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## FOREWORD

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Robert H. Jackson, the former Attorney General and Associate Justice of the Supreme Court, has famously observed that the President is “the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear.”<sup>1</sup> If we limit our consideration to the topic of American constitutionalism, however, these words most aptly describe the Supreme Court. The Court’s position as the focal point of constitutional interpretation has solidified to the point that its pronouncements dominate discourse on the Constitution’s meaning.

The Supreme Court has done much to earn its high esteem.<sup>2</sup> As the Court’s profile has grown more prominent, the role of other branches and of the public in elaborating constitutional meaning has receded from view. Nonetheless, we have a rich tradition of constitutionalism practiced outside the judiciary.

The history of American constitutionalism is to a significant extent a history of extra-judicial constitutional construction. The Clinton Administration has been an especially fertile ground for constitutional controversy and construction. The inaugural conference of the Duke University School of Law Program in Public Law convened a conference of leading academics and practitioners and asked them to present papers and commentary to assess critically the ways in which the Clinton Administration has shaped, or disfigured, our understanding of the Constitution.

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1. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (concurring opinion).
2. Of course, the Court’s highlight reel might be shown as a double feature with a horror movie including excerpts from the likes of *Dred Scott v. Sandford*, 60 U.S. 393 (1856); *Bradwell v. Illinois*, 83 U.S. 130 (1872); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Buck v. Bell*, 274 U.S. 200 (1927); *Korematsu v. United States*, 323 U.S. 214 (1944).

To set the stage for examining the Constitution under Clinton, it is important to reaffirm the important history of extra-judicial constitutionalism, as practiced by Congress, the President, and the public. Congress has given a great deal of attention to the Constitution's meaning. Before his appointment to the Supreme Court, for example, then-Congressman John Marshall delivered a speech during a floor debate that established the President's position as the "sole organ" of the nation's foreign affairs.<sup>3</sup> Congressman Marshall's articulation remains the dominant model of the President's constitutional role in foreign affairs.<sup>4</sup> The First Congress went about erecting the executive branch and the federal judiciary. Its architecture was a consciously constitutional project that has endured. The breadth and depth of constitutional deliberation in Congress was stunning.<sup>5</sup>

There is also a long and important history of public deliberation over the meaning of the Constitution. The pivotal election of 1800 provides a dramatic illustration. Among the most prominent points of disagreement between the Federalists and the Jeffersonian Republicans was the constitutionality of the Alien and Sedition Acts. Thomas Jefferson and James Madison did not turn to the courts to vindicate their conviction that President John Adams and the Federalist Congress had violated the First Amendment. Rather, they turned to the political process. First, they drafted the Virginia and Kentucky Resolutions, arguing against the constitutionality of the Acts. Later, Jefferson placed this constitutional issue at the heart of his presidential campaign. The Jeffersonian landslide went a long way toward establishing a relatively expansive construction of the First Amendment's guarantee of freedom of speech<sup>6</sup> and toward securing freedom of speech as a central component of our national identity.<sup>7</sup> For its part, the Supreme Court took another 164 years to arrive at this conclusion.<sup>8</sup>

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3. The speech is reproduced at 4 THE PAPERS OF JOHN MARSHALL 82, 104 (Charles T. Cullen ed., 1984).

4. See, e.g., *Haig v. Agee*, 453 U.S. 280, 291 (1981); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 552 n.6 (1977); *New York Times Co. v. United States*, 403 U.S. 713, 756 (1971); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). See generally H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1511-28 (1999) (discussing Marshall's speech and analyzing its view of executive power over foreign affairs).

5. Professor David Currie's important book reviews and assesses the constitutional deliberations of the Federalist Congresses. See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* (1997).

6. To the modern observer, it is difficult to fathom a credible argument in defense of the constitutionality of a seditious libel statute. At the time of its enactment, however, meritorious defenses of the statute were available. See STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM* 694-706 (1993).

7. After taking office, President Jefferson pardoned all those under punishment or prosecution on the basis of his interpretation that the Act was unconstitutional. See Letter to Abigail Adams (July 22, 1804), in 4 THE WRITINGS OF THOMAS JEFFERSON 555, 556 (1903) ("I discharged every person under punishment or prosecution under the Sedition law, because I considered, and now consider, that law to be a nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.").

8. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack on its validity has carried the day in the court of history.").

The executive branch—no less than Congress or the public—has provided crucial elaborations of constitutional meaning throughout our history. For example, President George Washington met with his cabinet in 1792 to consider a congressional request for documents relating to the losses that the military expedition led by Major General Arthur St. Clair suffered at the hands of Indian tribes. The President and cabinet deliberated over whether there was any ground to withhold the requested information. According to the notes of Secretary of State Thomas Jefferson, the cabinet's deliberations were principally concerned with determining the constitutional basis of authority of the President and Congress in the matter. The cabinet recognized a broad power in Congress to initiate investigations of the Administration's conduct. The cabinet also concluded that the Constitution accords the President discretion to withhold information that might harm the public interest if disclosed. Demonstrating that this discretion was not boundless, the Cabinet concluded that all requested information should be produced.<sup>9</sup> It was not until 1974 that the Supreme Court had occasion to determine whether the Constitution affords any measure of executive privilege. When it did, the Court agreed with President Washington and his cabinet that the constitutional separation of powers vests in the President an executive privilege to withhold information that is the subject of an otherwise validly authorized request.<sup>10</sup>

The most vivid illustration of extra-judicial constitutional interpretation involved the controversy over whether to charter a Bank of the United States. Unlike the St. Clair inquiry, the Cabinet was sharply divided over the Constitution's meaning on this point. Secretary of State Thomas Jefferson and Attorney General Edmund Randolph each presented President Washington with extensive arguments to the effect that the Constitution does not authorize Congress to charter a bank and that any attempt to find such a power by implication would practically obliterate the limited character of federal power.<sup>11</sup> This position was carried in Congress by Representative James Madison.<sup>12</sup> Opposing Jefferson and Randolph was Treasury Secretary Alexander Hamilton, who argued

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9. See 1 THE WRITINGS OF THOMAS JEFFERSON 303-05 (1903).

10. See *Nixon v. United States*, 418 U.S. 683 (1974). That case involved records (the Watergate tapes) that were the subject of a subpoena duces tecum issued to President Nixon in prosecution of a criminal indictment that identified the President as an unindicted co-conspirator. The Court adopted a narrower view of the scope of executive privilege than the articulation of Washington's cabinet might have been taken to comprehend. The Court left open whether the privilege has a broader scope in the context of a congressional demand. In that context, courts have been less willing to place tight constraints on executive privilege. See, e.g., *Senate Select Comm. v. Nixon*, 370 F. Supp. 521 (D.D.C.), *aff'd*, 498 F.2d 725 (D.C. Cir. 1974).

11. For Jefferson's opinion, see MATTHEW ST. CLAIR CLARKE & DAVID A. HALL, *LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA* 91-94 (1832). Attorney General Randolph offered the President his views in two separate, though contemporaneous, opinions. For Randolph's opinions, see Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 DUKE L.J. 110, 122-30 (1994).

12. See 13 THE PAPERS OF JAMES MADISON 372 (Charles F. Hobson & Robert A. Rutland eds., 1981) (Madison's speech opposing the Bank).

that a commodious understanding of the powers incidental to those enumerated in the text of the Constitution would allow the government to pursue the goals set forth in that document and that it would not completely undo the commitment to a limited federal government. Hamilton's argument carried the day both in Congress and with President Washington. The Supreme Court never weighed in on the question. Nevertheless, this political construction persuaded James Madison that the constitutionality of the bank had been established. As President, James Madison expressly acceded to the political construction and signed the bill chartering the Second Bank of the United States.<sup>13</sup>

It was only after Madison signed the law authorizing the Second Bank that a case arose giving the Court an opportunity to opine on its constitutionality. By this time, the arguments were thoroughly familiar. So completely had the matter been debated through the political process that the advocates for the bank, chiefly Daniel Webster and Charles Pinkney, deemed it unnecessary even to meet before presenting oral argument. As Pinkney expressed in a letter to Webster, oral argument in the Supreme Court would "involve little else than the threadbare topics connected with the constitutionality of the establishment of the Bank."<sup>14</sup>

Chief Justice John Marshall's famous opinion in *M'Culloch v. Maryland*<sup>15</sup> was far from the last word on the subject. The opinion was greeted by a series of scathing essays published in the *Richmond Enquirer*. Recognizing the importance of public deliberation on this constitutional question and fearing that no adequate defense of the opinion would be forthcoming, Justice Marshall published a series of rebuttals, under the pseudonyms "A Friend to the Union" and "A Friend of the Constitution."<sup>16</sup> Moreover, President Andrew Jackson accepted neither the apparent construction of the political process nor the Supreme Court's decision as having settled the matter. He vetoed reauthorization of the bank on the ground that it was *ultra vires* and therefore unconstitutional.<sup>17</sup>

The practice of constitutional construction outside the courts is by no means limited to the early chapters of American constitutional history. Examples continue to abound: Some relatively recent and important issues include the constitutionality of the War Powers Act and the nature and degree of military action that requires as a constitutional precondition a declaration of war. The latter issue was replayed in connection with the Persian Gulf War and the

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13. On the history of the Second Bank, see generally RALPH C.H. CATTERALL, *THE SECOND BANK OF THE UNITED STATES, 1816-1836* (1902).

14. This communication is reported in GERALD GUNTHER & KATHLEEN SULLIVAN, *CONSTITUTIONAL LAW* 105 (13th ed., 1997).

15. 17 U.S. (4 Wheat.) 316 (1819).

16. The essays criticizing *M'Culloch* were published by two pseudonymous authors, "Amphictyon" (probably Judge William Brockenbrough) and "Hampden" (Judge Spencer Roane). The essays of Amphictyon, Hampden, A Friend of the Constitution, and a Friend to the Union are reprinted in GERALD GUNTHER, *JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND* (1969).

17. See 2 *MESSAGES AND PAPERS OF THE PRESIDENTS* 576 (James D. Richardson ed., 1896).

NATO bombing of Kosovo and Serbia, which the Bush and Clinton Administrations respectively claimed did not necessitate a declaration of war.

Extra-judicial construction is not limited to foreign affairs and national security. For example, the successor to the Bank of the United States, the Federal Reserve System, has never received the Supreme Court's imprimatur of constitutionality.<sup>18</sup> In other areas, the Court's constitutional interpretations are of secondary significance. The controversy over the legislative veto is illuminating. Congress began enacting these provisions in the early twentieth century. Every President from Herbert Hoover through Ronald Reagan objected, asserting that legislative vetoes are unconstitutional. In the Administration of President Dwight Eisenhower, Attorney General Herbert Brownell issued an opinion explaining the executive branch's position. He argued that the power was properly considered executive and thus could not be exercised by Congress except through the process, set forth in Article I section 7, of bicameralism and presentment.<sup>19</sup> When the Supreme Court finally addressed the issue in 1983, the Court's opinion striking down the legislative veto device closely resembled Brownell's.<sup>20</sup> Moreover, by the time *Chadha* was decided, the practice of legislative vetoes was so fully incorporated into the system of legislative-executive

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18. The Federal Reserve Board is headed by a board of governors whose members the President may remove only for cause. It is not a great stretch from the relevant judicial precedents to conclude that this tenure protection does not impermissibly interfere with the President's role as the chief executive officer under the Constitution. *See, e.g., Morrison v. Olson*, 487 U.S. 654 (1988); *Mistretta v. United States*, 488 U.S. 361 (1989); *Humphreys Ex'r v. FTC*, 295 U.S. 602 (1935). Yet, these cases do not definitively resolve the matter. While many of the Board's functions are not executive, the Court announced in *Morrison* that its analysis of separation of powers is functional and not driven by labeling the powers exercised. 487 U.S. at 689. The Board's authority over making and managing the nation's monetary policy is not limited in any of the ways that the authorities of the Office of Independent Counsel were. Its scope and duration are not limited to a single matter. The Board is not in any sense inferior to any other officer of the executive branch, while the Independent Counsel was formally inferior to the Attorney General and subject to the policy guidance of the Department of Justice. The only similarity is the President's power to remove a Board governor for cause.

It is unlikely that Supreme Court doctrine will, or could, provide a full and persuasive answer to the question. First, the vast majority of potential plaintiff's apparently lack standing to challenge the structure of the Federal Reserve System's Board of Governors. *See Melcher v. Federal Open Market Comm.*, 836 F.2d 561 (D.C. Cir. 1987). Even if a justiciable case or controversy were to arise, perhaps brought by a governor who claims the President lacked cause to remove her, judicial doctrine is largely beside the point. The close examination of the Federal Reserve Board's organic structure that *Morrison* calls for fails to afford a powerful basis for concluding that the Federal Reserve Board is critically similar to or critically distinguishable from institutions like the Office of the Independent Counsel or the Federal Trade Commission. A persuasive answer must contend with the long-standing and important commitment that the nation's monetary policy be insulated, in actuality and in appearance, from the threat of political manipulation. Moreover, such an answer should account for the extra-judicial construction that the Board's independence is consistent with those commitments embodied in the Constitution.

19. *See Authority of Congressional Committees to Disapprove Action of Executive Branch*, 41 Op. Att'y Gen. 230 (1955). Brownell's opinion set forth an alternative ground for its conclusion. The separation of powers forbids Congress to assign any authority to act outside the legislative sphere to its agents or officials over whom it exercises legal control, again other than through bicameralism and presentment. In this alternative ground, Attorney General Brownell anticipated the Court's opinion in *Bowsher v. Synar*, 478 U.S. 714 (1986), issued approximately 30 years later.

20. *See INS v. Chadha*, 462 U.S. 919 (1983).

relations that the opinion had almost no practical effect. The expectation that the Administration will cooperate with interested members and committees of Congress is now communicated through legislative history, report-and-wait requirements, and informal communications between the Administration and congresspersons and committee staffs. The process is so ingrained that Congress has passed, typically without executive branch protest, hundreds of legislative vetoes since *Chadha*. These enactments are not legally enforceable, but they communicate an expectation that remains enforceable through extrajudicial means.<sup>21</sup>

One of the most remarkable features of American constitutionalism is that it has not yielded to specialization. Not only do the political branches play a substantial role in elaborating the Constitution's meaning, the public has been fully engaged in deliberation. The Program in Public Law, through its inaugural conference and its continuing activities, is fully immersed in the project of public deliberation and discourse on the Constitution. In this vein, the Program is proud to publish these outstanding contributions by leading scholars on the Constitution.

The existence of the Program in Public Law springs from the generosity and vision of Rick and Marcy Horvitz. Neither is a constitutional lawyer, yet both epitomize the tradition of American constitutionalism. The Horvitz family's support for the Program in Public Law exemplifies the tradition of public deliberation on the Constitution that allows that document to constitute us, even today, as We the People.

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21. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273 (1993).