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Constitutional Discourse & American Government



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Constitutional Discourse and American Government

Constitutional issues and rhetoric have played an important role in politics and government throughout American history. Contrary to the assumption by many contemporary Americans that the Supreme Court is the sole arbiter of constitutional meaning, the elected branches have numerous powers and duties that give them the opportunity to shape constitutional interpretation and application.

For instance, Congress can pass legislation that affects individual rights as well as the scope of the federal government and the vitality of federalism. It can initiate constitutional amendments and confirm (or refuse to confirm) presidential appointments of federal judges and executive branch officials charged with interpreting or applying the Constitution, such as the Attorney General. It can, by statute, limit the appellate jurisdiction of the Supreme Court. And it can (indeed, must) define the grounds for impeachment and removal.

The President, for his part, swears an oath written into the Constitution itself to preserve, protect, and defend the Constitution. He can use his veto against legislation he deems unconstitutional. He appoints judges and executive branch officials. And he enforces the law and is the first to put forward an interpretation of presidential powers in the gray zones where the Constitution itself is vague.

The result is that the elected branches can and should have a major influence on our constitutional understanding. Hence, constitutional issues can and should be an important part of election campaign rhetoric and of governing discourse after the campaign is over.

A key question, then, is how constitutional rhetoric has fared over the years. When it comes to campaign rhetoric, this question is important for at least three reasons.

- As incredible as it may seem to many Americans, politicians usually take their campaign promises seriously, so what they say on the campaign trail matters.
- Additionally, a great deal of voter education takes place through the medium of campaigns.
- In the other direction, what campaigns talk about can also be seen as a barometer of public sentiment.

Constitutional rhetoric in the process of governing likewise educates citizens and serves as a barometer of what is on the national mind. Most important, that rhetoric in the White House and on the floor of Congress gives us an imperfect but useful indication of whether the nation's leaders are actually taking into consideration the nation's highest law. Is the Constitution a vibrant reality shaping policy debates, or is it a dead letter to our public officials?

Is a High Number of References to the Constitution a Good Sign?

Consequently, the following analysis is based on three assumptions. The first is that, under normal conditions, more constitutional discussion in campaigns and in governing is better than less. Second, more open discussion of the Constitution is better than opaque discussion. Finally, broader discussion is better than discussion that is narrowly focused on only a few constitutional issues.

One might object, in response to the first assumption, that too much constitutional debate is symptomatic of a constitutional system in distress. James Madison, it might be recalled, clearly hoped for a stable Constitution, the provisions and boundaries of which were generally understood and accepted, not part of the struggle of day-to-day politics. So why should we not want as little debate about the Constitution as possible? Debate involving the Constitution would imply some question about its legitimacy. It would be preferable to have no mention of the Constitution during policy debates, according to this view, because all sides agree on the Constitution's general parameters and argue from within those boundaries.

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At the extreme, there is some merit to this objection. The peak volume of constitutional discourse in American politics came in and around the Civil War as constitutional controversy spun out of control. While some of this talk itself contributed to civil strife, for the most part the rhetoric about the Constitution was a symptom that was produced by a greater struggle. The basis of the conflict itself lay not in the world of rhetoric but in real differences.

Herein lies an answer to the criticism as well. As Madison also pointed out forcefully, it is inevitable that free societies will be rife with contests involving both rival interests and competing principles. The only question is whether those conflicts will be discussed in light of the nation's highest law and guiding principles or only in mundane terms divorced from its highest law and principles.

A close look at the peaks and valleys of constitutional discourse in American politics shows no rigid pattern in regard to constitutional distress: Some such moments (such as 1860 and the 1930s) show increased discussion of the Constitution, while others (such as the war years of the Wilson Administration) do not. The widely told story of a Constitution under assault since 2001 has corresponded with less rather than more discussion of the Constitution, as did the political–social crisis of 1968. Some moments of greater discussion of the Constitution, like the 1980s, were not moments of appreciably greater conflict.

The lesson would seem to be that much depends on the political and rhetorical choices made by political leaders in each era. These facts also suggest that an increase in discussion of the Constitution can occur in a healthy way that serves to bring our people and their representatives back to first principles.

Ultimately, constitutional government requires a constitutional conversation that includes the people and their representatives. Failure to sustain such a conversation will not lead to social peace, nor will it serve as the marker of a healthy Constitution. Rather, it will contribute to the constitutional illiteracy of the nation. When candidates and elected officials stop talking about the Constitution, it will not be because the Constitution is secure; it will be because the Constitution is irrelevant.

Constitutional Rhetoric in Election Campaigns

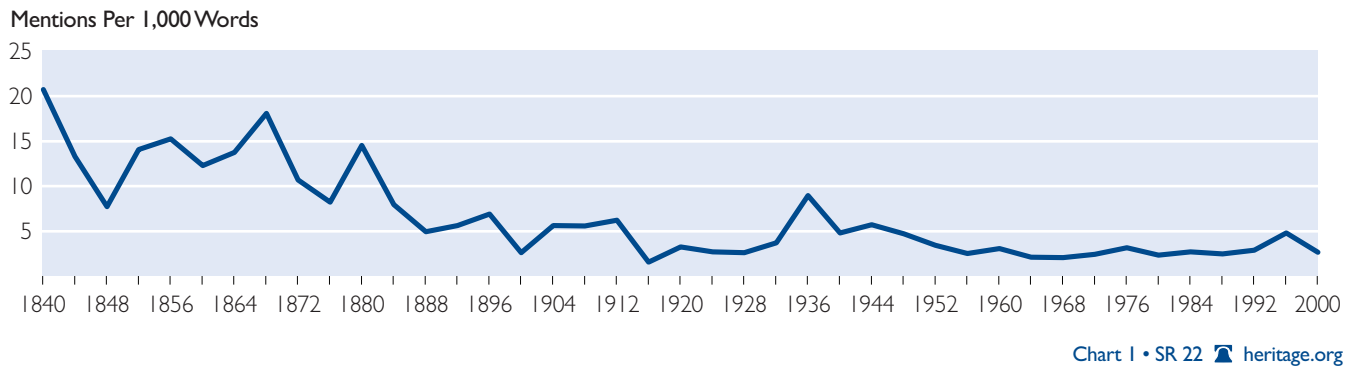
Since the 1790s, constitutional issues have been a part of campaigns.

- In the early years of the two-party system, starting with the first major party platform offered by the Democrats in 1840, the enumeration of powers, federalism, executive powers, and the overall philosophy of constitutional interpretation were widely discussed, as was, increasingly, the subject of slavery.
- The Civil War and Reconstruction (1865–1876) brought a heated conversation centered on the character of the federal union, the use of executive power by Lincoln and Grant, and civil liberties during wartime or post-war occupation.
- The Populist era (1890s) saw an upsurge in debate about the federal courts and proposals for constitutional change, as did the Progressive era (1900–1920) that followed.
- The aftermath of World War I provoked considerable campaign discourse about wartime powers exercised by the Wilson Administration and allegations that Wilson had compromised the sovereignty of the United States by agreeing to the League of Nations.
- The New Deal in the 1930s brought a constitutional debate over the scope and powers of the federal government, the independence of the judiciary, and what Republicans liked to call Franklin Roosevelt's "one man rule."
- Since the 1960s, a large number of constitutional issues including civil rights, abortion, the parameters of the federal system, and the proposed Balanced Budget Amendment have appeared with considerable frequency.

Although constitutional issues were part of the campaign discourse in every era, many fear that there has been, on balance, a general "deconstitutionalization" of politics over the past century or more. There is considerable evidence to support such fears.

Total Constitutional References Per 1,000 Words in Major Party Platforms, 1840–2004

Major party platforms since 1840 have experienced a general decline in references to the Constitution, controlled for the size of the platform.



For example, major party platforms since 1840 have experienced a serious decline of constitutional rhetoric as measured by total references to the Constitution, controlled for the size of the platform. In 1840, there were 20 constitutional references per thousand words of the Democratic platform; although the platform was short, nearly every paragraph made at least one reference to the Constitution. In 2004, by contrast, both major parties’ platforms contained approximately three constitutional references per thousand words. (See Chart 1.)

In addition, a smaller proportion of constitutional discussion is explicitly constitutional in character today. In the 1800s, platforms were more likely to refer to the constitutional rights of the states or First Amendment rights; today, they are more likely to refer to federalism or freedom of speech. From 1840 through 1864, about 75 percent of constitutional references in party platforms could be considered explicit. In every election since 1948, a majority of platform references have been implicit, usually by a wide margin.

In a related vein, one sign of the deconstitutionalization of American campaigns over the long run has been the severe decline in the use of what one might call “perfunctory” references to the Constitution; that is, references not to a concrete constitutional issue but to the Constitution itself in a sort of hortatory or purely symbolic way. Such references, which are always explicit, used to be a very common component of political rhetoric in America. Today, they stand out as unusual and perhaps a bit old-fashioned. Like a dying canary in a mineshaft, the loss of this art of constitutional praise in campaigns might be considered the sign of a broader distress in the American polity.

Evidence also shows that the constitutional discussion that does occur now is narrower and less balanced among different types of issues than it used to be. An examination of 15 different categories of constitutional discourse reveals that a broad range of constitutional concerns has largely been supplanted by a narrower interest in individual rights, though of course other issues continue to be raised.¹

Finally, the mode of campaign communication makes a significant difference. Party platforms are consistently more likely to address constitutional questions, to address those questions explicitly, and to address a broad range of those issues than are television advertisements. Platforms typically contain two or three times as many constitutional references per thousand words as do television advertisements run the same year by the same party. And if party platforms deal seriously with a narrower range of issues than they used to, they remain superior on that score to television ads, which are even more heavily skewed toward rights and away from substantive discussions of the constitutional structure of American government.

1. The 15 categories included appointments, constitutional amendments, constitutional sovereignty, enforcement of the law, executive powers, enumeration of powers, federalism, impeachment, individual rights, judicial power, mode of constitutional interpretation, perfunctory references, separation of powers, Supreme Court decisions, and veto for constitutional reasons.

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All in all, the type of communication most important for reaching the mass electorate in modern campaigns—television advertising—is also usually the one with the least constitutional content.

A Modest Resurgence?

However, drawing a direct line from 1840 to 2004 masks a number of ups and downs in between, including a modest upward trend in constitutional discourse in campaigns since the late 1960s. Also, it is surely not insignificant that the total number of constitutional references in platforms—as opposed to references per thousand words—has increased. In other words, there has actually been a partial resurgence of constitutional discourse since the 1960s.

While modest, this resurgence has been broadly based. It has occurred in both parties, though among Republicans more than Democrats. It has also occurred across different types of campaign communication, including party platforms, presidential debates, and even television ads, despite their low absolute levels of constitutional content. While Democrats have been disproportionately concerned with rights during this period of recovery, Republicans have tended to place greater emphasis on structural issues (mostly federalism) and questions having to do with constitutional interpretation.

The overall increase in constitutional discussion since the 1960s has been driven by the rising prominence of a number of issues. For example, presidential campaigns since 1968 have given much greater attention to judicial powers (by Republicans) and judicial appointments (by both parties). Likewise, judicial decisions have become a more common topic of conversation, as have constitutional amendments, many (though not all) of which have been proposed with the intention of overturning controversial court decisions.

Many of those judicial decisions have also driven increased discussion of several individual rights issues in the social arena. In particular, civil rights, abortion, school prayer, and same-sex marriage were either brand-new issues or, in the case of civil rights, old but dormant issues that attained new prominence during the recent era of increased constitutional rhetoric.

Finally, some of the surge of constitutional discourse since 1968 has been driven by an issue that one might call constitutional sovereignty: the degree to which the United States should be subject to international agreements and organizations. Although this issue became prominent for the first time in the 1920 election, it has resurfaced in the 1990s and in this decade. Much of the 2004 presidential contest revolved around the question of whether the United States should be bound by the preferences of the United Nations in devising its security policy.

Altogether, although it is accurate to refer to a deconstitutionalization of politics since the mid-1800s, such a description does not capture the full picture. Candidates and parties are actually talking more about the Constitution today than they did 40 years ago.

A Recent Backslide

If too much pessimism is unwarranted, though, so is too much optimism. For one thing, the uptick in constitutional discussion since 1960 has come nowhere close to restoring all of the ground lost since the mid-1800s. For another, since 2000 we have witnessed another falloff in the constitutional content of party platforms, especially because of a decline in Republican references to structural issues. As a topic of discussion, federalism, which was found in nearly every domestic corner of the 1996 Republican platform, was greatly diminished in 2000 and 2004.

Even so, the 2004 presidential debates saw a record number of constitutional references, and the campaigns as a whole dealt at some length with issues such as constitutional sovereignty, the Federal Marriage Amendment, and civil liberties in wartime. Since the level of constitutional discourse in 2004 was still about the same as in 1992 and higher than 40 years ago, it is not yet clear whether the post-1996 dip is the beginning of a bigger decline or simply a reversion to conditions before an unusual spike in 1996. It may also be that the dip will prove to be particular to the politics of the current era.

Constitutional Discourse in Governing

As one might expect, rhetorical trends in campaigns find a parallel in governing. A study of inaugural addresses and State of the Union messages—two venues that are relatively ceremonial and hence might be expected to have more constitutional references than other types of presidential communication—shows that constitutional discussion has declined there as well.

Inaugural addresses have experienced a sharp decline in constitutional references, especially since 1929. Inaugural addresses from 1953–2005 in both parties have average rates of constitutional references comparable to the very low levels found in television advertising. Recent inaugural addresses have also been characterized by the dominance of implicit over explicit references.

The constitutional subjects found in inaugural addresses are relatively constricted. Since 1841, individual rights have been mentioned in about three out of every five inaugural addresses in both major parties; about half of Democratic inaugurals had at least one perfunctory mention of the Constitution; about half of Whig or Republican inaugurals mentioned federalism, executive powers, or enforcement of the law. Federalism and executive powers on the Democratic side and perfunctory mentions of enumeration of powers on the Whig/Republican side found their way into around four in 10 inaugurals. Other topics received much more sporadic attention.

For most of the 20th century, as in campaigns, Democratic Presidents were more likely to focus on rights and Republican Presidents on structure and constitutional interpretation in their inaugural addresses. However, the last three Republican inaugurals—by George H. W. Bush and current President George W. Bush—contained only references to rights, marking a sharp break with their party's previous tradition.

State of the Union messages also provide a forum for Presidents to articulate their vision of politics, both grand and petite. If they are inclined, Presidents can find in State of the Union messages multiple opportunities to draw a connection between policy questions of the day and constitutional principles. Indeed, there is a clear link between the inaugural address and the State of the Union message. As Karlyn Kohrs Campbell and Kathleen Hall Jameison pointed out in their book *Deeds Done in Words*:

[Each State of the Union message is] rooted in a president's most recent inaugural. The inaugural lays down the principles that will govern a presidency while demonstrating presidential commitment to the country's most basic principles. In State of the Union addresses, presidents revive the principles to which they committed their presidencies and show how those principles will be reflected in their legislative program.²

The modern State of the Union message owes its form to Woodrow Wilson, who restored the message to its original form (an address delivered to a joint session of Congress) and saw it as a means of aggressively advancing the President's legislative agenda.

It is consequently troubling, but perhaps not surprising, to note a decline in constitutional rhetoric in State of the Union messages that parallels the decline found in other forms of presidential communication. In this venue, the absolute decline in discussion of the Constitution after 1913 is partly traceable to the change in form of the message itself. When messages became speeches rather than written reports, Presidents cut their length considerably.

In general, though, State of the Union messages have exhibited a broader and richer discussion of the Constitution than have inaugural addresses. For example, State of the Union addresses since 1948 have been much more likely than inaugurals to contain explicit discussion of constitutional issues.

Likewise, State of the Union messages have tended to discuss a broader range of constitutional issues than have inaugurals. Individual rights were mentioned in around four of every five State of the Union messages from 1841 through 2006 in both major parties. Four topics (rights, federalism, executive powers, and enumeration of powers) were mentioned in more than half of Whig/Republican messages. In both major parties, 10 categories of constitu-

2. Karlyn Kohrs Campbell and Kathleen Hall Jameison, *Deeds Done in Words: Presidential Rhetoric and the Genres of Governance* (Chicago: University of Chicago Press, 1990), p. 73.

tional issues were mentioned in at least 15 percent of State of the Union messages; in contrast, in inaugurals, only six topics met that standard on the Democratic side and nine on the Republican side. Fourteen categories were mentioned in at least one Democratic State of the Union message and all 15 categories were mentioned in at least one Whig/Republican message; in contrast, five topics were not mentioned in even one Democratic inaugural, and two were not mentioned in any Republican inaugurals.

From the first term of Franklin Roosevelt’s Administration through 2006, Republican Presidents were significantly more likely to raise constitutional issues in State of the Union addresses than Democrats were. Overall, Republican Presidents during that period exceeded Democratic Presidents by about 44 percent in absolute constitutional references and by about 87 percent in the rate of references per thousand words. Only three Presidents averaged more than 10 constitutional references in each of their State of the Union addresses: Republicans Dwight D. Eisenhower, Gerald Ford, and Ronald Reagan. Reagan led the group with an average of about 16 constitutional references per address. (See Table 1.)

Examples of presidential discussion of constitutional issues in State of the Union addresses since Franklin Roosevelt include the following:

- Several references by Roosevelt defending himself against charges of executive usurpation and discussing federalism and enumeration of powers while advancing his program of federal activism.
- Repeated (and sometimes dominant) concerns by Harry Truman, Dwight Eisenhower, John F. Kennedy, and Lyndon Johnson regarding civil rights, including voting rights.
- Expressions of fear about the prospect of excessive centralization of power and devotion of considerable rhetorical effort to a defense of federalism by Eisenhower, Richard Nixon, and Ronald Reagan. In particular, federalism was a dominant theme of Nixon’s 1971 address and Reagan’s 1982 address.
- A vigorous defense of executive power by Nixon and Gerald Ford.
- Promotion of constitutional amendments on topics including abortion, a balanced budget, and marriage by Reagan, George H. W. Bush, and George W. Bush.
- Calls for the U.S. Senate to confirm stalled judicial appointments by Bill Clinton and George W. Bush, coupled with broader opposition to the imperial judiciary by Bush.

Although George W. Bush made some notable constitutional references in these governing speeches, his overall record in this regard has been as disappointing while serving as President as it was while campaigning. His two inaugural addresses show a substantial dip from the rhetorical attention given to the Constitution in the 1980s (or even 1997). In a similar fashion, Bush’s State of the Union addresses from 2002–2006 had the least constitutional content of any President’s since 1934. Here, he averaged only three constitutional references per speech, the lowest of any modern President, and a rate of references per thousand words that was tied with Bill Clinton for the lowest of any modern President. Clearly, Bush’s relative lack of interest in articulating a constitutional vision on the campaign trail has extended deep into his presidency.

Average Constitutional References in State of the Union Addresses by Administration and Party, 1934–2006

Administration	Average References	Average References Per 1,000 Words
G.W. Bush	3.2	0.72
Clinton	5.7	0.72
G. H.W. Bush	5.3	1.29
Reagan	15.9	3.49
Carter	8.8	0.83
Ford	12.3	2.64
Nixon	9.8	2.46
Johnson	7.3	1.47
Kennedy	5.3	0.89
Eisenhower	10.3	1.75
Truman	6.6	1.03
Roosevelt	5.6	1.67
Democratic Average	6.6	1.10
Republican Average	9.5	2.06

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Constitutional Debate on the Floor of Congress

As in the White House, constitutional rhetoric in Congress has a long history. Debates in Congress throughout the 1800s were often filled with constitutional arguments and rationales. However, by the early 1960s, Harvard scholar Donald Morgan expressed concern that Congress was not taking its role as constitutional guardian as seriously as it once did. Morgan pointed to an incident in 1935 as one key moment in the evolution of Congress's attitude.

Morgan noted that while grappling with the Guffey Coal Act (otherwise known as the Bituminous Coal Conservation Act), Congress received a written message from President Roosevelt that urged it to refrain from concerning itself with the act's constitutionality. Congress, argued FDR, should simply pass the bill if it thought the legislation was good policy and let the Supreme Court sort out its constitutionality. This message represented the first known instance of a President calling on Congress to ignore the question of whether a piece of legislation was constitutional. Today, it is probably safe to assume that this approach is used by Congress more often than not.

After examining the course of constitutional debate since that crucial moment, Morgan concluded his study by contending that Congress was losing its capacity to engage in constitutional dialogue. Even so, 203 Members of Congress responded to a survey that Morgan distributed to Members in 1958–1959. Most said they believed that constitutional arguments, when they were raised in Congress, were raised sincerely more often than not. Most also indicated that they believed that Congress, not just the Supreme Court, played a legitimate role in constitutional interpretation.

Scholars attempting to replicate Morgan's survey since 2000 have obtained similar answers. However, they received only 80, 20, and 12 responses, perhaps implying that Members of Congress (or their staffs) are less interested in the topic than they used to be.

As with campaign rhetoric and presidential rhetoric, it is possible to obtain a rough measurement of how often constitutional rhetoric is used on the floor of Congress. The *Congressional Record* has been digitized going back to the 101st Congress (1989–1890), and some conclusions can be reached from that period. Those conclusions include the following:

- In total, the Constitution is mentioned in Congress with substantial frequency. Every Congress from 1989 through 2006 contained at least 2,000 statements by Members that included use of the word “constitution.” A cursory review shows that a few such references are not to the American Constitution (for example, statements commemorating the first Polish constitution), but most are. In contrast with campaign rhetoric, a large proportion of such references seem to be perfunctory in character. (The 110th Congress, with several months still remaining, was up to 1,876 articles mentioning “constitution” as of June 17, 2008).
- Individual rights issues receive considerably more attention than other kinds of constitutional issues. The phrase “civil rights” was mentioned in between 1,166 and 1,586 congressional statements in every Congress except the 102nd (1991–1992), which was occupied with debate over the Civil Rights Restoration Act of 1991 and saw 2,000-plus statements. “Civil liberties” was almost always the next most frequently used term.
- In comparison, structural issues like “federalism” or “separation of powers” were mentioned in a non-negligible but much smaller number of congressional statements. Since 1989, the peak number of federalism statements in any particular Congress was 277 (1995–1996), and the peak number of separation of powers statements was 245 (1991–1992). Most Congresses recorded significantly fewer such statements.
- Members of Congress rarely address the core principle of constitutionally limited federal authority. In no Congress did more than 33 statements refer to “enumeration of powers” or “enumerated powers.” Members of Congress are a bit more likely to use the more generic phrase “limited government,” but this principle is still overshadowed by other topics.

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- Congressional concern with judicial philosophy and controversial court cases ebbs and flows depending on the salience of those issues at the moment. At their most engaged, Members of Congress discuss “judicial activism,” “independent judiciary,” or “*Roe v. Wade*” as much as or more than limited government, but always less than rights and almost always less than even federalism or separation of powers.
- Recent presidential trends are also reflected in congressional discourse. In the period since 1989, the use of the terms “federalism,” “limited government,” or “enumerated powers” peaked during the 104th Congress (1995–1996). During the presidency of George H. W. Bush, the frequency of congressional statements using those terms reached or approached lows. In some cases, deterioration had already advanced in the late 1990s; then the discussion of federalism and enumerated powers fell by half again from the 106th Congress (1999–2000) to the 107th Congress (2001–2002). (See Table 2.)

In sum, although there continues to be persistent discussion of the Constitution in Congress, it is striking how rarely some topics are brought into the debate. Through mid-June 2008, Members of the 110th Congress had made 104 statements referring to federalism and 108 statements including a mention of separation of powers out of what must be many thousands or even tens of thousands of statements included in the *Congressional Record*. Yet nearly every domestic policy of the federal government contains implications for federalism, and the President and Congress during this period found themselves locked in a number of disputes that bore on the principle of separation of powers. Only 13 or 14 statements in a year and a half raised the issue of enumerated powers, even though they are (or ought to be) the font of every federal law—and this was a number double that of the previous Congress.

Factors Contributing to the Current Environment

A natural question is why constitutional discourse in elections and governing stands where it does today.

Clearly, there has been a broad trend of politicians and parties giving lower priority to the Constitution in their public arguments. That broad trend since the mid-1800s can be traceable to the end of the great debate over slavery and union, the rise of a pragmatic commercialism in the late 1800s, and the ascent of Progressive and New Deal philosophies that systematically downplayed the importance of strict adherence to the Constitution. This overarching atmosphere of American politics, in which “excessive” concern with the Constitution is often seen as archaic, is undoubtedly the most critical contributor to the deconstitutionalization of political rhetoric.

The evolution of communications technology may also have played a role in this decline. As the primary means of political communication have shifted from written missives to audiovisual media, it is possible that constitutional

Statements Using Constitutional Terms in the *Congressional Record*, 1989–2008

	Session of Congress									
	110th 2007– 2008	109th 2005– 2006	108th 2003– 2004	107th 2001– 2002	106th 1999– 2000	105th 1997– 1998	104th 1995– 1996	103rd 1993– 1994	102nd 1991– 1992	101st 1989– 1990
Constitution	1,876	2,000+	2,000+	2,000+	2,000+	2,000+	2,000+	2,000+	2,000+	2,000+
Federalism	104	171	110	98	211	197	277	122	165	123
Separation of Powers	108	182	125	106	137	164	178	152	245	156
Civil Rights	1,294	1,586	1,386	1,173	1,195	1,223	1,166	1,504	2,000+	1,584
Civil Liberties	426	561	419	322	224	217	239	289	412	311
Enumeration of Powers	1	0	4	0	0	0	1	0	1	0
Enumerated Powers	13	7	7	14	29	30	32	13	14	4
Limited Government	63	79	71	52	58	84	102	55	80	38
Judicial Activism	13	83	73	34	27	72	20	26	43	30
Independent Judiciary	47	135	93	29	65	74	52	33	65	76
<i>Roe v. Wade</i>	80	91	136	57	58	34	35	16	37	37

Table 2 • SR 22  heritage.org

argumentation has lost out to more emotive and visual themes. If this is true, the rise of the blogosphere may offer some hope for a return of written argument as a means of reaching the mass public.

The proclivities of individual political figures have, of course, been important. Ronald Reagan's commitment to a philosophy of constitutionalism and his evident understanding of the importance of articulating a constitutional vision explain the high level of constitutional discourse that he used when governing. The recent slippage of constitutional discourse on the Republican side is traceable to George W. Bush's decision to disavow the decentralizing preferences of his party in order to pursue an agenda of "compassionate conservatism."

There are, of course, a number of other actors who influence the electoral environment. They are "inputs" that help to determine the "output" of constitutional rhetoric (among many other things).

For example, few of the most influential interest groups are concerned with the Constitution. Of the top 20 political action committees, no more than two or three (the National Rifle Association and the American Trial Lawyers Association) can be considered primarily or even substantially interested in constitutional issues. Those organizations that do tackle constitutional issues focus almost exclusively on rights. These would include the NRA and Trial Lawyers, pro- and anti-abortion groups, People for the American Way, civil rights groups, the American Civil Liberties Union, and groups on the religious right (such as the Christian Coalition and Concerned Women for America) that are generally mobilized around controversial rights issues like school prayer, abortion, or same-sex marriage.

There are virtually no advocacy groups that take a serious interest in federalism, enumeration of powers, or separation of powers. Some think tanks such as The Heritage Foundation, the American Enterprise Institute, and the Cato Institute maintain a serious interest in constitutional issues generally and in structural questions in particular, but they can only offer good ideas—not election resources—to advance their principles.

Similarly, the major news media are clearly much more interested in rights than in structural questions. A Lexis/Nexis search of newspaper articles six months prior to April 2006 using 33 key search words across a broad range of constitutional issues had the following results:

- Civil rights, civil liberties, and abortion pulled up 1,000-plus articles (the search was stopped at 1,000).
- Gay marriage or same-sex marriage produced 500 hits.
- Constitutional amendments and Supreme Court appointments were each cited in 426 articles (clearly because this six-month period included the confirmations of Chief Justice John Roberts and Associate Justice Samuel Alito).
- The First Amendment appeared in 326 articles, *Roe v. Wade* in 241, and the International Criminal Court (a proxy for the issue of constitutional sovereignty) in 134.
- Federalism, one of the most important constitutional structures of the American Republic, was mentioned in only 116 articles, and many of those actually concerned federalism in Canada.
- No other searches produced more than 100 hits in a six-month period, including "war powers," "Kelo" (the notorious property rights case), "Electoral College amendments," "original intent," or "Supreme Court appellate jurisdiction."

Further illuminating this tendency, no journalist has asked a question about federalism in a presidential debate since 1960.

Much evidence points to a cohort of party activists who are more ideological and more polarized today than in 1960. This trend helps to explain both the increase in constitutional discourse in elections since 1960 and why it is that party platforms have more such discourse than alternative forms of campaign communication. Activists write the platforms—and are almost the only ones who read them.

Of course, public sentiment ultimately serves as the foundation for politics in America, and it also establishes its parameters. If a long history of polling data is to be believed, public opinion combines a high abstract veneration of the Constitution with relatively low levels of knowledge. Polls routinely show seven or eight out of every 10 Americans expressing admiration for the Constitution and attributing much of America's success to that document. At the same time, only around three in five know that there are three branches in the federal government.

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To the extent that voters demonstrate detailed knowledge about the Constitution, they do so in questions about rights much more than any other sorts of issues. This, too, helps to explain both the long-term decline of constitutional discussion in campaigns and the relative prominence of rights in the discussion that remains.

Of course, there may also be an effect in the other direction: Diminished discussion in high-level campaigns may reduce the constitutional literacy of voters. By neglecting to advance a serious discussion of the Constitution in campaigns and in governing, politicians may be contributing to this decline in constitutional literacy.

The 2008 Election and Prospects for Constitutional Rhetoric

Thus far in the 2008 presidential election, the Constitution has continued to be an important part of campaign rhetoric. However, the future prospects for constitutional discourse remain unclear.

A number of also-rans in both parties attempted to elevate constitutional issues to an important part of their campaigns. On the Republican side, Fred Thompson attempted to restore federalism to a prominent place in his party's rhetoric. Rudy Giuliani likewise attempted to mitigate his pro-choice position on abortion by calling for a revitalization of federalism on that issue. And the inimitable Ron Paul made a broad constitutional argument for limited government, a limited executive, and civil liberties. In doing so, he consistently garnered 10 percent to 15 percent of the vote in Republican primaries long after the nomination had been secured by John McCain.

On the Democratic side, Dennis Kucinich employed the Constitution in railing against what he considered to be George W. Bush's abuses of executive power. Hillary Clinton championed "a woman's right to choose," criticized a number of recent Supreme Court decisions and George W. Bush's two Supreme Court appointments, and emphasized the protection of voting rights. Senator Clinton more generally charged Bush with having shredded the Constitution and contended that the genius of our Constitution is that it was "crafted to expand as our hearts do, allowing each generation to lead us closer to that more perfect union." In a speech to the American Constitution Society, Clinton also defended constitutional rights to privacy as applied to national security and extolled the protections offered by the American system of checks and balances.

The two main contenders for the presidency, John McCain and Barack Obama, also returned to constitutional themes throughout the nominating season. Obama, a former lecturer on constitutional law, emphasized civil rights, repeatedly criticized the Bush White House for excessive executive reliance on secrecy, promised to "restore habeas corpus" and provide better executive-legislative coordination, and called for some flexibility for the states within the framework of his health care plan.

Obama's notable Philadelphia speech on race (entitled "A More Perfect Union") contained a perfunctory reference to the Constitution and discussed equal citizenship under law and civil rights laws. In a speech on "Renewing the American Economy," the Illinois Senator conducted an extended discourse on the political economy of Jefferson and Hamilton, saying that "The great task before our Founders that day was putting into practice the ideal that government could simultaneously serve liberty and advance the common good." Like Clinton, Obama offered a version of the "Living Constitution," contending in his announcement speech that "The genius of our founders is that they designed a system of government that can be changed." However, about three-fourths of the issue papers on his Web site lacked any constitutional reference, as did speeches entitled "Keeping America's Promise," "Reclaiming the American Dream," and "The Great Need of the Hour," which one could imagine containing such references.

For his part, McCain also called for state flexibility to experiment with different approaches to health care, which might be considered to be an allusion to federalism. He described *Roe v. Wade* as a flawed decision that should be overturned, promised to nominate judges who do not legislate from the bench, and declared that "In their wisdom, our Founding Fathers reserved for the states the authority and responsibility to protect and strengthen the vital institutions of our civil society." Addressing the Second Amendment, McCain proclaimed that the "right of law-abiding citizens to keep and bear arms is a fundamental, individual Constitutional right."

In campaign speeches in early 2008, McCain also laid out a broader constitutional vision, arguing that the purpose of government is to "protect the liberty and property of its citizens" and that government must "respect the rights, property, and opportunities of the people to whom we are accountable." At the Values Voter Summit, McCain

argued for freedom of religious expression, saying that “Judges should not legislate from the bench and actually restrict religious freedom by banning its expression in the public square.” He went on to offer advice to judges: “Don’t federalize issues not addressed in the Constitution. Don’t constitutionalize issues where federalism has a chance to work.”

In a speech to the Federalist Society, the Arizona Senator expounded on Madison’s view of human nature, limited government, the rule of law, individual rights, the enumeration of powers, the separation of powers, federalism, executive vs. congressional war powers, and judicial restraint and original intent. Conversely, about two-thirds of the issue papers on McCain’s Web site did not include any constitutional references.

What all of this would mean in the event of an Obama or a McCain victory cannot be known with certainty, but both of the 2008 major party nominees held forth the possibility that the Bush years would prove to be an aberration and that the parties would revert to their pre-Bush relationship. The putative Republican nominee was more focused on questions of structure and interpretation; the Democrat was more focused on rights. However, the campaign also may have illuminated the limits of this reversion; federalism in education was a non-issue for both candidates, in contrast with 2000 when both Bush and Albert Gore advanced centralizing education plans but nevertheless felt compelled to promise “local control of education.” Neither major party nominee seized on the Constitution as a general theme of his campaign, but the general election campaign seemed to promise considerable debate over judicial appointments, judicial philosophy, and controversial court decisions. As in the past, the out-of-power party was more interested in executive power controversies than was the party in the White House.

Restoring Our Constitutional Vision

Since 1840, the frequency and breadth of constitutional discourse, both in American elections and in governing, has declined noticeably. While some recovery has taken place since a trough in the 1960s, the recovery itself has suffered some reversal in the past eight years.

The current Administration’s relative lack of attention to constitutional concerns in campaigning has been mirrored by an equal lack of concern in rhetoric while governing, at least as measured in inaugural and State of the Union addresses. Indeed, in these rhetorical venues, President Bush has made less of an effort to expound on constitutional themes than any other President in modern times. Congress as an institution has almost certainly also suffered a loss of concern with constitutional argument, as has been noted by several scholars. Nevertheless, as in the presidency, conversation about the Constitution remains part of the political discourse of Congress.

It is not difficult to argue—and, indeed, many have argued—that President Bush’s troubles and the troubles of Republicans more generally are partially due to their loss of constitutional vision. To be sure, public perception about the war in Iraq and perceptions of corruption hurt the party badly in 2006, but Republicans were also hurt by a growing perception that they had come to see power as an end in itself. By November 2006, it was no longer clear to many voters what Republicans stood for or why they should be entrusted with power.

Arguably, the Democratic Party is able to function perfectly well without a coherent philosophy of government. It is a party whose main task is to hold together its political coalition of identity groups by distributing public resources to them. Republicans, on the other hand, have long depended on a philosophy to hold them together and motivate them. If they fail to articulate a public argument on behalf of that philosophy, they are reduced to a bidding war with Democrats that they cannot win.

It is almost certainly no mere coincidence that the years of Republican electoral ascendancy were years when Republicans led a broad resurgence of constitutional discourse in American politics. It can also be no coincidence that the Republican “brand” has suffered considerable damage during years when a Republican President backed away precipitously from that approach, aided and abetted by a Republican Congress that had long lost the constitutional perspective that catapulted it to ascendance in 1994.

For the moment, there is a vacuum left by the current President’s inattention to constitutional principles. Democrats might fill it with Obama’s high-altitude rhetoric about rights. Libertarians in the form of Ron Paul and Bob Barr seek to fill it with an alternative conception of the proper role of government. A long-term GOP comeback will

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depend partly on the ability of Republicans to fill that vacuum themselves by reconnecting specific issues with a broader constitutional vision.

For instance, it will be easier to advance a free-market health care plan (or to block a big-government one) if the debate is elevated to a matter of constitutional principles. Americans want certain problems in the health care system solved, but it is doubtful that they want those problems “solved” in a way that does violence to key foundational principles of American political life. At the very least, some in the American public would pause before pursuing an immediate policy wish at the expense of the Constitution.

Likewise, Americans have come increasingly to value environmental protection. There will be little obstacle to massive new economic regulation and political centralization if Republicans fail to redefine the question as one of finding the best way to provide that protection without trampling on constitutional liberty. Indeed, Republicans will find themselves on stronger terrain on virtually every domestic policy issue if they insist on examining and protecting first principles as part of the policy discussion.

It is clear that presidential leadership is crucial to restoring a discourse of constitutionalism. As was shown in the mid-1990s, such a transformation cannot be led from Congress if the President is determined to prevent it. After 2000, Congress became more apathetic, and the President did nothing to revive the effort. Throughout, presidential leadership was lacking. This is not to say that Congress should throw up its hands and abandon discussion of the Constitution unless the President is actively supporting it, but it does mean that there are real limits to how far a revival of constitutional rhetoric (and action) can go in the absence of presidential leadership in setting the tone.

In any event, it is clear that in modern American politics, there are not many politicians in either party or in either elected branch of government who are naturally suited to thinking or talking in constitutional terms. In an earlier era, that conversation came naturally to those who inhabited the political world. After a century of progressivism and technocratic liberalism, the thinking and rhetoric of most American political figures is not naturally inclined in that direction. Reagan was an exception, but we have come to see how extraordinary he was and how difficult to imitate. And even Reagan was well-read and influenced by serious thinkers. He devoted time and attention to equipping himself for the task of rhetorical leadership on behalf of constitutional principles.

This means that conservatives who strive for the restoration of constitutional discourse must maintain an institutional capacity to inform and influence political figures. All of this renders The Heritage Foundation and similar institutions quite important. Heritage devotes no small commitment of energy and resources to developing the intellectual framework that policymakers need first to understand and then to expound upon the links between seemingly mundane policy questions and broad constitutional principles. Perhaps our constitutional discourse today, in both campaigns and governing, is not what it should be, but without The Heritage Foundation it would almost certainly be much worse. If America experiences a new surge of such discourse, it will almost certainly be thanks to Heritage and other institutions like it.