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Constitutional Interpretation and Policy-Making: TheGovernance as Dialogue Movement

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I. INTRODUCTION

Scholars who study judicial politics in the United States, as I do, have increasingly come to the conclusion that the courts cannot be understood in isolation, but instead the judiciary must be seen as a part of the larger governmental system.[1] Federal judges, especially justices sitting on the Supreme Court of the United States, do not make their decisions in a vacuum.[2] Rather, when making their rulings, courts must anticipate the reactions of other political actors such as the president and the United States Congress.[3] As a political scientist, I see the Supreme Court as clearly political in nature, because its decisions have enormous consequences for public policy in this country.[4] This is especially true when the U.S. Supreme Court interprets the Constitution of the United States.[5] Constitutional interpretation is a very complex process in my view, and it involves many political actors in addition to the Supreme Court.[6] By its very nature, constitutional interpretation in our society means making

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1. LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 3 (1988).
2. *Id.*
3. *Id.* at 5.
4. *Id.* at 16.
5. *Id.* at 16-17.
6. FISHER, *supra* note 1, at 3.

crucial public policy choices.[7] My plan today is to explore how Governance as Dialogue scholars such as myself examine the interactions between the U.S. Supreme Court and the elected federal governmental institutions, including the U.S. Congress and the President of the United States.[8]

As Richard Neustadt has reminded us, in the United States, instead of having a simple and straight forward separation of powers system, we in fact have "separated institutions *sharing* powers."[9] This means that each of the institutions of government, including the courts, are involved in various aspects of the policy making process.[10] The traditional media, and even interest groups, also understand that the courts and other political actors interact in a variety of ways, and that these interactions have distinct political relevance.[11] As two scholars of the interactions between Congress and the federal courts have written, "[t]reating the Court or Congress in isolation misconstrues the nature of inter-institutional lawmaking in the United States. The actions of each institution have important reciprocal effects; both contribute to the form and substance of laws."[12]

This lecture will therefore examine some of the recent interactions between the Congress and the Supreme Court on the one hand, and between the president and the Supreme Court on the other, as each institution attempts to participate in the ongoing constitutional dialogue.[13] At times the relationships between the courts and the other institutions are cooperative, often even routine in nature, but sometimes these interactions are rife with conflict.[14]

II. THE GOVERNANCE AS DIALOGUE MOVEMENT

We should now turn to an introduction of the Governance as Dialogue Movement's basic approach. The Governance as Dialogue Movement argues that the U.S. Supreme Court does not necessarily have the last word on interpreting the U.S. Constitution.[15] Instead, constitutional meaning comes out of an inter-institutional conversation among the courts, the

7. *See id.* at 17.

8. *See infra* Parts III-IV.

9. RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER 26 (1980).

10. *See id.*

11. MARK C. MILLER, THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY 188-96 (2009).

12. Kevin R. den Dulk & J. Mitchell Pickerill, *Bridging the Lawmaking Process: Organized Interests, Court-Congress Interaction, and Church-State Relations*, 35 POLITY 419, 420 (2003).

13. *See infra* Parts III-IV.

14. *See* Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 831 (1967); MILLER, *supra* note 11, at 38.

15. *See* MILLER, *supra* note 11, at 5-7.

Congress, the president, the states, and other political actors.[16] While the federal courts, especially the U.S. Supreme Court, are clearly political policymakers in our separation of powers system, their decision-making is different from the other branches because the courts must justify their decisions using legal analysis and legal reasoning.[17] Thus, unlike the other voices at the table, the courts bring legal reasoning to the inter-institutional conversation.[18]

Alexander Bickel was one of the first Americans to advocate that judicial scholars should consider the interactions between the courts and others in his famous 1962 book, *The Least Dangerous Branch*.[19] Bickel said that the courts must engage in a "Socratic colloquy" with the more political branches of the government.[20] Bickel was reacting against a notion of judicial supremacy then common among legal and other judicial scholars.[21] Louis Fisher is probably the next key voice in the Governance as Dialogue Movement. In 1988, Fisher published his book entitled *Constitutional Dialogues*, in which he argued that the U.S. Supreme Court was not solely responsible for interpreting the U.S. Constitution because constitutional interpretation involves a very complicated ongoing dialogue among many political actors.[22] Fisher often refers to this phenomenon as "coordinate construction," and, as he uses the term, it means, "the opportunity for all three branches to interpret and shape the Constitution."[23] In later works, Fisher argued that the Supreme Court's ability to participate in the constitutional dialogue is a fragile one because the judiciary is totally dependent on the more political branches for "understanding, supporting, and implementing judicial rulings."[24] Barry Friedman generally agrees with Fisher's approach, although he adds that the courts "facilitate and mold the national dialogue concerning the meaning of the Constitution."[25] And as Mitch Pickerill explains, "[l]awmaking in our separated system is continuous, iterative, speculative, sequential, and declarative . . . ."[26]

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16. *Id.*

17. *See* Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305-06 (2002).

18. *Id.* at 305-07.

19. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962).

20. *Id.* at 70-71; FISHER, *supra* note 1, at 3.

21. *See* BICKEL, *supra* note 19, at 1; FISHER, *supra* note 1, at 3.

22. FISHER, *supra* note 1, at 3.

23. LOUIS FISHER & DAVID GRAY ADLER, AMERICAN CONSTITUTIONAL LAW 22 (7th ed. 2007).

24. Louis Fisher, *Judicial Finality or an Ongoing Colloquy?*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 153 (Mark C. Miller & Jeb Barnes eds., 2004).

25. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580-81 (1993).

26. J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 4 (2004).

Canadian scholars often use dialogic language to describe the interactions among their courts and the elected branches in Canada.[27] While American scholars in the Governance as Dialogue Movement are reacting against ideas of judicial supremacy,[28] Canadian scholars in the movement are generally reacting against notions of parliamentary supremacy.[29] On both sides of the border, the Governance as Dialogue Movement's key point is clear: constitutional interpretation involves an ongoing conversation among the various branches of government, including each country's supreme court.[30]

Even U.S. Supreme Court justices seem to use the governance as dialogue language. For example, as Justice Jackson argued in the mid-1950s, "[n]o sound assessment of our Supreme Court can treat it as an isolated, self-sustaining, or self-sufficient institution. It is a unit of a complex, interdependent scheme of government from which it cannot be severed."[31] Justice Ginsburg has stated that constitutional interpretation often requires courts to enter into "a continuing dialogue with […] other branches of government, the States, or the private sector."[32] Justice Kennedy used similar dialogic language in *Boumediene v. Bush*.[33] In *City of Boerne v. Flores*,[34] even while striking down a congressional statute as unconstitutional, Justice Kennedy's majority opinion noted, "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."[35]

Judge Robert Kaztmann of the United States Court of Appeals for the Second Circuit studied court-Congress interactions when he held joint appointments at the Brookings Institution and at Georgetown University before his appointment to the bench.[36] Judge Katzmann has written,

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27. *See, e.g.*, Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures: (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75, 79-80 (1997).

28. *See supra* notes 20-21 and accompanying text.

29. *See, e.g.*, Hogg & Bushell, *supra* note 27, at 78-82; Kent Roach, *Common Law Bills of Rights as Dialogue Between Courts and Legislatures*, 55 U. TORONTO L.J. 733, 765-66 (2005); Sujit Choudhry & Claire E. Hunter, *Measuring Judicial Activism on the Supreme Court of Canada: A Comment on* Newfoundland (Treasury Board) v. NAPE, 48 MCGILL L.J. 525, 525 (2003).

30. *See supra* notes 15-29 and accompanying text.

31. ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 2 (1955).

32. Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119, 2125 (1995).

33. 553 U.S. 723, 738 (2008).

34. 521 U.S. 507 (1997).

35. *Id.* at 535.

36. Michael H. Armacost, *Foreword* to ROBERT A. KATZMANN, COURTS AND CONGRESS, at vii-viii (1997); *Chief Judge Robert A. Katzmann*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, http://www.ca2.uscourts.gov/judges/bios/rak.html (last visited Apr. 16, 2014).

"[g]overnance, then, is premised on each institution's respect for and knowledge of the others and on a continuing dialogue that produces shared understanding and comity."[37] Members of the legislative branch also use the governance as dialogue language, although they often see the governmental institutions as competing with each other.[38] As one Member of Congress told me in an interview for a research project I conducted, "'[t]he relationship between Congress and the courts involves a continuous back and forth between us and the courts. In other words, it is a complex dialogue among equal branches always jockeying for power.'"[39]

III. EXECUTIVE AND JUDICIAL BRANCH INTERACTION

The interactions between the president and the Supreme Court are also extremely important to consider. Some scholars have argued that the framers intended for the president and the justices of the Supreme Court to work together as partners in order to check the potential power of the legislative branch.[40] Alexander Hamilton seems to contradict this view in *The Federalist No. 78*, where he wrote, "[l]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments . . . ."[41]

Of course, one of the key ways in which the president attempts to influence Supreme Court rulings is through his power to make appointments to the high court when a vacancy occurs.[42] The Senate must approve all presidential nominations to the Supreme Court,[43] and Senators often use the confirmation process to attempt to influence the high court's future rulings.[44] However, since justices on all federal courts have life terms, the decisions of the individuals whom presidents appoint to the Supreme Court are often surprising to the appointing presidents.[45] Many scholars have argued that President Eisenhower felt that the two biggest mistakes of his presidency were the nominations of Chief Justice Warren and Justice Brennan.[46] Certainly, Justices Blackmun, Stevens, Souter, and even O'Connor did not follow the preferred views of their appointing presidents

37. KATZMANN, *supra* note 36, at 1.
38. *See, e.g.*, MILLER, *supra* note 11, at 8.
39. *Id.*
40. ROBERT SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY vii (1971).
41. THE FEDERALIST NO. 78 (Alexander Hamilton).
42. *See* LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 130 (2005).
43. *Id.* at 8.
44. *See* Christine Kexel Chabot, *A Long View of the Senate's Influence over Supreme Court Appointments*, 64 HASTINGS L.J. 1229, 1241 (2013).
45. *See, e.g.*, *infra* note 46 and accompanying text.
46. KIM ISAAC EISLER, THE LAST LIBERAL: JUSTICE WILLIAM J. BRENNAN, JR. AND THE DECISIONS THAT TRANSFORMED AMERICA 158 (1993).

after their confirmations to the Supreme Court.[47] Nonetheless, presidents take their appointment powers very seriously, and all of them seem to try to find potential justices who will vote to uphold their preferred policy preferences. [48]

Presidents have also used the Office of the Solicitor General to attempt to influence the Supreme Court's decisions.[49] The Solicitor General, of course, is the president and the executive branch's lawyer at the Supreme Court.[50] The Solicitor General is the only official who is not a part of the judicial branch with an office at the Supreme Court.[51] The president appoints the Solicitor General, whom the U.S. Senate must then confirm.[52] The Solicitor General serves at the will of the president, meaning that the president can fire him or her at any time.[53] Recent research indicates that the Solicitor General has a great deal of influence over decision-making at the U.S. Supreme Court in every stage of the case consideration process.[54]

Even though there is often the potential for conflict between the president and the U.S. Supreme Court, the Solicitor General nevertheless has a strong record of success at the Court.[55] At the certiorari stage, most litigants have around a one percent success rate.[56] The Solicitor General, however, generally has at least a seventy percent success rate.[57] In some years, the success rate at the certiorari stage has reached as high as ninety percent.[58] This means that in well over seventy to ninety percent of the

47. *Presidents Sometimes Regret Justices They Appoint*, U.S.A. TODAY (July 4, 2005), http://usatoday30.usatoday.com/news/washington/2005-07-04-defiant-justices_x.htm.

48. *See* EPSTEIN & SEGAL, *supra* note 42, at 3-4.

49. *See* Ryan C. Black & Ryan J. Owens, *The Solicitor General and the United States Supreme Court: Executive Influence and Judicial Decisions* 9, 18 (2012), *available at* http://www.law.uchicago.edu/files/files/SG_Chicago_Paper-1.pdf.

50. *Id.* at 10.

51. *Solicitor General*, NPR NEWS (July 22, 1997), http://www.npr.org/news/national/1997/jul/970722.solicitor.html.

52. Stephen Wermiel, *SCOTUS for Law Students: What Does the Solicitor General Do? (Sponsored by Bloomberg Law)*, SCOTUSBLOG (May 2, 2012, 10:49 AM), http://www.scotusblog.com/2012/05/scotus-for-law-students-what-does-the-solicitor-general-do-sponsored-by-bloomberg-law/.

53. RICHARD L. PACELLE, BETWEEN LAW & POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION 10 (2003).

54. *See* Black & Owens, *supra* note 49, at 23.

55. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 749-50 (2000).

56. Scott L. Nelson, *Getting Your Foot in the Door: The Petition for Certiorari* 2 (2010), *available at* http://www.citizen.org/documents/GettingYourFootintheDoor.pdf.

57. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 231 (5th ed. 2000) ("Between 1954 and 1985, some 71 percent of the government's cases were granted each year.").

58. LAWRENCE BAUM, THE SUPREME COURT 100 (8th ed. 2004).

cases it reviews, the justices accept the advice of the Solicitor General and approve the petitions for certiorari that the Solicitor General recommends.[59]

The Solicitor General also has a strong record of winning on the merits.[60] The Solicitor General wins in cases where the federal government is a party, as well as where he or she files an amicus brief.[61] As one recent study concluded, "[w]e know that the [Office of the Solicitor General] wins an astonishingly high percentage of its Supreme Court cases . . . ."[62] The justices also often incorporate the Solicitor General's arguments into the Court's opinions, both in his or her briefs on the merits and in oral argument before the Court.[63] Thus, wise presidents will use the Office of the Solicitor General to influence the Court's rulings.[64] In this way, the president is indirectly affecting the voice of the Supreme Court in the inter-institutional conversation about constitutional meaning.

Presidents have also used their Solicitors General to advance certain political agendas by refusing to file certain appeals. For example, President Obama signaled his disagreement with the federal Defense of Marriage Act ("the Act") by refusing to appeal a decision declaring the Act to be unconstitutional.[65] In the appellate litigation before the First Circuit, the Obama Administration refused to defend the constitutionality of the Act.[66] Republicans in the U.S. House of Representatives then hired their own lawyers to argue in favor of the Act on appeal.[67] By refusing to appeal, and having the Attorney General announce the Administration's new position, the Obama Administration clearly advanced its political agenda and signaled to the Supreme Court how it wanted the justices to rule on this issue.

Presidents have also been more direct in their attempts to influence the decisions of the Supreme Court.[68] Throughout our history, presidents have

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59. *See supra* notes 57-58 and accompanying text.

60. *See* KEVIN T. MCGUIRE, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY 173-74 (1993).

61. Ryan Juliano, Note, *Policy Coordination: The Solicitor General as Amicus Curiae in the First Two Years of the Roberts Court*, 18 CORNELL J.L. & PUB. POL'Y 541, 542 (2009).

62. Black & Owens, *supra* note 49, at 5.

63. James F. Spriggs & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365, 377 (1997).

64. *See supra* notes 56-63 and accompanying text.

65. Charlie Savage, *Justice Dept. Backs Equal Benefits for Gay Couples in Military*, N.Y. TIMES (Feb. 18, 2012), http://www.nytimes.com/2012/02/18/us/holder-backs-equal-benefits-for-gay-couples-in-military.html?_r=0.

66. *Id.*; Teresa Welsh, *Was the First U.S. Circuit Court of Appeals Right to Strike Down the Defense of Marriage Act?*, U.S. NEWS (May 31, 2012), http://www.usnews.com/opinion/articles/2012/05/31/was-the-first-us-court-of-appeals-right-to-strike-down-the-defense-of-marriage-act.

67. Savage, *supra* note 65.

68. *See, e.g.*, Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 380-87 (1992).

long criticized the Supreme Court and its rulings.[69] This has often led to periods of intense conflict and discord between the courts and the other branches.[70] Presidents Jefferson, Jackson, Lincoln, and Franklin Roosevelt all had very tense relationships with the Supreme Court.[71] These presidents felt that the Court was blocking their necessary policy initiatives.[72]

American conservatives saw the Supreme Court as the great protector of economic freedoms from the late 1800s until 1937.[73] Starting in the 1950s, however, conservatives began to fear that judicial power was advancing the liberal agenda.[74] "Conservatives were furious about a wide variety of the Warren Court['s]" rulings, including decisions on "race discrimination, congressional investigations of Communism, other national-security issues, freedom of speech and expression, the rights of accused criminals, and the redrawing of legislative districts to ensure the 'one person, one vote' principle."[75] Recall that after the Supreme Court's ruling in *Brown v. Board of Education*,[76] there were bumper stickers and billboards all over the South calling for the impeachment of Chief Justice Earl Warren.[77] Congressional opponents of the Court's desegregation decisions even drafted the infamous Southern Manifesto, which stated that the *Brown* decision was "'a clear abuse of judicial power.'"[78] Conservatives remained angry with the Court for decades to come.[79] Presidents Nixon and Reagan often attacked the courts in their presidential campaigns, and they vowed never to appoint liberal activists to the bench.[80]

Conservative resentment toward the federal courts has continued. When George W. Bush was president, he attacked "activist judges" in both his 2004 and 2005 State of the Union addresses.[81] Various conservatives called for restrictions on the power of the courts, while some even advocated impeaching federal judges because of their rulings.[82] During the

69. *See id.* at 380-81.
70. *See generally id.*
71. *See id.* at 380-87.
72. *Id.*
73. *See* Marghretta Adeline Hagood, *South Carolina's Sexual Conduct Laws After* Lawrence v. Texas, 61 S.C. L. REV. 799, 803 (2010).
74. *See* MILLER, *supra* note 11, at 69.
75. *Id.* at 69-70.
76. 347 U.S. 483 (1954).
77. MILLER, *supra* note 11, at 70; *see also* CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 109 (2009).
78. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 61 (2000).
79. MILLER, *supra* note 11, at 73-75.
80. *Id.*
81. RICHARD DAVIS, JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA 8 (2011).
82. *See infra* Part IV; *see also* Katharine Q. Seelye, *House G.O.P Begins Listing a Few Judges to Impeach*, N.Y. TIMES (Mar. 14, 1997), http://www.nytimes.com/1997/03/14/us/house-gop-begins-listing-a-few-judges-to-impeach.html.

2008 presidential elections, Republican candidate John McCain of Arizona pledged to appoint only federal judges who believed in the philosophy of judicial restraint.[83] While some might argue that these attacks on the Supreme Court were meant to influence the voters, it is also plausible that these presidents were attempting to blunt the voice of the Supreme Court in the inter-institutional dialogue on the meaning of the Constitution.[84] President George W. Bush's signing statements that accompanied enacted legislation were also a clear attempt to increase the voice of the president in the inter-institutional constitutional conversation.[85]

In the 2012 campaign for president, the Supreme Court again became an issue.[86] Many of the more conservative Republican candidates for president attacked the federal courts in general, and the Supreme Court specifically, during the Republican primary season.[87] As two journalists noted, "Republican presidential candidates are issuing biting and sustained attacks on the federal courts and the role they play in American life, reflecting and stoking skepticism among conservatives about the judiciary."[88] For example, Governor Rick Perry of Texas called for term limits for Supreme Court justices, who, of course, currently have life appointments to the bench.[89] Representatives Michele Bachmann and Ron Paul pledged to forbid the Supreme Court from ruling on cases regarding same-sex marriage.[90] Newt Gingrich and Rick Santorum wanted to abolish the United States Court of Appeals for the Ninth Circuit because of its perceived liberal activism.[91] Many of the candidates seemed to want to limit the federal courts' power of judicial review.[92] As Gingrich argued, "'judicial supremacy is factually wrong, it is morally wrong and it is an affront to the American system of self-government.'"[93] And, as Santorum proclaimed, "'If you want to send a signal to judges that we are tired of them feeling that these elites in society can dictate to us . . . then you have to fight back.'"[94]

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83. *See* Emma Schwartz, *McCain's Judicial Speech Could Help with Conservatives*, U.S. NEWS (May 6, 2008), http://www.usnews.com/news/campaign-2008/articles/2008/05/06/mccains-judicial-speech-could-help-with-conservatives.

84. *See* MILLER, *supra* note 11, at 76.

85. *See id.* at 165.

86. *See* Adam Liptak & Michael D. Shear, *Republicans Turn Judicial Power into a Campaign Issue*, N.Y. TIMES (Oct. 23, 2011), http://www.nytimes.com/2011/10/24/us/politics/republicans-turn-judicial-power-into-a-campaign-issue.html?pagewanted=all.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Liptak & Shear, *supra* note 86.

92. *Id.*

93. *Id.*

94. *Id.*

While liberals have for several generations generally supported the federal courts,[95] that period may be coming to a close as the Supreme Court's rulings in particular have become more conservative.[96] More and more liberals are attacking the Supreme Court for its conservative, activist decisions.[97] President Obama has certainly attacked various Supreme Court decisions with which he disagrees. President Obama even took the unusual step of condemning the Court's decision in *Citizens United v. Federal Election Commission*[98] during his State of the Union address when six of the justices were in attendance.[99] As noted above, President George W. Bush had criticized "'activist judges'" during his 2004 and 2005 State of the Union addresses.[100] But President Obama went much further in attacking the *Citizens United* decision directly.[101] The ruling declared that federal limits on corporations' and unions' campaign spending were unconstitutional.[102] Liberals were especially upset because the Supreme Court implied that corporations had the same First Amendment rights to free speech as individuals.[103] In his State of the Union address, President Obama said, "'With all due deference to separation of powers, last week the Supreme Court reversed a century of law that, I believe, will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.'"[104] I attended a dinner meeting at the Supreme Court soon after that State of the Union address, and several of the Court officers asked me if there was any precedent for such a blunt, overt presidential attack on the Supreme Court in the State of the Union.

Soon after the Supreme Court's oral arguments in the health care reform case, President Obama again criticized the Court.[105] Many in the media assumed (incorrectly, as it turned out) that the Court was poised to declare that the President's signature health care reform legislation was

95. *See* Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 195-96 (1988).

96. *See* MILLER, *supra* note 11, at 155.

97. *See, e.g.*, Robert Barnes, *Alito Dissents on Obama Critique of Court Decision*, WASH. POST (Jan. 28, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012800053.html.

98. 558 U.S. 310 (2010).

99. Barnes, *supra* note 97.

100. *See supra* note 81 and accompanying text.

101. Barnes, *supra* note 97.

102. *Citizens United*, 558 U.S. at 372.

103. *Id.* at 365, 372; Barnes, *supra* note 97.

104. Barnes, *supra* note 97.

105. *Obama Remarks on Health Care and the Supreme Court*, ASSOC. PRESS (Apr. 5, 2012), http://news.yahoo.com/obama-remarks-health-care-supreme-court-212957047.html.

unconstitutional.[106] Perhaps in a preemptory strike, the President strongly stated that he would have found such a decision to be a clear example of conservative judicial activism.[107] President Obama stated, "'Ultimately, I'm confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress.'"[108] Clearly, the President was attempting to make the Supreme Court and its conservative, activist decisions a key campaign issue for the 2012 elections. But President Obama was also attempting to influence the Court's ruling and its position in the inter-institutional conversation about the meaning of the Constitution.

At times, other political actors will respond to the voice of the Supreme Court in the constitutional dialogue with silence.[109] Since the Supreme Court usually cannot enforce its own decisions, sometimes other political actors will simply ignore a Supreme Court decision with which they disagree.[110] For example, after the Court ruled in *Worcester v. Georgia*[111] that the state could not remove the Cherokee Nation from its lands in Georgia, President Jackson ordered federal personnel to ignore the Court's order.[112] As another example, Congress plainly refused to accept the Supreme Court's declaration in *Immigration & Naturalization Service v. Chadha*[113] that a one-house legislative veto is unconstitutional.[114] In this case, the Immigration and Naturalization Service, which used to be the agency with jurisdiction over illegal immigration issues,[115] ordered Mr. Chadha's deportation.[116] The U.S. House of Representatives voted to overturn the agency's decision by a one-house legislative veto provision, which was included in the statutes related to illegal immigration issues.[117] The Supreme Court ruled that Congress could overturn a decision of an executive branch federal agency only by using the normal method: having both houses of Congress pass a bill that the president could either sign or

106. *See, e.g.*, Benjamin Hart, *Obama Health Care Law Predictions: A Roundup*, HUFFINGTON POST (June 27, 2012), http://www.huffingtonpost.com/2012/06/27/obamacare-predictions-supreme-court_n_1632110.html.

107. *Obama Remarks on Health Care and the Supreme Court*, *supra* note 105.

108. *Id.*

109. *See* MILLER, *supra* note 11, at 103.

110. *Id.*

111. 31 U.S. (9 Peat.) 515 (1832).

112. *See id.* at 594-96; MILLER, *supra* note 11, at 51.

113. 462 U.S. 919 (1983).

114. *See id.* at 952-59; MILLER, *supra* note 11, at 103.

115. *Immigration and Naturalization Service (INS)*, CORNELL U. L. SCH. LEGAL INFO. INST., http://www.law.cornell.edu/wex/immigration_and_naturalization_service_ins (last visited Apr. 16, 2014).

116. *Chadha*, 462 U.S. at 923-26.

117. *Id.* at 927-28.

veto.[118] Congress, however, has simply ignored the Court's decision in *Chadha*, and continues to pass a variety of statutes that include one-house legislative vetoes even though the Supreme Court has declared this practice to be unconstitutional.[119]

IV. LEGISLATIVE AND JUDICIAL BRANCH INTERACTIONS

We should now turn to the relationship between Congress and the Supreme Court. Certainly the conflicts between the courts and legislatures get the most attention from the media and from scholars, and there are often misunderstandings between the branches.[120] For example, one recent book on the relationship between Congress and the U.S. Supreme Court is entitled *Strangers on a Hill: Congress and the Court.*[121] A leading law professor who studies the interactions between courts and Congress entitled one of his book chapters *The Choreography of Court-Congress Conflicts*.[122] In the fall of 2006, I interviewed various members of Congress, their staffs, federal judges, and lobbyists in order to understand the interactions between Congress and the federal courts better.[123] At that time, the interviewees described the relationship between the two branches as "'venomous,' 'hostile,' 'tense,' 'deteriorating,' 'contentious,' 'animosity,' . . . 'strained,'" and "'adversarial.'"[124] Even though the conflicts between the two branches rarely result in direct congressional attacks on the courts as institutions, the mere threat of retaliation may alter the way judges approach their rulings.[125]

One of the reasons why judges and legislators do not always understand each other is because they do not always know how to communicate effectively with each other. As two leading congressional scholars have noted, "Communications between Congress and the federal courts are less than perfect. Neither branch understands the workings of the other very well."[126] Judge Kaztmann of the Second Circuit agrees, and he has noted, "Congress is largely oblivious of the well-being of the judiciary as an institution, and the judiciary often seems unaware of the critical nuances of

118. *Id.* at 951.

119. *See* MILLER, *supra* note 11, at 103.

120. *See infra* notes 121-126 and accompanying text.

121. ROSS K. BAKER, STRANGERS ON A HILL: CONGRESS AND THE COURT xvii (2007).

122. Charles Geyh, *The Choreography of Courts-Congress Conflicts*, *in* THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC 19, 19 (Bruce Peabody ed., 2011).

123. MILLER, *supra* note 11, at 17.

124. *See id.*

125. *See* Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J. (Sept. 26, 2006), http://online.wsj.com/news/articles/SB115931733674775033.

126. ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 350 (9th ed. 2004).

the legislative process. But for occasional exceptions, each branch stands aloof from the other."[127]

Congress has a variety of weapons at its disposal in order to signal its disapproval to the Court.[128] One of its biggest weapons is clearly the power of the purse.[129] Thus, while Congress cannot reduce the salaries of federal judges, it is under no obligation to provide annual cost of living increases to them.[130] It is also under no obligation to pay for the justices to have law clerks, computers, or even air conditioning.[131] Although they rarely follow through, members of Congress seem routinely to threaten to cut the budget of the courts when they disagree with specific court rulings.[132] Congressman Steve King, a Republican from Iowa and a vocal critic of the Supreme Court, has been quoted, "'When their budget starts to dry up, we'll get their attention . . . .'"[133] Former House Majority Leader Tom DeLay was even more blunt when he said, "'We set up the courts. We can unset the courts. We have the power of the purse.'"[134] Sometimes Congress does follow through with these threats. In 1964, for example, Congress increased the salaries of lower federal judges by $7,500 per year, but allowed only a $4,500 increase for Supreme Court justices, clearly signaling its unhappiness with the justices of the high court.[135]

Thus, at times Congress uses its budget power to send a clear message to the Supreme Court and to the other federal courts.[136] Although it is not clear that Congress was acting intentionally to send a message to the courts, the budget for the judiciary has just recently experienced some dramatic cuts.[137] In the automatic sequester cuts that went into effect in March of 2013, the federal courts saw their $6.97 billion annual budget cut by over

127. ROBERT A. KATZMANN, JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 7 (1988).

128. *See* Carolyn B. McHugh, *Separation of Powers*, 19-AUG UTAH B.J. 18, 18-19, 21 (2006).

129. *See id.* at 20.

130. Jonathan L. Entin, *Getting What You Pay For: Judicial Compensation and Judicial Independence*, 2011 UTAH L. REV. 25, 26-27 (2011).

131. *See, e.g.*, Bruce Moyer, *July 2013: Judiciary Requests Emergency Funds to Avert Deep Cuts*, FED. BAR ASSOC. (July 2013), http://www.fedbar.org/Advocacy/Washington-Watch/WW-Archives/2013/July-2013-Judiciary-Requests-Emergency-Funds-to-Avert-Deep-Cuts.aspx.

132. *See infra* notes 133-134 and accompanying text.

133. Ruth Marcus, *Booting the Bench: There's New Ferocity in Talk of Firing Activist Judges*, WASH. POST. (Apr. 11, 2005), http://www.washingtonpost.com/wp-dyn/articles/A42691-2005Apr10.html.

134. Rick Klein, *DeLay Apologizes for Blaming Federal Judges in Schiavo Case but House Leader Calls for Probe of 'Judicial Activism'*, BOSTON GLOBE (Apr. 14, 2005), *available at* 2005 WLNR 5811675.

135. JOHN R. SCHMIDHAUSER & LARRY L. BERG, THE SUPREME COURT AND CONGRESS: CONFLICT AND INTERACTION, 1945-1968 8-9 (1972).

136. *See supra* note 135 and accompanying text.

137. *See infra* note 138 and accompanying text.

$322 million, a five percent reduction.[138] The cuts have required furloughs and layoffs for many employees of the federal judicial branch.[139] However, it always possible that Congress was, in fact, sending a message to the Supreme Court about its views on the inter-institutional constitutional conversation.

When legislators become particularly angry with judges over their decisions, they may even call for the impeachment of judges with whom they disagree.[140] This is a drastic measure, and, since the failed attempt to impeach Justice Chase in 1803, Congress has never removed a federal judge solely because politicians disagreed with his or her decisions.[141] But the movement for impeachment for political reasons seems to be growing. For example, Justice at Stake found that there were fifty-eight impeachment threats against federal judges from 2002 to 2006.[142] Concerned that members of Congress and other political actors were using threats of impeachment to attempt to alter specific court decisions, in May of 2005 seventy-five percent of the deans of U.S. law schools sent a joint letter to the leadership of both chambers of Congress opposing such actions.[143] In part, the deans' letter stated, "it is irresponsible and harmful to our constitutional system and to the value of a judiciary that is independent, in fact and appearance, when prominent individuals and members of Congress state or imply that judges may be impeached or otherwise punished because of their rulings."[144]

Congress may also use other methods to attempt to silence the courts in the inter-institutional constitutional dialogue.[145] Over the last several decades, conservatives in Congress have pushed for more congressional oversight of the judiciary and its decisions.[146] Some have even claimed that the courts are inferior to Congress, and that Congress should thus assert more authority over the courts and over specific court decisions.[147]

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138. Tom Schoenberg & Andrew Zajac, *Sequestration Hits the Law as Courts Keep Bankers' Hours*, BLOOMBERG (Mar. 8, 2013), http://www.bloomberg.com/news/2013-03-08/sequestration-hits-the-law-as-courts-keep-bankers-hours.html.

139. *See id.*

140. *See, e.g.*, MILLER, *supra* note 11, at 70; *see* McHugh, *supra* note 128, at 19.

141. Charles Gardner Geyh, *Why Courts & Congress Collide, and Why Their Conflicts Subside*, AM. BAR ASSOC., Fall 2006, at 9, *available at* http://apps.americanbar.org/publiced/constitutionday/WhyCourtsCongressCollide.pdf.

142. Bert Brandenburg & Amy Kay, *Crusading Against the Courts: The New Mission to Weaken the Role of the Courts in Protecting Our Religious Liberties*, JUSTICE AT STAKE 1, 17 (2007), http://www.justiceatstake.org/file.cfm/media/resources/CrusadingAgainstCourts_20121F89B068B.pdf.

143. *Law Schools' Deans Challenge Congressional Attack on the Judiciary*, N.Y. UNIV. (May 10, 2005), http://www.nyu.edu/about/news-publications/news/2005/05/10/law_schools_deans.html.

144. *Id.*

145. *See infra* Part IV.

146. *See infra* notes 152-161 and accompanying text.

147. *See* Klein, *supra* note 134.

Congressional oversight of the executive branch is to be expected since both branches make politically based decisions, but congressional oversight of the judicial branch might be seen as an attempt to make the courts subservient to the will of Congress and/or the president. These efforts could force enormous changes in the way the federal courts participate in the ongoing constitutional conversations among government institutions.[148]

Court-stripping is one such method. Because court-stripping legislation has been enacted so rarely, there is a great deal of uncertainty about the extent of Congress's ability to prevent the federal courts in general, or the Supreme Court specifically, from hearing certain types of cases.[149] At the heart of the issue is whether the federal courts should enjoy complete decisional and institutional independence or be accountable to the will of the elected branches of government, and thus, perhaps to the will of the people.[150]

Historically, court-stripping has often been threatened, for example, by labor supporters and other progressives during the conservative activist era of the Supreme Court from the 1890s to the mid-1930s.[151] Today, it is the conservatives who are attempting to strip the federal courts' jurisdiction over a variety of types of cases. In September 2004, for example, the Senate Republican Policy Committee distributed a report entitled *Restoring Popular Control of the Constitution: The Case for Jurisdiction-Stripping Legislation.*[152] The report states, "[t]he American people must have a remedy when they believe that federal courts have overreached and interpreted the Constitution in ways that are fundamentally at odds with the people's common constitutional understandings and expectations."[153] Thus, court-stripping is a method for changing the direction of federal judicial decisions and altering the independent voice of the courts in the inter-institutional constitutional dialogue.

Congress began to pass a variety of laws that one could argue restrict judicial power in the mid-1990s.[154] The nation generally had not seen these

148. *See infra* notes 149-60 and accompanying text (discussing the enemy combatant case law and Congress's attempt to prevent the Supreme Court from participating in the inter-institutional conversation about the meaning of the Constitution).

149. *See* FISHER & ADLER, *supra* note 23, at 1042-51.

150. *See id.*

151. *See* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 1-10 (1994).

152. Jon Kyl, *The Case for Jurisdiction-Stripping Legislation: Restoring Popular Control of the Constitution*, U.S. SENATE REPUBLICAN POLICY COMM. (Sept. 28, 2004), http://web.archive.org/web/20041015011506/http://rpc.senate.gov/_files/Sept2804CourtStrippingSD.pdf .

153. *Id.*

154. *See infra* notes 156-161 and accompanying text.

kinds of limits on the courts enacted into law since Reconstruction.[155] For example, the 1995 Prison Litigation Reform Act reduced the ability of federal judges to manage state prisons and force the early release of prisoners.[156] The Effective Death Penalty Act of 1995 limited the ability of the federal courts to hear multiple habeas corpus appeals from death row inmates.[157] The 1996 Immigration Reform Act limited the number of appeals available to immigrants facing possible deportation.[158] Other limits were placed on the federal courts' discretion in a variety of circumstances in the mid-1990s.[159] The Terrorism Risk Insurance Act of 2002 "prohibited the federal courts from reviewing the U.S. Secretary of the Treasury's official designation of particular actions as 'terrorist acts.'"[160] Some have even interpreted various sections of the 2001 Patriot Act as containing court-stripping measures.[161]

One of the most important, recent court-stripping actions occurred when Congress enacted the Military Commissions Act of 2006,[162] which attempted to strip the courts of the right to hear habeas corpus appeals from any noncitizen whom a military tribunal designated as an "unlawful enemy combatant."[163] It also prohibited federal judges from consulting foreign or international sources of law when interpreting Common Article 3 of the Geneva Convention, leaving that power to the president alone, and it banned litigants from invoking treaty rights in federal courts.[164] Generally the Republican majority at the time supported the legislation, while most Democrats opposed it.[165] Congress, therefore, agreed with the president in

155. *See, e.g.*, Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 514 (fearing that the Court would hold Reconstruction unconstitutional, Congress repealed the statute on which the Court's jurisdiction was based).

156. G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING 34 (4th ed. 2006).

157. *Id.*

158. Linda Greenhouse, *How Congress Curtailed the Courts' Jurisdiction*, N.Y. TIMES (Oct. 27, 1996), http://www.nytimes.com/1996/10/27/weekinreview/how-congress-curtailed-the-courts-jurisdiction.html.

159. *See, e.g., id.*

160. Brett W. Curry, *The Courts, Congress, and the Politics of Federal Jurisdiction* 191 (2005) (Ph.D. dissertation, The Ohio State University), *available at* http://rave.ohiolink.edu/etdc/view?acc_num=osu1124055554.

161. Bert Brandenburg & Amy Kay, *Courting Danger: How the War on Terror Has Sapped the Power of Our Courts to Protect Our Constitutional Liberties*, JUSTICE AT STAKE 1, 2-3 (2006), http://apps.americanbar.org/tips/faic/4_CourtingDanger.pdf.

162. Military Commissions Act of 2006, 10 U.S.C. § 948a (2012).

163. Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay*, 1 HARV. L. & POL'Y REV. 41, 69 (2007).

164. *Id.*

165. Anup Shah, *U.S. Military Commissions Act 2006 – Unchecked Powers?*, GLOBAL ISSUES (Sept. 30, 2006), http://www.globalissues.org/article/684/us-military-commissions-act-2006-unchecked-powers.

the act that the executive branch alone should determine the fate and the constitutional rights of the detainees at Guantanamo Bay.[166]

The court-stripping measures included in the legislation were in direct response to the Supreme Court's decisions in *Hamdi v. Rumsfeld*,[167] *Rasul v. Bush*,[168] and *Hamdan v. Rumsfeld*.[169] In these cases, the Supreme Court basically ruled that President Bush's proposals for trying accused terrorists held at Guantanamo Bay were not constitutional, rejecting the Bush administration's assertions that "the detainees' fate was a question for the executive branch alone."[170] More specifically, in *Hamdan* the Supreme Court held that the military tribunals established to try accused terrorists were not constitutional, in part because Congress had not properly approved them.[171] In *Rasul*, the Supreme Court ruled six-to-three that detainees at Guantanamo Bay had habeas corpus rights, and in *Hamdi*, the Court found that even U.S. citizens suspected of being terrorists have habeas corpus rights.[172] In its 2006 legislation, Congress attempted to strip the courts of the ability to continue to participate in this inter-branch constitutional conversation on the rights of accused terrorists, thus supporting the notion of executive supremacy on this issue.[173] The Supreme Court declared the congressional actions to be unconstitutional in *Boumediene v. Bush*.[174] Thus, court-stripping is clearly a way to prevent the Supreme Court from participating in the inter-institutional conversation about the meaning of the Constitution.

In addition to stripping the courts' jurisdiction over a variety of cases, the House Judiciary Committee has discovered some novel ways to attack the courts. In September 2006, the Committee approved a proposal introduced by then House Judiciary Committee Chair F. James Sensenbrenner Jr. (R-WI) "that would have established an inspector general (IG) for the federal judiciary in order to oversee the courts, investigate ethical problems among federal judges, and conduct investigations into the issue of judges' overreaching their constitutional powers . . . . At the 2006 hearings for the bill, neither federal judges nor representatives from the Administrative Office of the Federal Courts were allowed to testify."[175] The

166. *Id.*
167. 542 U.S. 507 (2004).
168. 542 U.S. 466 (2004).
169. 548 U.S. 557 (2006).
170. Linda Greenhouse, *For Justices, Another Day on Detainees*, N.Y. TIMES (Dec. 3, 2007), http://www.nytimes.com/2007/12/03/washington/03scotus.html?pagewanted=all&_r=0.
171. *Id.*
172. *Rasul*, 542 U.S. at 484, 488; *Hamdi*, 542 U.S. at 509.
173. MILLER, *supra* note 11, at 167-68.
174. *Boumediene*, 553 U.S. at 732-33.
175. MILLER, *supra* note 11, at 170-71; *see also* Mike Allen, *GOP Seeks More Curbs on Courts*, WASH. POST (May 12, 2005), http://www.washingtonpost.com/wp-

legislation was never approved by the full House, and it died at the end of the 109th Congress.

The timing of this legislation was important. At the time, there were threats of impeachment of federal judges coming from many House Judiciary Committee members, and the Committee had passed a variety of court-stripping bills.[176]

Although the authors of this Inspector General legislation said that it was not intended to alter the decisions of federal judges, others were less convinced.[177] Law Professor Charles Geyh wrote that "'[c]ontext is everything . . . the backdrop here is a fairly carnivorous House trying to hold judges accountable for the decisions they make. This proposal is not made in the context of judges spending lavishly. It is being used as a proxy for [congressional oversight of] their decisions.'"[178] Justice Ruth Bader Ginsburg declared that, "judges have good cause for concern" about the legislation, implying that the sponsors' intent was to force federal judges to issue decisions with which they agreed.[179] As one lobbyist told me in an interview for a research project, "'[h]aving the IG report information to Congress is a clear form of intimidation of federal judges over the direction of their judicial decisions and a clear impeachment threat against them.'"[180] Adding some force to this argument, the then Chairman of the House Judiciary Committee said in a speech at Stanford University, "the inspector general would be able to manage how we punish and who does the punishing for judges' misconduct."[181]

Thus, the inspector general legislation was just one of the House Judiciary Committee's several institutional attacks on the federal courts when it was under Republican control.[182] Having an inspector general for the federal judiciary would have skewed the continuing dialogue between Congress and the courts, as well as potentially harm both the institutional and the decisional independence of the judiciary.

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dyn/content/article/2005/05/11/AR2005051101773.html; *An Inspector General?*, WASH. POST (Oct. 9, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/10/08/AR2006100800706.html.

176. *See supra* notes 162-163, 142 and accompanying text.

177. *See* Allen, *supra* note 175.

178. Pamela A. MacLean, *Does the Judiciary Need a Watchdog?*, NAT'L LAW JOURNAL (May 27, 2005), http://www.jail4judges.org/J.A.I.L._News_Journals/2005/2005-06-02.html.

179. Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 8-9 (2006).

180. MILLER, *supra* note 11, at 173.

181. Albert Yap, *Congressmen Speaks on Legislature, Judiciary*, STANFORD REV. (May 20, 2005), http://stanfordreview.org/old_archives/Archive/Volume_XXXIV/Issue_9/News/News2.shtml.

182. *See* MILLER, *supra* note 11, at 179 (stating that "[i]n addition to court-stripping legislation and the proposed inspector general for the judiciary, the House Judiciary Committee has" also threatened impeachment of federal judges).

Congressional attempts to change the views of the Supreme Court continue. For example, in December of 2011, a subcommittee of the House Judiciary Committee held hearings on federal judges' use of foreign law in their rulings.[183] Referring to cases pending before the U.S. Supreme Court concerning whether juveniles may receive a sentence of life without parole, the chair of the Constitution Subcommittee stated, "global practice and American practice on this question differ. The real question will be whether Americans or 'the global community' decides what violates the Eighth Amendment."[184] The Chairman's disdain for the fact that some justices look outside the United States for examples was obvious.[185] It is worth quoting the Chairman's remarks at some length:

> This march toward transnationalism must end. America's independence and democracy have been hard won and preserved by the sacrifice of generations of patriots going back to Lexington and Concord. The United States Constitution, with its Federal structure seen in the checks and balances, protection of individual rights, and commitment to representative democracy, is the greatest system for making wise and just laws that the world has ever known. The Constitution and laws of the United States and the several States are sufficient. We do not need to go abroad to download legal rules from other countries.
>
> At its core, the issue is whether Americans will remain a sovereign, self-governing people or whether we will be governed by an elite caste of judges, imposing rules based on the supposed preferences of the so-called international community.[186]

This seems to be a clear attempt to alter the voice of the Supreme Court at the table of constitutional interpretation.

At times, the Supreme Court fights back against the other branches' attempts to restrain its participation in the inter-institutional constitutional dialogue. For example, in *Employment Division, Department of Human Resources of Oregon v. Smith*,[187] the majority on the Supreme Court changed the standard for determining whether a statute violated the Free Exercise Clause of the First Amendment.[188] When Congress passed the

183. *Judicial Reliance on Foreign Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 5 (2011) (statement of Rep. Franks, Chair, H. Subcomm. on the Constitution) [hereinafter *Hearing*].

184. *Id.*

185. *See infra* note 186 and accompanying text.

186. *Hearing*, *supra* note 183, at 7.

187. 494 U.S. 872 (1990).

188. *Id.* at 882-90.

Religious Freedom Restoration Act of 1993 in an attempt to overturn the Supreme Court's ruling, the Court responded by declaring unconstitutional major portions of this legislation in *Flores*.[189] The Court majority was quite emphatic that Congress overstepped its authority in trying to restrain the Court. Writing for the majority, Justice Kennedy wrote:

> Our national experience teaches that the Constitution is best preserved when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is . . . . Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, [190] to determine if Congress has exceeded its authority under the Constitution.[191]

The Court clearly won this battle.[192]

The Court continues to assert itself in the constitutional dialogue. For example, Justice Scalia took the unusual approach of reading his dissent aloud when the Supreme Court announced its decision in *Arizona v. United States*,[193] which struck down most of the provisions of an Arizona law that aimed at preventing illegal immigration.[194] During his oral comments, Justice Scalia also attacked President Obama's then-recent decision to refuse to deport almost 1.4 million illegal immigrants who entered the country as children.[195] The president's executive order was not part of the case before the Court, and many commentators were shocked that Justice Scalia even mentioned it.[196] Justice Scalia's attacks on the president may not be an isolated occurrence. One journalist has described how many of the justices view the legislative branch by writing, "Congress is not held in

189. *Flores*, 521 U.S. at 536; Stephen G. Bragnaw & Mark C. Miller, *The City of Boerne: Two Tales from One City*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 140, 140-49 (Mark C. Miller & Jeb Barnes eds., 2004).

190. 5 U.S. (1 Cranch) 137 (1803).

191. *Flores*, 521 U.S. at 535-36.

192. Congress eventually found a way to narrow the impact of the Court's ruling in *Boerne* when it enacted the Religious Land Use and Institutionalized Persons Act of 2000, at least as applied to federal government actions and to federal contractors. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1 (2012). The Court upheld this act in Cutter v. Wilkinson, 544 U.S. 709, 719-20 (2005).

193. Arizona v. United States, 132 S. Ct. 2492 (2012); Ethan Bronner, *A Dissent by Scalia is Criticized as Political*, N.Y. TIMES (Jun. 27, 2012), http://www.nytimes.com/2012/06/28/us/scalias-immigration-dissent-is-criticized-as-political.html?_r=0.

194. *Arizona*, 132 S. Ct. at 2510.

195. Bronner, *supra* note 193.

196. *See, e.g.*, *id.*

very high regard by most of the justices. In public and private comments, they often speak with distain of the politicians in the House and Senate."[197]

V. CONCLUSION

In conclusion, this lecture has explored some of the relationships between the Supreme Court and the president on the one hand, and between the Court and Congress on the other hand.[198] I hope that I have been able to show you a little bit about how Governance as Dialogue Movement scholars interpret these interactions. The Supreme Court brings a critical voice to the inter-institutional conversation about constitutional meaning, in large part because the Court relies so heavily on legal reasoning.[199] However, the Supreme Court is not the only political actor that plays a role in interpreting the Constitution and the important public policy choices that come from the ongoing constitutional dialogue.

197. David G. Savage, *GOP Lawyers See Tilt to Activist High Court*, LOS ANGELES TIMES (Apr. 1, 2012), *available at* 2012 WLNR 6915473.

198. *See supra* Parts III-IV.

199. MILLER, *supra* note 11, at 200.