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A Comment on Democratic Constitutionalism

Robert F. Nagel
University of Colorado Law School

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A COMMENT ON DEMOCRATIC CONSTITUTIONALISM

ROBERT F. NAGEL*

Much of the public commentary immediately following the Attorney General's remarks is remarkable in underestimating his seriousness and modulaton. Despite Meese's articulated respect for the judiciary and his concern for the rule of law, a prominent and sophisticated commentator characterized the argument as a "calculated assault on the idea of law in this country."[1] Others, who apparently read the speech more carefully, were able to disapprove of the speech despite acknowledging the importance of the issues raised[2] and despite ignoring (or even conceding) the substance of the argument.[3] Some, for example,

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* Professor of Law, University of Colorado; B.A., Swarthmore College 1968; J.D., Yale University 1972.

1. Lewis, *Law or Power*, N.Y. Times, Oct. 27, 1986, at A23, col. 1. Similarly, "TRB" quoted Meese as saying that a Supreme Court decision "lacks the character of law," which is precisely the opposite of what he said. *Court Jester*, NEW REPUBLIC, Nov. 17, 1986, at 4 [hereinafter TRB]; *see also* Cutler, *What Ed Meese and Thomas Jefferson Have in Common*, WASH. MONTHLY, Dec. 1986, 45, 46 ("Meese unfortunately . . . appeared to be suggesting that the executive branch had no duty to respect or enforce federal court orders in cases to which it is not a party.").

2. *See, e.g.*, Lacayo, *Supreme or Not Supreme*, TIME, Nov. 3, 1986, at 46 (describing the issues raised as "part of a venerable debate" but going on to identify the "troubling contention . . . that in general only the parties to a suit are bound"); *Meese: Wrong Again*, L.A. Times, Oct. 28, 1986, § 2, at 4, col. 1 (editorial) ("Legal scholars have long debated the source and scope of the court's authority . . . . Meese, however, is out of his depth . . . ."); Heron & Miles, *Meese Dissents on the High Court*, N.Y. Times, Oct. 26, 1986, at E4, col. 2 (noting many legal scholars' agreement with Meese that Cooper v. Aaron, 358 U.S. 1 (1958), was troubling but fearing he was "encouraging defiance"); Ostrow, *Meese: View that Court Doesn't Make Law is Scored*, L.A. Times, Oct. 24, 1986, § 1, at 27, col. 1 (quoting Dean Choper as saying that Meese raised "a profound question with eminent antecedents" but criticizing the speech on the ground that "he is the nation's top law enforcement officer . . . [and] he's not submitting it to get tenure on a university faculty . . . .").

3. *See* TRB, *supra* note 1 ("On a very technical level, Meese is right."); Lacayo, *supra* note 2 ("In one sense, Meese's remarks are unexceptional."); *Meese: Wrong Again*, *supra* note 2 ("To be sure . . . [m]embers of Congress can vote against a bill because they think it is unconstitutional, and the President may veto an act of Congress on those grounds. If that is all that Meese meant to say, he could perhaps be excused. . . ."); *Mr. Meese's Contempt of Court*, N.Y. Times, Oct. 26, 1986, at E22, col. 1 (editorial) (points described as "obvious").

suggested that it was inappropriate for the Attorney General to raise such issues because of the nature of his office.[4] Others did not so much attack the substance of the speech as condemn its tone, which allegedly was "contemptuous of the Court" and made "in a spirit of petulant disobedience."[5] Still others criticized what they claimed the Attorney General *almost* said[6] or what they believed to be the ideological motivations behind the speech.[7]

Attorney General Meese argued for these main propositions: (1) that the Constitution as a document is different from the judicial opinions that interpret the document; (2) that the legal authority of the document is superior to the legal authority of the opinions; (3) that Supreme Court opinions should be subject to criticism and revision because of the possibility that they might not be faithful to the document; (4) that citizens and government officers should not view judicial decisions in a way that cuts off independent, critical judgment about the meaning of the document; and (5) that an expansive view of the binding effect of constitutional cases is inconsistent with the formation of independent, critical judgments. In short, the rule of law itself requires that Supreme Court decisions be binding only on the parties to the case and on the executive officers responsible for enforcing the judicial resolution of the case. Although I believe this argument needs to be amended in certain respects, under the circumstances of modern reliance on judicial power, it is a thoughtful and important contribution to public debate.

While some of the criticism of Meese's speech can be explained on partisan or personal grounds, its sources run deeper than that. In this Commentary, I first compare the reaction to the Attorney General's speech with common reactions to other "attacks" on the judiciary. I then develop my own limited criti-

4. *See Meese: Wrong Again*, *supra* note 2 ("inappropriate for the nation's highest law-enforcement officer"); Ostrow, *supra* note 2.

5. *Mr. Meese's Contempt of Court*, *supra* note 3.

6. *See* Herron & Miles, *supra* note 2 ("could be taken as encouraging defiance"); Kurtz, *Meese's View on Court Rulings Assailed, Defended*, Wash. Post, Oct. 24, 1986, at A12, col. 1 (Professor Neuborne quoted as saying that Meese "is skating very close to saying something quite radical").

7. TRB, *supra* note 1 (asking question, "what is he really up to?"); *Mr. Meese's Contempt of Court*, *supra* note 3 (linking the speech to Justice Department policies on affirmative action and Social Security disability cases).

cism of Meese's position; oddly, the deficiency that I identify suggests that the Attorney General did not follow through the full implications of his position for much the same reason that drove his critics to protest his remarks. In a sense, then, both Meese and his popular critics were bothered by the same aspect of his argument. In different degrees, each recoils from an understanding of the nature of the Constitution that would permit real dialogue between the public and the Court.

I. Attacks on the Judiciary

The most perplexing aspect of the popular reaction to the Attorney General's speech was the frequent combination of harsh criticism with the admission that important aspects of his position were obvious or, at least, had highly respectable jurisprudential and political antecedents. This is a common tendency in modern debate about judicial power. Arguments for some constraint on the courts suddenly lose their pedigree when it is proposed that a constraint actually be implemented. Sometimes the very individual who is the source of a respected argument for constraint vigorously attacks his own position when it threatens to be put into practice.[8]

Consider the issue of the scope of the Senate's review of nominees to the Supreme Court. The respectable realist view was expressed some seventeen years ago by Professor Charles Black:

> To me, there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered

8. Compare, for example, Professor Cox when he was writing in the abstract about congressional authority to enforce the 14th amendment with his comments on the Human Life Bill. *See infra* notes 25, 27. Similarly, Professor Tribe's generous views on the responsibility of all government officials to construe the Constitution are in at least apparent conflict with his hostile reaction to the speech that is the subject of this Symposium. *See The Irrepressible Mr. Meese*, Wall St. J., Oct. 19, 1986, at 28, col. 1 (editorial).

> by deference to the President's, as a satisfactory basis in itself for a negative vote. I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view.[9]

Today everyone from Laurence Tribe to Grover Rees holds something close to this view.[10] But this consensus turns to doubt and hesitation when it is to be put into practice. *Senator* Hatch, for example, chastised *Professor* Tribe (whose book urges full senatorial review) for being too political.[11] Politicians in general seem embarrassed by their ideological objections to a nominee,[12] as a comparison of the recent confirmations of Chief Justice Rehnquist and Justice Scalia attests. In this era of legal realism, only four federal judicial nominees have been rejected.[13] Perhaps more significantly, the Senate has consistently tolerated nominees' ingenuous or evasive answers and even their flat refusals to answer.[14] Journalists and politicans continue to give unwarranted deference to the American Bar Association's assessment of the "professional" qualifications of nominees.[15] To find consistently robust political consideration of judicial nominees, it is necessary to go back before this century when some 21 nominees were rejected.[16]

No doubt there are many reasons for this fastidiousness in the nomination process, but the most obvious ones seem only

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9. Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 663-64 (1970).

10. *See* L. TRIBE, GOD SAVE THIS HONORABLE COURT (1985); Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 919 (1983); *see also* Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551 (1986); Powe, *The Senate and the Court: Questioning a Nominee* (Book Review), 54 TEX. L. REV. 891 (1976); Note, *Must a Supreme Court Justice Refuse to Answer Senators' Questions?*, 78 YALE L.J. 696 (1969).

11. Hatch, *Save this Court from What?* (Book Review), 99 HARV. L. REV. 1347 (1986).

12. *See* Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 83 (1983).

13. *Id.* at 1.

14. *See, e.g.*, Powe, *supra* note 10; Rees, *supra* note 10; Note, *supra* note 10.

15. *See generally* Slotnik, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment—Part I*, 66 JUDICATURE 349 (1983); *see also* Barnes, *White House Watch: Judging Judges*, NEW REPUBLIC, Dec. 9, 1985, at 10.

16. *See* C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 124-230 (1982); Friedman, *supra* note 12, at 1.

partly satisfactory. It may be true that politicians (or their constituents) adhere to a naive formalism, but a moment's reflection (or a glance at opinion surveys[17]) suggests that any remaining myths about judges' applying—and never making—"the law" are surely modified by a healthy dose of cynicism. It may also be true that today the Supreme Court enjoys the kind of prestige that inhibits sustained inquiry. Yet that prestige is seriously undermined by public dissatisfaction with judicial decisions in areas like school desegregation and criminal law enforcement. There may be a sober realization that politicizing the appointment process might invite political retaliation that would jeopardize everyone's interests. However, the mechanism of mutual forbearance is always risky while the possibility of gain from politicizing the appointment process often is immediate.

A different kind of explanation is suggested by one additional factor: during the period when political debate about judicial nominees was strongly political, none was questioned in person; only since 1925 has the custom been for senators to question nominees directly.[18] Could it be that the modern insistence on interrogating judicial nominees is related to the unwillingness to press for serious answers, to the apparent sense of regret and even guilt about raising ideological concerns, and to the reluctance to reject the president's nomination?

It is not immediately obvious what the appearance of a nominee before a committee of the Senate adds to the confirmation process. It does not, in most circumstances, add much useful information because the evidence about the nominees' background and politics is usually available from other sources.[19] Theoretically, the appearance might be used as an occasion for elucidation of the nominee's specific views on the exercise of judicial power, but the custom seems to be that the blandest assurances are offered and are uncritically accepted.[20] Moreover, no matter what information the nominee offers, realism itself requires some skepticism about the accuracy of predictions about how a future judge will think or behave.

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17. *See* Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 L. & Soc'y Rev. 385 (1974).

18. Note, *supra* note 10, at 705.

19. *See* Powe, *supra* note 10, at 895-96.

20. *See, e.g.*, Powe, *supra* note 10; Rees, *supra* note 10.

Although personal appearances do not offer much help in getting information *from* the nominee, they do provide an opportunity for senators to speak *to* the nominee.[21] Indeed, since a committee hearing can be the occasion for considerable publicity, the expression of senators' opinions, either directly or by way of questioning, has added drama and potential impact. Viewed from this perspective, it hardly matters what the nominee says. The appearance of the nominee at a hearing permits representatives of the political culture to speak one last time to the potential judge before that person disappears behind the relative insulation afforded by judicial rituals and traditions.

If the main reason for confirmation hearings is communication rather than investigation or even judgment, the awkwardness and futility of the process is more fully understandable. It is difficult for politicians to speak convincingly about law. Because we know that politics does (and should) affect law and because senators do insist on speaking to the nominees, the deficiency must be a matter of capacity rather than inclination. At the point where law and politics intersect, our vocabulary fails. It is not only that the normal language of politics—party identification, emotion-laden symbolism, horsetrading, civil disobedience, and so on—cannot be assimilated into judicial norms. It is also that political understandings about self-interest, justice, custom, and aspiration cannot be effectively translated into legal terms. The language of the law, especially of constitutional law, has been designed precisely to be impenetrable by common understanding.[22] Confirmation hearings, then, are so frequently ineffectual because, although we are realistic enough to know that their primary purpose is communication, we do not have available the forms for effective discourse.

Under the terms of modern debate, almost any political effort to speak to and constrain the Court seems illegitimate. Defenders of judicial authority condemn not only politicizing the confirmation process, but also "packing" the Court or even using a "litmus" test in selecting nominees; they quickly label "unconstitutional" congressional proposals to limit jurisdiction or to

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21. *Cf.* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 782 (1983) (suggesting that hearings act as a "degradation ceremony").

22. *See* Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

implement the fourteenth amendment when such proposals challenge the Court.[23] Similarly, the Attorney General's argument that politicians should speak to the Court was so rudely rejected in part because he used illustrations—the defiance of judicial authority that led to *Cooper v. Aaron*[24] and the Kentucky statute requiring the posting of the Ten Commandments in public schools—of actual disagreement and resistance. The modern mindset tolerates abstract criticism but not the vocabulary of real political conversation, whether it consists of legislative enactments or words in a confirmation hearing.

The Attorney General tried to disarm the modern mindset by appealing to the authority of the Constitution's text and the need to subordinate the Court to the rule of law. I turn now to some reasons for the failure of this appeal. In making this criticism, I am looking for some indication as to how the language of politics might, as the Attorney General urges, be made more effective.

II. The Full Implications of Meese's Argument

A. *The Legitimacy of Criticizing the Court*

Members of the legal academy are in no position to argue with the Attorney General's assertions that the Supreme Court is fallible and in need of criticism. Those who teach the methods of legal discourse certainly do not have any hesitancy or difficulty in articulating their doubts and suggestions about the direction of the case law; the effort to speak to the judges that seems so strained in the confirmation process flourishes among academics and some practitioners. Unless the legal profession is to have a monopoly on criticizing the Court, the Attorney General's claim that citizens and governmental officials must retain the capacity for independent judgment is also uncontroversial. However, his claim that this capacity would be jeopardized by an expansive view of the binding effect of the Court's decisions is fairly debatable.

In a formal sense, there is no inconsistency between the attitude symbolized by *Cooper v. Aaron* and public criticism of

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23. *See, e.g., infra* note 24.
24. 358 U.S. 1 (1958).

the Court. Even if the Court's constitutional judgments were literally acts of legislation binding on everyone, criticism could occur. Traditional parties to a lawsuit, after all, can and do form opinions about the propriety of the rulings in their cases. This point requires only a small shift of emphasis in Meese's argument. If errant Court opinions are to be corrected, it is necessary not only that there be criticism but that the Court be respectful of and receptive to the criticism. However, to the extent that the Court sees its opinions as "the supreme law of the land," actions by non-parties motivated by disagreement will tend to be perceived by the Court as illegitimate, as evasions, or as illicit confrontations rather than as the appropriate exercise of countervailing authority.

To the extent that Meese's argument rests on the need for judicial receptivity to criticism, it is plausible; an exalted view of the Court's role is demonstrably linked to intolerance of criticism. The negative reaction to the Human Life Bill, which was proposed some years ago, is a vivid illustration.[25] The substantive provision of the bill would have deemed the fetus to be a person for certain purposes under the fourteenth amendment. The bill had no enforcement provisions. It was designed as an almost purely communicative device. Its effect would have been to express congressional disagreement with the Court's conclusion in *Roe v. Wade*[26] that a fetus is not a person within the meaning of the fourteenth amendment and, more generally, with the weight that the Court assigned to the state's interest in protecting the fetus. Although the bill itself would not have prohibited abortions, its proponents hoped that its passage would encourage states, relying on the new congressional judgment, to adopt restrictive abortion laws; they also hoped that the judgment of a coequal branch of government, coupled with evidence produced at hearings on the bill, might induce the Court to revise or reverse its holding.

Eminent scholars, some of whom earlier had written defenses of broad congressional power to enforce the fourteenth

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25. *See Human Life Bill: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 97th Cong. 1st Sess. (1981) 242 (testimony of Professor Tribe), 275 (testimony of Professor Van Alstyne), 328 (testimony of Professor Cox), 515 (testimony of Professor Dorsen) [hereinafter *Hearings*].

26. 410 U.S. 113 (1973).

amendment, went before Congress to describe the Human Life Bill as a dangerously unprincipled attack on the Court and on constitutionalism.[27] The intensity of this charge was baffling. No new abortion law would have been constitutional unless the Court approved it. Moreover, judicial reassessment would have involved the factors that the Court itself at one time or another had declared legally relevant, including the nature and status of the fetus[28] and the judgment of a coequal branch of government about how to implement the fourteenth amendment.[29] How could precipitating judicial reconsideration of the issue under these circumstances have been thought to be an assault on the Court? It might have been that the outcome of such reconsideration was certain, since the Court's calculus was unlikely to be changed. But this is simply to say that the Court would have found its intellectual task easy and somewhat redundant. On the other hand, it might have been that the political and moral pressure exerted on the Court would make its reconsideration exasperating and difficult, especially inasmuch as it would have involved elucidation of the reasoning in *Roe*. But in either event, there was no threatened "assault" on judicial authority unless the Court has to be protected from the kinds of frustrations that go along with making and explaining constitutional decisions.

The key to understanding the sometimes hysterical attacks on the Human Life Bill is that the legislation was designed to be communicative. Its sponsors wanted the Court to reconsider *Roe* because they wanted to induce a reversal of that decision. They were motivated, that is to say, by disagreement with the Court. It was this motivation, I think, that made the bill seem to so many to be an attack on judicial review. Because the critics of the bill assumed that not only the holding in *Roe* but also the direction and emphasis in that opinion were binding on the members of Congress, the desire to create an occasion for reconsideration was perceived as illegitimate resistance to the law. If these responses by scholars to the Human Life Bill are any measure, surely Meese is correct. Serious consideration of the possibility of judicial error cannot occur if the intent to communicate

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27. For a brief commentary on Professor Cox's various approaches, see *Hearings*, *supra* note 24, at 351-55 (testimony of Professor Uddo).

28. *Roe*, 410 U.S. at 159.

29. *See, e.g.*, Rome v. United States, 446 U.S. 156 (1980); Katzenbach v. Morgan, 384 U.S. 641 (1966).

disagreement is itself the ground for invalidating an otherwise proper political act. The desire of the public's representatives to speak would cause the Court to refuse to listen.

Unfortunately, it is not necessary to speculate about the Court's receptivity to political criticism. In *Thornburgh v. American College of Obstetricians and Gynecologists*,[30] to use a recent example, the Court invalidated a series of "informed consent" requirements for abortions. One of the provisions required that women be informed of detrimental physical and psychological effects, including particular medical risks. No matter what one might think of the wisdom of mandating this sort of disclosure, the Court's characterization of the requirement as "the antithesis of informed consent"[31] was an overreaction. The Court's reason—that the information would "increase the patient's anxiety"[32]—inexplicably equated the possible effect of receiving information with ignorance.

Perhaps in context the Court's reaction was less incomprehensible. It is true that all of the consent requirements together evidenced legislative disapproval of abortion (although the Court's claim that the requirements would "intimidate women into continuing pregnancies"[33] seems, again, an injudicious exaggeration). But is it necessarily unconstitutional for a government to attempt to persuade someone not to exercise a constitutional right? The Court's answer was that an effort to deter the abortion decision "wholly subordinates constitutional privacy interests;"[34] this was yet another example of stridency and extravagance. It is constitutional for a state to have a moral preference for live births;[35] it is constitutional for that preference to be expressed in some ways, at least, that could significantly affect a woman's decision—for example, by withholding public funds for abortions.[36] In *Thornburgh*, however, the Court did not explain why this same moral preference for live births may not be ex-

30. 106 S. Ct. 2169 (1986).
31. *Id.* at 2180.
32. *Id.*
33. *Id.* at 2178.
34. *Id.*
35. Even in Roe v. Wade, 410 U.S. 113 (1973), the Court acknowledged that the state's interest in protecting potential life is compelling (at least at certain stages of pregnancy).
36. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

pressed in words that communicate accurate information and thus increase the opportunity for a knowing (if difficult) choice.

It is not reaching too far, I think, to suggest that the Court was not impartial in its consideration of the issues raised in *Thornburgh*. Early in its opinion, the Court noted,

> In the years since this Court's decision in *Roe*, States and municipalities have adopted a number of measures seemingly designed to prevent a woman. . .from exercising her freedom of choice. . . . "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955).[37]

The Court's references to abortion laws not before it and its citation to the desegregation issue raise the suspicion that *Thornburgh* was driven as much by anger at perceived defiance as by the merits of the case. Although it does go without saying that constitutional principles cannot yield simply because of disagreement, it should also go without saying that the reach of constitutional principles ought not to grow simply because of disagreement with them. The overwrought and conclusory language in the opinion is certainly inconsistent with detached consideration of the limits of the relevant principles. It is not necessary to approve of the consent requirements invalidated in *Thornburgh* to sense that the authority of the Court was a crucial element in the decision. It is psychologically difficult under any circumstances to be receptive to arguments motivated by sharp disagreement. But an exalted view of the duty of government officials to obey goes further; it transforms public dissent into perceived defiance and converts the fact of disagreement into a basis for invalidation.

B. *Searching for the Meaning of the Constitution*

Although the Attorney General was right that an expansive view of the Supreme Court's authority interferes with revision of its errors, his explanation of the need for such revision was less persuasive. He argued that political criticism is required to subordinate the Court's authority to the authority of the written

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37. *Thornburgh*, 106 S. Ct. at 2178 (quoting Brown v. Board of Educ., 349 U.S. 294, 300 (1955)).

Constitution. He equated the rule of law with the rule of the document. I believe this inaccurately describes the nature of constitutional law and is untrue to an important aspect of Meese's own position.

My objection is not the improbability in any particular situation that the public will remain relatively true to the meaning of the document. Certainly, the Court's record of interpretation does not inspire much confidence; its rendition of history is often simplistic and inaccurate[38] and its treatment of text sometimes casual at best.[39] I suspect that political pressure in 1937 led the Court to improve its interpretation of the commerce clause and that public pressure in 1986, as exemplified by cases like *Thornburgh*, could lead to a better interpretation of the due process clause.

My objection is that the authoritative meaning of the Constitution does not reside, as the Attorney General suggests, "simply" in its 6,000 words. Much of the meaning of those words arises from political practice. Occasionally, the Court has recognized this, as, for example, when it relied on "the court of history" and "a national awareness of the central meaning of the First Amendment" to support the conclusion that seditious libel laws violate the Constitution.[40] More often, the political meaning of the Constitution is so solid and successful that courts, as well as the rest of us, take it for granted.[41] We know what a "republican form of government" is due to a sense of recognition based on long-established institutional patterns among our state governments. We know that the requirement of "advice and consent" does not mean the President must actually go to the Senate for consultations because no President since Washington has done so. We know that presidents will not be removed from of-

38. Three well-documented examples involve the establishment clause, 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 627-34 (5th ed. 1891); the free speech clause, L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960); and the incorporation doctrine, Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

39. "Substantive" due process, for instance, is a self-contradictory phrase to which we have become accustomed; some think the Court just found meaning in the "wrong" clause. *See* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 366 (1981).

40. New York Times Co. v. Sullivan, 376 U.S. 254, 273, 276 (1964).

41. *See* Nagel, *Interpretation and Importance in Constitutional Law: A Re-assessment of Judicial Restraint*, LIBERAL DEMOCRACY: NOMOS XXV 181 (Pennock & Chapman eds. 1983).

fice even for most serious disabilities because their cabinets and vice-presidents have refrained from removing them. While we do not know the precise meaning of "high crimes and misdemeanors," we know that the phrase does not include political disagreement of even the gravest kind because such disagreements have never led to the removal of a president.

My point is not that the written Constitution is supplemented by an "unwritten" constitution; my point is that in large and important ways the meaning of the written Constitution is a function of established political behavior. Those meanings that are too obvious to contest do not acquire their certainty only from textual or historical clarity but also from the bounds of normalcy established by prolonged behavior and by the dim understandings that accompany and grow out of such behavior. Sometimes this sort of meaning tracks the words and history of the written Constitution. I believe this is strikingly true, for example, in the way in which the tenth amendment has been realized by successful operation of state and local governments for nearly two centuries. Similarly, the establishment clause has been implemented by the complete absence of any serious move to create a national church. However, in other instances prolonged practice has established powerful meanings that are only arguably related to text or intent. The most obvious illustration is the institution of judicial review, which is securely a part of our Constitution because it is a long accepted practice, not because the document unambiguously requires it. Moreover, sometimes political meaning is quite different from what a scholarly interpretation of the written Constitution would support. The core of freedom of speech, for example, does not reside in the somewhat narrow concerns of the Framers[42] (nor, for that matter, in the many inventive and often trivializing judicial interpretations[43]); it resides in the norm of energetic public debate that has characterized American politics.

The Attorney General came close to recognizing the importance of political behavior when he referred to "the right of the people to govern themselves" and to Lincoln's fear that the people might cease to be "their own rulers." Not surprisingly, how-

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42. *See* L. Levy, *supra* note 38.

43. *See* Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 Cornell L. Rev. 302 (1984).

ever, he emphasized the more conventional notion that the Court must be subordinated to the legal document called the Constitution. Full recognition of the extent to which the content of that document is based on politics rather than law is deeply unsettling. For many influential people, the myth of the Constitution as an entirely legal document is the fire that keeps the night warm and the shadows at a distance. In clinging to this myth, the Attorney General was at one with his critics.

In the first section of this Paper, I suggested that political constraints on the Court nearly always are labeled illegitimate when they might be implemented and that this sort of doubt exemplifies the inadequacy of our language at the point where politics and the Constitution converge. Political influence on the Court will always be seen as improper as long as the Constitution is thought to be essentially legal. The first step toward the development of useful dialogue is to recognize that the Constitution is largely political and that much of its great success derives from American political behavior. The Senator who wants to speak to a judicial nominee ought to speak as a matter of proud right, as a participant in the process that has given the document some of its best and most important meanings. An Attorney General who wishes to constrain the judiciary by speaking to it and to the public need not be apologetic, for the kind of influence he represents is not inferior or secondary. But neither the Senator nor the Attorney General will speak successfully until they forthrightly reclaim for American political history its full measure of credit and responsibility for creating the fundamental law.