREST ET AL. *supra* note 21, at 261-262.

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One might dispute that the Buchanan example is really a Type Two crisis precisely because most of us are children of Abraham Lincoln, who rejected his predecessor's crabbed reading of constitutional possibility. If there was a crisis, it was caused only by Buchanan's unnecessarily narrow reading of the Constitution and not "by the Constitution itself." But what is central to identifying a Type Two crisis is what relevant political actors believe, *not* what someone looking from the outside maintains is a better interpretation. It is worth noting that Lincoln himself recognized important limits on constitutional interpretation. He did not, for example, try to assume the Presidency early in order to displace the feckless Buchanan and head off secession. Early in the war, he explicitly rejected the authority of Union generals—or even the Commander-in-Chief—to emancipate slaves in conquered territories. Referring to just such a proclamation by General John C. Fremont, Lincoln denounced it as "simply 'dictatorship.' . . . Can it be pretended that it is any longer the government of the U.S.—any government of Constitution and laws,—wherein a General, or a President, may make permanent rules of property by proclamation."<sup>70</sup> This may help to explain why the Emancipation Proclamation that he finally issued on January 1, 1863, did not apply to territory that had been successfully conquered and pacified by the Union troops.

Some Type Two crises are hidden or latent crises. Flaws in constitutional design may create problems that only emerge after years of political interaction; or suddenly appear due to changed circumstances. A prime example involved the effects of the three-fifths rule for counting "other persons," – i.e., slaves– which gave the South extra representation in the House of Representatives and extra votes in the Electoral College. This "slavery bonus" in the electoral college explains why Thomas Jefferson, and not John Adams, was elected President in 1800, an outcome with profound consequences for the development of American politics.<sup>71</sup> The three-fifths rule helped the South dominate the federal government—including the Supreme Court—throughout the antebellum period and helped to turn the United States into what Don Fehrenbacher has termed a "slaveholder's republic."<sup>72</sup> Moreover, as Mark Graber has argued, the fact that the Constitution requires that every member of Congress be elected locally means

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<sup>70</sup> Letter of Sept. 22, 1861 to Illinois Senator Orville H. Browning, in LINCOLN: SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, PRESIDENTIAL MESSAGES AND PROCLAMATIONS 268-69 (Library of America 1989).

<sup>71</sup> See GARRY WILLS, "NEGRO PRESIDENT": JEFFERSON AND THE SLAVE POWER (2003).

<sup>72</sup> DON FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES (2001).

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that political issues that have strongly regional dimensions may become especially hard to resolve; election-seeking politicians have very incentive to focus on the presumptive interests of their constituents and forego any particular concern about a wider national interest.<sup>73</sup> Thus, Graber argues, flaws in the design of the antebellum Constitution help to account for the ever-growing regional intransigence leading to the secession crisis of 1860 and the two side's inability to reach a compromise. One might applaud that result if the alternative was maintaining slavery.<sup>74</sup> This, however, requires us to address another Type Two Crisis: the fact that the 1787 Constitution, correctly understood by almost all "respectable" interpreters, required significant collaboration with chattel slavery. It required, in Lincoln's words, a house divided against itself, which, sooner or later, could not stand. Lincoln himself recognized the necessity of this collaboration not only in his view that he must preserve slavery where it already existed,<sup>75</sup> but also in the duty even of anti-slavery members of Congress to vote for a fugitive-slave law that would help slaveowners recover their runaway "property."<sup>76</sup>

As the above examples suggest, Type Two crises are brought about by features of constitutional structure whose defects are magnified by changing circumstances. What might have been merely an anodyne feature of the constitutional system at one point may become a serious problem in a new context.<sup>77</sup> For example, the United States Constitution, in contrast to many parliamentary systems, establishes a system of fixed elections and inaugurations. Consider, however, the Canadian Constitution Act of 1982, which provides that

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<sup>73</sup> MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

<sup>74</sup> See, e.g., Jack Balkin and Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 *CHI.-KENT L. REV.* 49 (2007).

<sup>75</sup> See, e.g., Lincoln's First Inaugural, excerpted in BREST ET AL., *supra* n. 21, at 268.

<sup>76</sup> See, e.g., Lincoln's reply to Sen. Stephen A. Douglas in the third of their famous debates, in *LINCOLN: SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, THE LINCOLN-DOUGLAS DEBATES* (Don Fehrenbacher ed., Library of America ed., 1989) 620 ("Now on what ground would a member of congress who is opposed to slavery in the abstract vote for a fugitive law, as I would deem it my duty to do? Because there is a Constitutional right which needs legislation to enforce it. And, although it is distasteful to me, I have sworn to support the Constitution, and having so sworn I cannot conceive that I do support it if I withheld from that right any necessary legislation to make it practical." See also *id.* at 813. ("Why then do I yield support to a fugitive slave law? Because I do not understand that the Constitution, which guarantees that right, can be supported without it").

<sup>77</sup> See the discussion in fn. 67 *supra*.

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“[i]n time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.”

Probably Lincoln’s most important recognition of constitutional limits was the fact that he would have to return to the American people—or at least those who had remained within the Union—for renewed authority in November 1864. Lincoln apparently never contemplated what to some might have been the altogether sensible postponement of a presidential election that would be occurring in the midst of civil war. One might well regard Lincoln’s willingness to remain accountable to the electorate as the greatest possible proof of his commitment to democracy. This was no small matter. On August 23, 1864, he wrote a “Memorandum on Probable Failure of Re-Election” that began with his observation that “it seems exceedingly probable that this Administration will not be re-elected,” requiring acceptance of a presumed victory by Gen. McClellan, running as the Democratic candidate. “Then it will be my duty,” wrote Lincoln, “to so co-operate with the President elect, as to save the Union between the election and the inauguration [which would not occur until March 4, 1865]; as he will have secured his election on such grounds that he can not possibly save it afterward.”<sup>78</sup> Given the depth of Lincoln’s commitment to preserving the Union, as the “last best hope” of mankind, testing the very possibility that the experiment in republican self-government might endure,<sup>79</sup> it is nothing less than stunning that he would almost certainly have felt bound to accept the defeat of his project “merely” (to quote Hamilton) because of the fact that the Constitution of the United States gave him only a four-year term of office that would have to be renewed in order for him to serve longer. Had Lincoln in fact lost and the Union dissolved—or been restored with slavery intact<sup>80</sup>—one might well regard this as a Type Two crisis. Today many people would condemn him for his refusal to bite the bullet and postpone the election. (Of course, had that occurred, we might well have ended up as “children of McClellan,” highly critical of Lincoln’s constitutional adventurism, given the propensity of “history,” especially as taught

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<sup>78</sup> Quoted in DAVID HERBERT DONALD, *LINCOLN* 529 (1995).

<sup>79</sup> See, e.g., MICHAEL LIND, *WHAT LINCOLN BELIEVED: THE VALUES AND CONVICTIONS OF AMERICA’S GREATEST PRESIDENT* (2004).

<sup>80</sup> “McClellan had always disagreed with the Emancipation Proclamation, and if he became president that document would be either withdrawn or ignored.” BURRUS M. CARNAHAN, *ACT OF JUSTICE: LINCOLN’S EMANCIPATION PROCLAMATION AND THE LAW OF WAR* 126 (2007).

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to the young, to represent the perspective of winners.)

Lincoln, of course, was re-elected, but he was killed by John Wilkes Booth within six weeks of his inauguration. Booth might have precipitated a quite different Type Two crisis had he merely incapacitated and not killed Lincoln. At that time there was no Twenty-fifth Amendment—itsself a response to the Kennedy assassination and the realization that a merely incapacitated President created serious problems of succession. Both Andrew and Lyndon Johnson could without controversy take the oath of office and assume the full legal powers as President of the United States because their predecessors had died. Had Lincoln lingered for months in a semi-comatose condition, that would have generated a Type Two constitutional crisis, since there was no one official, whether Vice President Andrew Johnson or Secretary of State William Steward, who could have exercised legitimate leadership in the freighted days after the end of the formal military struggle. A similar problem arose when President Woodrow Wilson suffered a stroke in October 1919, while (unsuccessfully) attempting to defend the Versailles Treaty, and lingered in office even though clearly debilitated.<sup>81</sup>

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<sup>81</sup> See DAVID PIETRUSZA, *1920: THE YEAR OF SIX PRESIDENTS* 47-54 (2006).

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As a final example of a Type Two crisis, consider the possibility that the United States is faced with an incompetent but mentally sane President serving in his second term—and therefore free from any restraints imposed by the possibility of electoral accountability—who has done nothing that would plausibly count as a “high crime or misdemeanor.” Even though he is causing the country irreparable harm in loss of life and treasure, there is nothing anyone can do to get him to leave. Instead, there is seemingly widespread and deep agreement that the fixed constitutional calendar and the provisions on impeachment mean that the country must suffer through his feckless incompetence until the next election--at which point they must wait still another ten weeks for the inauguration of a new Chief Executive.<sup>82</sup>

Type Two crises almost invariably involve problems with constitutional structure, problems that actors may not even notice because they are viewed as almost literally unquestionable background features of the political system that all sides take for granted. Moreover, to the extent that our political culture is one defined by a significant measure of “constitutional faith” and Madisonian “veneration” for the Constitution,<sup>83</sup> the citizenry will likely not blame the Constitution itself for the political system’s inability to respond adequately to great issues of the day.

Instead of focusing on the implications of the structures of governance established by the Constitution, it is far easier to blame “lack of leadership,” the “absence of sufficient political will,” or, as a recent, breathlessly titled book, *The Genius of America: How the Constitution Saved Our Country and Why It Can Again*<sup>84</sup> puts it, unfortunate “attitudes of the men and women” who populate those

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<sup>82</sup> If a constitution has a robust “emergency-powers” provision that allows suspension upon the declaration of “states or emergency,” then one might wonder if there would ever be either Type One *or* Type Two crises; the existing constitution itself would recognize that normal processes can sometimes be dysfunctional, and provide a solution (even if some people might describe the solution—a declaration of constitutional suspension--as the equivalent of jumping from the frying pan into the fire). This of course, was the point of the Roman (temporary) dictatorship. Many modern constitutions, like those of India, Turkey, Germany, and France, have emergency or suspension clauses; ours, quite notably, does not, save for the possibility of suspending Habeas Corpus under very specific conditions, i.e., “invasion or rebellion” when the public safety requires it. U. S. CONSTITUTION, Art. I, sec. 9.

<sup>83</sup> See Sanford Levinson, *Constitutional Faith* (1988); “Veneration” and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment,” 21 TEXAS TECH L. REV. 2443 (1990).

<sup>84</sup> ERIC LANE AND MICHAEL ORESKES, THE GENIUS OF AMERICA: HOW THE

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structures. No doubt we could use better leadership, and more vigorous political will on behalf of the public good. But the constitutional system often stacks the deck against even quite capable politicians. Even the wisest and ablest of leaders may not be able to overcome the remarkable number of “veto points” that our Constitution places in the way of legislative achievement. Thus, the concept of Type Two crises is important precisely because it forces us to confront the possibility that we may be ill-served by the our Constitution’s scheme of governance. In a Type Two crisis, if everyone plays by the rules, the Constitution will fail us. In a Type Two crisis, the Constitution is not the solution; it is the problem.

This fact reveals the deep connection between Type One and Type Two crises: The perceived failure of the existing constitutional forms leads political actors to believe that they are justified in violating them. If many people perceive that the country or the political system is in danger, there will be real incentives to demonstrate that the Constitution, correctly understood, doesn’t really require marching over a cliff. As we have seen, a President claiming a right to act in time of crisis will not be likely to embrace a Schmittian or even Lockean prerogative; rather he or she will probably argue that Article II, correctly interpreted, grants all of the necessary powers.

What is particularly interesting about Type Two crises, however, is that they can sneak up on us. Sometimes the relevant actors believe that the Constitution does not provide the means for political actors to solve problems facing the nation and nobody has the political will to abandon the limits imposed by the Constitution as they understand them. This describes the situation during the last years of the Buchanan Administration. But more interestingly, sometimes the constitutional rules-- as all relevant actors understand them-- are leading the country toward greater and greater difficulties, even “ruin,” but nobody recognizes the problem because they are too invested in maintaining and exercising the powers the system gives them. They accept the background rules, in spite of the fact that these rules are exacerbating the situation, until matters reach a point of crisis—a conflict that comes from playing by the rules, not against them. This is the sectional crisis created by the antebellum Constitution’s rules for representation, and its acceptance of a special status for slavery. Our country managed to avoid disaster several times before (with various compromises—including what William Freehling labeled the “armistice” 1850);<sup>85</sup> ultimately, however, we were unable to recognize the limitations of our

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CONSTITUTION SAVED OUR COUNTRY AND WHY IT CAN AGAIN 181 (2007).

<sup>85</sup> WILLIAM FREEHLING: 1 THE ROAD TO DISUNION: SECESSIONISTS AT BAY (1990).

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constitutional structure and lacked an easy way to change the basics of the political system to resolve the crisis short of war.

### V. TYPE THREE CRISES: STRUGGLES FOR POWER BEYOND THE BOUNDARIES OF ORDINARY POLITICS

If Type One crises involve acknowledgment of a state of exception, triggered by recognition of constitutional inadequacies that, woodenly adhered to, would produce Type Two crises, Type Three crises describe a different kind of political struggle. In a Type Three crisis the relevant actors all proclaim their constitutional fidelity; they simply disagree about what the Constitution requires and who holds the appropriate degree of power. In Type Three crises, each side may claim that *their opponents* are violating the Constitution or wrongly preventing lawful action under it. That is, in Type Three crises, each side may accuse the other of fomenting a Type One crisis, while each claims impeccable legal pedigree for its own actions.<sup>86</sup> The crisis ends when one side or the other backs down, and agrees, however grudgingly, to the practical legality of the new legal status quo. Of course, this is true of many other constitutional conflicts that do not rise to the level of crises. Constitutional revolutions brought about through

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<sup>86</sup> This marks an important difference between our typology and Whittington's. Whittington distinguishes between "crises of fidelity" and "operational crises," roughly corresponding to what we call Type One and Type Two. However, we think that among the most interesting examples of crisis are Type Three, where the question of fidelity is seriously in doubt. Two (or more) sides of a constitutional controversy struggle for dominance, and over whose vision of the Constitution will prevail. The winner's interpretation becomes the accepted conventional wisdom about the meaning of the Constitution, leading to what one of us (Balkin) has called a "Winner's Constitution." Jack M. Balkin, "Winner's Constitutions," *Balkinization*, June 7, 2007, at <http://balkin.blogspot.com/2007/06/winners-constitutions.html>.

Whittington does not regard these as either crises of fidelity or crises of operation because "interpretive disagreement still implies a commitment to interpreting a specific constitution, and to constitutional fidelity." Whittington, *supra* note 13, at 2111 n. 67. We think this leaves out an important category of constitutional struggles for power, in which each side sees the other as precipitating what Whittington calls a "crisis of fidelity," but in fact there are plausible arguments on both sides. It is not accidental that because Whittington does not regard what we call Type Three Crises *as* crises of fidelity, he regards constitutional crises as relatively rare in American history, *id.* at 2095, whereas we see them as somewhat more frequent.

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what Mark Tushnet has called “constitutional hardball”<sup>87</sup> need not be constitutional crises. When Franklin Roosevelt appointed nine Justices to the Supreme Court, he changed the practical meaning of the Constitution, but he did not precipitate a crisis, in part because everyone assumed that he had the power to nominate committed New Dealers to the Court if the Senate confirmed them. Previously Roosevelt’s controversial court packing plan had failed, but this also did not generate a crisis; after it was rejected Roosevelt accepted his defeat and did not attempt to install extra Justices without Congressional approval.<sup>88</sup> What distinguishes Type Three crises from ordinary disagreements about the Constitution is the means that the parties are willing to use (or threaten to use) to prevail. The Constitution is designed to keep political disagreements—including disagreements about the Constitution’s proper interpretation—within the bounds of normal politics. In Type Three crises, the Constitution fails at this task, and one or more of the parties moves outside the ordinary boundaries of politics in an effort to win.

Thus, Type Three crises are a small subset of a much larger category of everyday disagreement about the meaning of the Constitution and the political conflicts and political machinations that arise from this disagreement. Although all Type Three crises involve constitutional conflicts and disagreements about the meaning of the Constitution, not all disagreements about the meaning of the Constitution rise to the level of a Constitutional crisis. Similarly, although crises involve what Eric Posner and Adrian Vermuele call “constitutional showdowns”<sup>89</sup>-- attempts to raise the stakes in political controversies until one side or the other gives up, not all constitutional showdowns rise to the level of constitutional crises.

Type Three constitutional crises involve situations in which political actors believe that their opponents are taking dangerous and illegal steps that endanger the constitutional foundations of the Republic, or threaten fundamental and unjustified changes. Therefore these steps justify-- and generally produce-- extraordinary forms of struggle and opposition that go outside the realm of ordinary political jostling and political brinksmanship.

Examples of Type Three crises include the following (listed in chronological order):

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<sup>87</sup> Mark Tushnet, *Constitutional Hardball*, 37 JOHN MARSHALL L. REV. 523 (2003-2004),

<sup>88</sup> By contrast, Bruce Ackerman believes that America’s three major “constitutional moments” all involved transgression of the existing constitutional order.

<sup>89</sup> Vermuele and Posner, *supra* note 25.

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(1) the 1800 election stalemate, which began as a Type Two crisis due to the poor design of the Presidential election rules, and became a Type Three crisis when various states threatened to march their militias to Washington to settle the matter; it was resolved by Jefferson's election;<sup>90</sup>

(2) the battle over the "tariff of abominations" that produced nullification resolutions in South Carolina, resolved by Andrew Jackson's military threats and the passage of a compromise tariff that allowed South Carolina to back down;<sup>91</sup>

(3) the 1860-61 secession crisis that led to and was resolved by the Civil War itself a constitutional crisis;

(4) the 1865-1868 struggle over Reconstruction which involved expulsion of Southern Senators and Representatives, military governorship of the South and impeachment of Andrew Johnson, resolved by Johnson's acquittal and his acquiescence in the ratification of the Fourteenth Amendment;

(5) the 1868-1876 struggle over Reconstruction, which one might well argue was resolved by the successful violent insurgency of the Ku Klux Klan and similar devotees of the ostensibly defeated Old Order that led to the resolution of the dispute over the 1876 presidential election, resolved not simply by appointment of an election commission, but also, and more importantly, by the "Compromise of 1877" that led to the restoration of white rule; and

(6) the Little Rock crisis 1957, resolved by the dispatch of federal troops to integrate the Little Rock schools.<sup>92</sup>

It is worth noting that most of the examples on this list involved conflicts between the South (or parts of the South) and the rest of the nation. This suggests that federalism, and conflicts between national power centers and regional or local power centers, may be an important source of Type Three crises, perhaps even more important than horizontal conflicts between the branches of the Federal government.

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<sup>90</sup> See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* (2006).

<sup>91</sup> See WILLIAM FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CRISIS IN SOUTH CAROLINA 1816-1836* (1965); RICHARD E. ELLIS, *UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS* (1987).

<sup>92</sup> See ELIZABETH JACOWAY, *TURN AWAY THY SON: LITTLE ROCK, THE CRISIS THAT SHOCKED THE NATION* (2007).

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From this list, one might also gather that use of military force or credible threats of military force are common signs of a Type Three crisis. They are not necessary, but may indeed be sufficient to demonstrate that we are entering into constitutional extraordinary times. Mass demonstrations, coupled with credible threats to take to the streets and commit mass civil disobedience, especially if combined with hints of the possible exercise of Second Amendment rights, might also be signs of a Type Three constitutional crisis. During the 1800 electoral stalemate, for example, several state militias considered a march on the Capitol to resolve the dispute, and during the 1876 disputed election, there was grumbling that the recently concluded Civil War might start up again.

By contrast, the mere fact that the Executive and Legislative branches vociferously disagree-- about issues of Executive Privilege, for example-- does not by itself generate a constitutional crisis, as most of these disputes are generally resolved through negotiation. Nor does the fact that (for example) pro-life state legislatures repeatedly pass laws that challenge aspects of the Supreme Court's decision in *Roe v. Wade* constitute a Type Three crisis, as is true as well of the fact that local school boards find multiple ways to get around the Supreme Court's school prayer decisions. These are ordinary forms of political struggle in which different parts of the constitutional system try to push each other in order to force acquiescence or compromise or attempt to get around each another to get their way. We all know, even if we don't sufficiently teach our students, that "law in action" can differ significantly from "law on the books," and the gap between the two does not, save for the most fanatical legalist, constitute a crisis of the legal system. If disobedience becomes so widespread that it threatens civil order, on the other hand, "crisis" seems an entirely appropriate word.

Sometimes events that might lead to a constitutional crisis diffuse so quickly that the term crisis is not really warranted. The Saturday night massacre of October 20, 1973, in which President Nixon fired Watergate Special Prosecutor Archibald Cox, accompanied by the resignations of Attorney General Eliot Richardson and Deputy Attorney General William French Smith is often called a constitutional crisis. There was widespread condemnation of Nixon's action, but it was unclear that Nixon acted illegally by dismissing a member of the Executive branch, even though he had made previous assurances that he would respect the special prosecutor's independence.<sup>93</sup> The crisis, if there was one, was caused by

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<sup>93</sup> See Carroll Kilpatrick, "Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit: President Abolishes Prosecutor's Office; FBI Seals Records," *Washington Post*, Sunday, October 21, 1973; Page A01 (noting Attorney General Richardson's assurances on behalf of Administration at his confirmation hearings) ] at <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>.

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the impression that firing Cox meant that Nixon would not abide by ordinary legal processes during the investigation of the Watergate scandal. (I.e., people were concerned that the situation was on the verge of becoming a Type One crisis.) By November 1, however, Nixon had caved to ordinary political pressure and appointed Leon Jaworski to replace Cox.

It is not even clear that the Watergate scandal as a whole was a constitutional crisis, although it was certainly a political crisis of the first order. Even if Nixon's counsel, James St. Clair might have hinted that Nixon might not obey a Supreme Court order to release the Watergate Tapes (producing a Type One crisis), Nixon in fact produced them within an acceptable time. Even more to the point, Nixon resigned from office rather than face impeachment and removal. At most we might say that Watergate might have been a constitutional crisis, but (ironically) due to Nixon's actions, it ultimately was not.

The current struggles over President Bush's exercise of executive privilege, his detention and interrogation policies, his use of Presidential signing statements, and the NSA domestic surveillance program offer another example. Bush's opponents, including one of the co-authors of this article, may refer to these policies as creating a constitutional crisis. But one must recognize they have not generated extraordinary political opposition by those who believe the Republic is endangered. Many of Bush's policies have been litigated in the courts, with the Administration losing some battles and winning others; these are ordinary features of constitutional conflict and their resolution. Moreover, Congress has acquiesced to many of the President's policies, as evidenced by the Military Commissions Act, and the PROTECT America Act, and the recent 2008 amendments to the Foreign Intelligence Surveillance Act. Agreement between the President and Congress (or capitulation, if one prefers the term), even to unwise and illegal policies, is not the same thing as crisis. Indeed it is the very opposite.

If the challenged actions of the Bush Administration do involve a constitutional crisis, they would most likely be a Type Two crisis, not a Type Three. They would be structural problems in the constitutional system that Bush's Presidency has brought to the fore. The idea would be that President Bush has taken maximal advantage of inherent ambiguities and possibilities for the expansion of executive power in the constitutional system. The constitutional system always had latent within it the possibilities for what Clinton Rossiter called "constitutional dictatorship" which would ultimately undermine its republican and democratic character. The Bush Administration's assertions of

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power are merely the working out in history of how the Presidency gradually descends toward dictatorship in times of extended emergency due to a combination of changes in military hardware, information technology, methods of warfare, party organization, and media technology.<sup>94</sup>

Nor can we say that the 2000 election was a Type Three constitutional crisis. (It would be a Type Two crisis only if one thought that our system of selecting presidents has led to disastrous consequences for the country.) What was most remarkable about the disputed 2000 election was the absence of large numbers of people taking to the streets to protest or the mobilization of troops to preserve order and ensure presidential succession. Instead, both sides fought out their disagreements in the Florida and federal courts, leading ultimately to the Supreme Court's halting of recounts on December 12th. At that point, Vice-President Al Gore accepted the Court's decision, ending any possibility of a genuine Type Three crisis. Gore's capitulation was fully endorsed by Democratic political leaders. No senator, for example, rose to protest patent racial discrimination in voting practices that occurred particularly in Florida, which doomed to failure protests that had been filed by members of the House of Representatives.<sup>95</sup> As with Nixon's earlier capitulation in Watergate, the 2000 election was at most a Type Three crisis that might have been. Almost all Americans now applaud Nixon's surrender; some still rue Gore's. This is simply to underscore the point that for some people there may be worse things than a full-scale constitutional crisis.

A final example is President Truman's seizure of the Steel Mills in 1952.<sup>96</sup> This is a borderline case, because the President did use military force. But his opponents did not act in a similar fashion or even take to the streets. They went to

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<sup>94</sup> Perhaps a few enthusiastic supporters of the Administration would concede the presence of a Type One crisis inasmuch as they concede that the President, because of overarching emergencies, has exercised his extra-legal prerogative power. See, e.g., Harvey C. Manfield, Jr., "The Law and the President: In a national emergency, who you gonna call?" *The Weekly Standard*, January 16, 2006. "To counter enemies, a republic must have and use force adequate to a greater threat than comes from criminals, who may be quite patriotic if not public-spirited, and have nothing against the law when applied to others besides themselves. But enemies, being extra-legal, need to be faced with extra-legal force."

<sup>95</sup> See U.S. COMMISSION ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001).

<sup>96</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). See generally MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* (1994).

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the courts, as did Truman. Moreover, Truman stated that he acted in order not only to safeguard the supply of war materiel for American forces fighting in Korea, but also to give Congress an opportunity to endorse or reject his decision to seize the mills. He respected the Court's decision against him, and looked to Congress for assistance. If this was a Type Three crisis, would that all such crises be so mild in their progress and outcome.

The examples of Watergate, the 2000 election and the Steel Seizure case suggest that there may be a useful relationship between the ways that people use (and overuse) the term "constitutional crisis" and our more technical definition. People may have regarded Watergate, the 2000 election and the Steel Seizure case as crises not because they *were* crises in the sense we describe, but because they feared that they *would become* that sort of crisis. They feared that Nixon would not obey the legal system, that Truman would not back down, and that either Bush or Gore would refuse to obey an adverse judgment. That is, they feared that the existing constitutional conflict would spin out of control and become a constitutional crisis of Type One or Type Three.

Similarly, when people attack the Bush Administration's expansion of executive power they worry that Bush is fomenting a Type One crisis—i.e., that he is deliberately acting outside the Constitution. Of course, from Bush's perspective—and from the perspective of lawyers in his Administration—he is doing no such thing. Nevertheless, we might also look at anxieties about the Bush Administration's expansion of Presidential power in a different way. People have placed their fears on the actions of a single politician and his Administration, instead of considering a different source of anxiety—our constitutional system's susceptibility to slide toward increasing Presidential power no matter who is in office, and, eventually to a form of plebiscitarian dictatorship that could drive the country to ruin. This would be a Type Two Crisis.

In short, often when people call a situation a "constitutional crisis" they may not be accurately describing the situation but reporting their fears (reasonable or not) about what may happen. They call something a crisis because they worry that the situation will spin out of control. They may worry that one or more parties has already or soon will deliberately exceed their powers under the Constitution (Type One). They may worry that the order will break down, that the parties will take to the streets or threaten or use force (Type Three). Finally, and perhaps most intriguingly, what people call a crisis may be the result of long standing defects in the constitutional system (Type Two)—which they incorrectly

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ascribe to the bad motives of their political opponents rather than to problems in the constitutional system as a whole.

### VI. CONCLUSION: GÖDEL'S PROOF?

We have described three models of constitutional crises for analytical clarity, but we recognize that they are merely ideal types. Moreover, as we have argued, in practice one kind of crisis can turn into another. Constitutional crises occur against the background of political actors' beliefs about problems facing the nation, their political will to meet them and their beliefs about constitutional power. If either their beliefs or their political will change, or if they are replaced by others with different views and attitudes, the nature of the constitutional crisis can change, or indeed, the crisis may resolve.

Replace James Buchanan with Abraham Lincoln as President, and the Type Two crisis of secession becomes a Type Three one, because the new President (Lincoln) believes that he has the power to stop secession, and acts on his belief. As we have noted, however, Lincoln did not believe that he could take over the Presidency immediately after his November 1860 election. He waited until March 4, 1861, as prescribed by the Constitution, thus extending the Type Two crisis. Moreover, the antebellum Constitution also provided that the new Congress elected in November 1860 would not have to meet until December 1861. This allowed the President to act without a legislative check or legislative oversight for many months. Although Lincoln in fact called Congress into special session on July 4, 1861, he could have called it into session even earlier. Failing to do so allowed him in effect to assume the powers of a dictator, which, if badly used, could have been disastrous for the country (and would have been a Type Two crisis). As Clinton Rossiter wrote, Lincoln's "arbitrary" decision led to "[t]he simple fact that one man was the government of the United States in the most critical period in all its 105 years, and that he acted on no precedent and under no restraint, makes this the paragon of all democratic, constitutional dictatorships."<sup>97</sup>

These examples suggest an important point about how constitutional systems evolve over time. Type Two crises occur because people share basic understandings about the rules and have insufficient incentives or abilities to

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<sup>97</sup> CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP* 224 (2d ed. 2002).

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abandon them or interpret them in different ways. But necessity is the mother of invention, and some Type Two situations may become ordinary constitutional conflicts (or, in extreme cases Type Three crises) because political actors usually have incentives to reimagine and reconceptualize their powers to their perceived advantage. Once this happens, disagreements about the rules may emerge where none existed before.<sup>98</sup> Thus, the continual emergence of new problems combined with continuous incentives for actors to reinterpret their own powers to their advantage may produce—instead of constitutional crises-- a series of constitutional struggles that will be resolved when the losers accept the winner's new conception of constitutional order.

By repeatedly turning potential Type Two crises into opportunities for constitutional adaptation, the American Constitution system may have worked itself out of any number of potential dead ends. Problems created by constitutional structures and constitutional regimes give incentives for actors to engage in creative interpretations. Usually these transformations can be managed within the forms of ordinary politics; the New Deal is one example. In rare instances, however, as in the case of the Civil War, they will generate Type Three crises. In either case, the constitutional regime will have shifted, changing the rules, and leading to new problems down the road and new conflicts, that in turn drive constitutional development forward. If this is an accurate picture of how the constitutional system evolves—turning potential dead ends into uncomfortable but resolvable conflicts—it suggests how very unique were the sectional disputes that led to Civil War. They were a set of problems that could not be resolved through this process of crisis generation, creative interpretation and crisis resolution.

For these reasons, it may sometimes be quite difficult to know whether one is genuinely in a Type Two situation—that is, a genuine failure of the

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<sup>98</sup> This marks another important difference between our typology and Whittington's distinction between operational crises and crises of fidelity. Whittington's notion of a operational crisis assumes that "following all of the correct constitutional procedures" leads to disorder or makes "the constitutional government . . . incapable of rendering the political decisions or taking the effective political actions widely regarded as necessary at a given moment." Whittington, *supra* note 13, at 2101-02. But once a reasonable dispute arises about what are the "correct constitutional procedures," then there is no longer an operational crisis in his terms. Our point is that what makes a dispute "reasonable" cannot always be assessed outside of the context of decision. That means, among other things, that there is always enormous pressure to turn Type Two crises into disagreements about interpretation.

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constitutional system. The real fault may lie in lack of political will, in misjudgments about the nature of the dangers facing the country, or in mistaken assumptions about constitutional powers. Type Two situations may dissolve into ordinary conflicts about interpretation for any number of reasons.

First, the set of relevant political actors may change: new actors may appear (or others become newly relevant) who disagree with the previous consensus and assert that they have constitutional powers or that others lack them. Type Two crises are caused by the failure of the rules of the constitutional system. But deciding whether the problem consists of the rules themselves or a bad interpretation of the rules depends on what we think are the boundaries of reasonable construction of the rules. When the rules are subject to reasonable dispute, the problem may not be the rules themselves but the failure to choose an interpretation that works.

Second, if one waits long enough, many potential Type Two crises may simply resolve themselves. Incompetent presidents must eventually leave office. If the President has not done too much irreparable damage, a new President and a new Congress will repair what was broken and remedy what was left undone. The crisis remains Type Two only if time was of the essence and the incompetent President managed affairs so badly that the political situation has become incorrigible. This suggests that the temporal framing of a crisis may be quite important in deciding whether there is a crisis, and if, so, what sort of crisis it is.

Nevertheless, if constitutional systems can preserve themselves through evolution, they can also reach evolutionary dead ends. The framers themselves disliked democracy (as they understood the term) because they believed that it inevitably evolved into oligarchy, dictatorship, and tyranny.<sup>99</sup> Over time, they feared, clever and unscrupulous politicians would play on people's emotions and fears and eventually seize power for themselves. They also understood that the Roman Republic had turned into Caesar's empire, and that Cromwell's protectorate had turned into a military dictatorship.<sup>100</sup> They designed the 1787 Constitution as a republic with checks and balances that would forestall the slide of democracies into tyrannies. Yet it is possible that their design choices could stem this tendency only for so long: First, they could not foresee new problems of executive administration and bureaucracy, new methods of making war, and new methods of public persuasion and propaganda using media that had not yet been invented. Second, their incompletely fleshed out plan in 1787 would always

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<sup>99</sup> David J. Luban, *On the Commander in Chief Power*, 81 *So. Cal. L. Rev.* \_\_\_ (forthcoming 2009), SSRN, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1026302](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026302)

<sup>100</sup> *Id.*

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be subject to creative reinterpretations and glosses along the way. Writing in the twentieth century, Max Weber offered a dark portrait of the likely progress of parliamentary democracies over time: inevitably, he suggested, they moved toward a form of Caesarism, a plebiscitarian dictatorship in which rulers claim authority through acclamation.<sup>101</sup>

As noted previously, people have accused the Bush Administration of overstepping its powers, accusing it (correctly or not) of creating a Type One crisis. But we should leave open the possibility that what we are really facing is a Type Two crisis. It is possible that George W. Bush's presidency is merely the continuation of a long term trend of an increasingly powerful presidency that rules through secrecy and surveillance, while claiming that his or election constituted a plebiscite authorizing (indeed "mandating") such extraordinary uses of power.<sup>102</sup> Given changes in media technology and the technologies of warfare, our country may be on a downward slide toward Caesarism, with Presidents who claim greater and greater unaccountable authority in order to fight a never-ending war against hidden enemies.

According to a celebrated story, the celebrated mathematician Kurt Gödel once glimpsed the danger of such a slide.<sup>103</sup> Gödel is famous today for his proof

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<sup>101</sup> Max Weber, *Parliament and Government in a Reconstructed Germany*, (1917) in 3 WEBER ECONOMY AND SOCIETY 1381 (1968). This was the theme of Gerhard Casper's Inaugural Kronman-Postol lecture at the Yale Law School, in December 2006. See Gerhard Caspar, "Caesarism in Democratic Politics, Reflections on Max Weber," at [http://www.law.yale.edu/documents/pdf/News\\_&\\_Events/CaesarismYLS.pdf](http://www.law.yale.edu/documents/pdf/News_&_Events/CaesarismYLS.pdf).

<sup>102</sup> See JOHN C. YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006) (noting that country held a presidential election after the revelations at Abu Grahیب and the leaking of the 2002 memos on interrogation practices); John C. Yoo, "With 'All Necessary and Appropriate Force'", *Los Angeles Times*, June 11, 2004, at B-13 ("If the American people disagree with [the Administration's detention and interrogation] policy, they have options: Congress can change the law, or the electorate can change the administration."); Cf. Jim VandeHei and Michael A. Fletcher, "Bush Says Election Ratified Iraq Policy," *Washington Post*, Sunday, January 16, 2005 at A01; "Transcript of Bush Interview," *Washington Post*, Sunday, January 16, 2005, at <http://www.washingtonpost.com/ac2/wp-dyn/A12570-2005Jan15?language=printer> ("Well, we had an accountability moment, and that's called the 2004 election. And the American people listened to different assessments made about what was taking place in Iraq, and they looked at the two candidates, and chose me, for which I'm grateful.").

<sup>103</sup> See JOHN L. CASTI AND WERNER DEPAULI, *GÖDEL: A LIFE OF LOGIC* 89 (2000); Jim Holt, *The Loophole: A logician challenges the Constitution*, LINGUA FRANCA (February 1998), <http://linguafranca.mirror.theinfo.org/9802/hyp.html>. A slightly different, but

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that there are true statements of mathematics that cannot be demonstrated logically using its axioms, and that one cannot prove that mathematics is consistent.<sup>104</sup> Gödel had fled Nazi Germany in the 1930's and later, under the urgings of his colleagues at the Institute for Advanced Study in Princeton, became an American citizen. Indeed, Albert Einstein and Oskar Morgenstern accompanied Gödel to Trenton, New Jersey for the ceremony where he would swear the oath of citizenship. Gödel, it appears, had prepared very carefully for the exam testing his knowledge of the Constitution and, as required by statute, affirming his "attachment" to the "principles of the Constitution."<sup>105</sup> Prior to his trip to Trenton, though, Gödel told Morgenstern that he had discovered a logical/legal proof of how one could transform the United States from a democracy into a dictatorship. According to one source, the flaw lay in the Recess Appointment Clause,<sup>106</sup> by which presidents can fill vacancies without Senate approval. "This, Gödel reasoned, could lead to a dictatorship."<sup>107</sup> Morgenstern recognized that the hypothetical possibility and its likely remedy involved a complex chain of reasoning and was clearly not suitable for discussion at the citizenship interview. He urged Gödel to keep quiet about his discovery.

The next morning Morgenstern drove Einstein and Gödel from Princeton to Trenton. Along the way Gödel told Einstein his theory of constitutional dictatorship. Hoping to avoid a potential debacle, Einstein tried to distract him with stories. The official in charge in Trenton was Judge Philip Forman, who had inducted Einstein in 1940 and struck up a friendship with him. He greeted them warmly and invited all three to attend the (normally private) examination of Gödel. The judge began, "You have German citizenship up to now." Gödel interrupted him and noted that his citizenship was actually Austrian. "Anyhow," Forman continued, you came from a country with a "wicked dictator" and, "fortunately that is not possible in America." This gave Gödel the opportunity to interject, "On the contrary, I know how that can happen." As one writer puts it, "Alarmed, Einstein, Morgenstern and Judge Forman quickly interrupted him and forced him to return to what was supposed to be a routine examination."

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non-contradictory, version of the story is given in The Institute Letter [published by the Institute for Advanced Study], Spring 2006, at 7 (a memoir by Oskar Morganstern, recorded on Sept. 13, 1971). We are grateful to Mary Dudziak for making us aware of this latter source.

<sup>104</sup> See STEPHEN HAWKING, ED., *GOD CREATED THE INTERGERS: THE MATHEMATICAL BREAKTHROUGHS THAT CHANGED HISTORY* (2005).

<sup>105</sup> See Sanford Levinson, *CONSTITUTIONAL FAITH* 122-154 (1988).

<sup>106</sup> U. S. CONSTITUTION, Art. II, sec. 2, cl. 3.

<sup>107</sup> See Hawking, *supra* n. 104. All subsequent quotations in this paragraph come from this source.

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Students of the Presidency might well think that Gödel's concerns are worth serious discussion even if one is more complacent than he about the potential ravages of the Recess Appointment clause. After all, enough lawyers, given enough time, are likely to attempt every logical argument to its fullest extent on behalf of the interests of their clients, including power-seeking presidents of the United States. If there is a plausible way to turn democracy into dictatorship, we should have no doubt that at some point in the future some ardent defender of presidential prerogatives will stumble across it. Indeed, some may think this day has already arrived: To defend several of its policies, the Bush Administration's Office of Legal Counsel came up with a theory, associated with Vice-President Dick Cheney, his close advisor John Addington, and Professor John Yoo, which states that when the President acts as Commander-in-Chief, he need not obey statutes passed by Congress that would interfere with his powers as the President understands them.<sup>108</sup> This Article II theory, taken to its fullest extent, would also allow Presidents to rule by decree if they believed that it furthered their activities as Commander-in-Chief.<sup>109</sup>

Gödel may also have realized that, by the dominant account, Article V offers a purely procedural set of requirements for amendment to the Constitution. It imposes no substantive limits on the content of amendments other than retaining the slave trade until 1808 and preserving each state's equal suffrage in the Senate.<sup>110</sup> In theory, Article V would allow the transformation of the United States Constitution into one's worst nightmare if there were a triumph of sufficient wills to meet the supermajority conditions of Article V.<sup>111</sup> Ironically, the Nazi-collaborator Carl Schmitt himself criticized the United States Constitution for being insufficiently committed to the protection of fundamental rights. With further irony, Schmitt at least indirectly influenced the development of the post-War German Constitution, which explicitly excludes amendments that

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<sup>108</sup> *Id.*

<sup>109</sup> Jack M. Balkin, "Reductio ad dictatorem," *Balkinization*, April 7, 2006, at <http://balkin.blogspot.com/2006/04/reductio-ad-dictatorem.html>.

<sup>110</sup> Akhil Amar has pointed out to us in conversation that the limitation on Amendments about the Senate is easily avoided. One could simply abolish the Senate through Article V and create a new body with identical powers but with a different name and a different mode of representation.

<sup>111</sup> See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 135-138, 142-154 (1988), for an extended discussion of *U.S. v. Schneiderman*, 320 US 119 (1944), which turns precisely on whether a Communist can in fact be "attached" to the "principles" of the Constitution. A majority in effect holds that there are no true substantive principles inasmuch as anything is possible through Article V amendment.

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affront the constitutionally entrenched principles of “human dignity” as well as those which threaten the continued existence of German *lander*.<sup>112</sup>

As noted above, many constitutional difficulties have never turned into constitutional crises precisely because clever lawyering can usually transform Type One and Type Two crises into struggles over interpretation that can be resolved through ordinary forms of politics and judicial decisionmaking. But before congratulating ourselves on the values of legal flexibility, we should inject a note of caution. First, as the Gödel story reminds us, creative lawyering cannot only get us out of constitutional dead ends, it can also back us into them. Second, and equally important, lawyers taught only the arts of constitutional interpretation, and not the implications of constitutional design, may not have much to contribute to either solving or avoiding genuine Type Two crises. Even if most crises are resolved without bloodshed, the Civil War teaches us that the most dangerous crises, and the ones most likely to be avoided by careful planning, are Type Two, for which most lawyers educated in American law schools come completely unprepared. Whether or not this marks a “crisis” in legal education, it is certainly a powerful argument for making constitutional design a central aspect of any serious course of study in constitutional law.

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<sup>112</sup> See, e.g., DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR* (Duke U. Press, 1997/2004)(critique of U.S. Constitution). On Schmitt’s influence with regard to the drafting of the German Constitution, see Volker Neumann, *Introduction*, in ARTHUR JACOBSON AND BERNHARD SCHLINK, *WEIMAR: A JURISPRUDENCE OF CRISIS* \_\_ (2001)( “It is an exaggeration to assess the guarantee against changing certain eternal constitutional principles in Article 79 (3) as an ‘expression in positive law’ of Schmitt’s doctrine of the substantive limits of constitutional revision. This provision can plausibly be traced back to Richard Thoma, who participated as an adviser in drawing up the Basic Law and in 1948 proposed such a ‘norm of inviolability.’ In 1932, however, Thoma had dismissed Schmitt’s doctrine as ‘wishful legal thinking,’ so that his position in 1948 can be considered a revision of his Weimar critique. Thus Schmitt was present in the emergence of Article 79 (3) at least indirectly.”)

For a critical analysis of such “eternity provisions,” see MELISSA SCHWARTZBERG, *DEMOCRACY AND LEGAL CHANGE* (2007). See also BRUCE ACKERMAN, *1 WE THE PEOPLE: FOUNDATIONS* 15 (1991), where he defines himself as a “democrat” precisely by conceding the possibility of limitless (and constitutionally legitimate) change so long as the correct procedures are followed. For a debate about the notion of “unconstitutional constitutional amendments,” see Walter F. Murphy, *Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity*, in SANFORD LEVINSON, ED., *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 163 (1995); John R. Vile, *The Case against Implicit Limits on the Constitutional Amending Process*, in *id.* at 191.

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