IS LAW? CONSTITUTIONAL CRISIS AND EXISTENTIAL ANXIETY

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To ask, "Is God?" appears to presuppose a being who perhaps isn't. . .and thus is open to the same objection as the question, "Does God exist?". . .but until the difficulty is pointed out it does not have the same propensity to confuse language with meaning and to conjure up a God who may have any number of predicates including omniscience, perfection and four-wheel-drive but not, as it happens, existence.

— Tom Stoppard, *Jumpers*[1]

[W]hereas the allotment of proper names rests only on an ad hoc convention, the extension of the general terms of any serious discipline is never without its principle or rationale . . . . When [it is asked], "We know that it is called law, but is it really law?", what is demanded—no doubt obscurely—is that the principle be made explicit and its credentials inspected.

— H. L. A. Hart, *The Concept of Law*[2]

INTRODUCTION

Scholars have raised (at least) two distinct specters of crisis in American constitutional law. The first is a potential crisis of doctrine: specifically, the worry is that constitutional doctrine has ceased to look like law. The doctrine is in disarray; one case contradicts another and some cases even contradict themselves. Of course, doctrinal muddles are nothing new, but now the mess

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1. TOM STOPPARD, JUMPERS 24 (1972).
2. H.L.A. HART, THE CONCEPT OF LAW 210 (1961).

is so bad that one of the country's leading constitutional scholars does not think it is possible to clean it up.[3]

A second concept of crisis focuses not on doctrine per se, but on the actions of institutions and officials within American government. Here, constitutional scholars have been interested in moments at which the Constitution fails to do what it is ostensibly designed to do: resolve disagreements, including disagreements between government institutions about their respective powers, without violence in order to ensure the possibility of "ordinary" politics.[4] On this account of crisis, the focus is less on judicial decisions than on the constitutional system itself. The worry is that the constitutional order is in crisis; it has reached a precarious spot from which it may change radically or topple altogether.[5]

These are two different accounts of crisis, each explored in more detail below, but the two accounts are related in that each implies profound constitutional disagreement.[6] Doctrinal crisis results when the official interpreters of the Constitution cannot agree on what it means, and when the interpreters' disagreement is so great that *their* interpreters—including scholars, lawyers, and lower court judges—cannot make sense of the doctrine. Institutional or systemic crisis results when the actors within the constitutional system disagree about their roles and authority and are willing to go to the mat to defend their competing interpretations.

3. *See* Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2d 291 (2005).

4. A contrast between "ordinary" politics and extraordinary moments is central to recent scholarship on constitutional crisis, and to the related concepts of "constitutional hardball" and "constitutional showdowns." *See, e.g.*, Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 710-11, 714 (2009); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 531-32 (2004) ("The term ordinary signals what we need to distinguish constitutional hardball."); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2096–99 (2002). Although Tushnet explicitly refers to Bruce Ackerman's distinction between ordinary politics and extraordinary moments of "higher" lawmaking, it does not seem to me that the ordinary/extraordinary line in these accounts of crisis corresponds to Ackerman's distinction. For further discussion, see *infra* note 32.

5. I use "constitutional order" as the term was introduced by Mark Tushnet—to describe "the set of institutions through which a nation makes its fundamental decisions over a sustained period, and the principles which guide those decisions." Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L REV. 29, 31 (1999).

6. On Levinson and Balkin's account, only a subset of constitutional crises—those they term "Type Three crises"—necessarily involve disagreement over the meaning of the Constitution. But Type Three crises appear to be the only ones that occur with any regularity. *See* Levinson & Balkin, *supra* note 4, at 738–40.

If the talk of crisis stems from the presence of profound disagreement, we should ask whether there is something distinctive about contemporary constitutional disagreement. Stark disputes over both doctrine and the scope of institutional power under the Constitution have occurred at many points in American history. If American constitutional law is in crisis now, it has been for a long time—perhaps since its inception. And if the notion of permanent crisis seems oxymoronic, it may be that "crisis" is not a very useful concept in the field of constitutional law.

Whether the concept of crisis is useful to American constitutional law or not, the *rhetoric* of crisis has surfaced often in recent years. The second part of this essay explores possible reasons for this rhetoric. It could just be that crisis talk sells papers (or places articles), and it should be noted that several academic commentators have raised the specter of crisis only to dismiss it.[7] Still, even if these commentators agree that the talk of crisis is a false alarm, what led anyone to raise this alarm now?

In the fact that the alarm has been raised, and even in the manner of its dismissal, we may find key insights into to contemporary American political and legal thought. In particular, in the discourses of crisis one may find traces of three forms of existential anxiety. The first, and most fleeting, is an anxiety about the continued existence of the nation itself. Such anxiety may have surfaced briefly after the attacks of September 11, 2001, and we still sometimes hear the rhetoric of existential crisis. Today, however, that rhetoric appears to be strategically deployed to defend preferred political outcomes; it does not seem that a genuine fear of imminent destruction survives on any large scale. All the same, it is worth considering the status of law in the face of threats to a nation's (or person's) survival.

A second form of existential anxiety—to my mind, the most interesting form—is an anxiety about the possibility of the rule of law itself. This anxiety might be the Pyrrhic victory of legal realism and its offspring, the critical legal studies movement. Though the CLS movement is now, in the words of one of its

7. At the January 2009 AALS panel for which the first draft of this paper was prepared, each panelist answered the titular question ("Is American Constitutional Law in Crisis?") in the negative. *See also* Michael J. Gerhardt, *Crisis and Constitutionalism*, 63 MONT. L. REV. 277, 277–81 (2002) (claiming constitutional law professors "live for crises" and "make [their] living[s] writing and talking about them," but then arguing that none of the recent developments labeled "crisis" actually was a crisis); Levinson & Balkin, *supra* note 4; Whittington, *supra* note 4.

founders, "dead, dead, dead,"[8] the more modest versions of realist claims about legal indeterminancy and the relation of law and politics are widely accepted in the academy.[9] As a consequence, it is increasingly difficult to develop legal, and intellectually honest, critiques of the actions of those who hold political power. And yet critiquing those in power is something that many members of the legal academy very much want to do. Hence, crisis.

Third, and most solipsistically, references to crisis in constitutional law scholarship could be produced by a kind of professional anxiety in the legal academy. Though I don't know if anyone in the academy will admit to this, we may be asking ourselves, "Constitutional theory: what is it good for?" and worrying that the answer is, "Absolutely nothing."[10] If we are not asking ourselves this question, we should be. Existential anxiety is not necessarily a bad thing. Indeed, it might be a moral responsibility.

In speaking of existential anxiety, I rely on two related but distinct usages of the word existential. In the simpler usage, existential can refer to the mere *fact* of existence. For example, references to "existential threats" to a nation typically conjure its potential destruction. A somewhat different usage invokes existentialism, a philosophical approach associated with thinkers such as Sartre and Camus, and is concerned less with the fact and more with the *meaning* of human existence.[11] As will become clear, contemporary discussions of constitutional crisis prompt questions of both the fact and the meaning of existence. We worry whether law exists, and we worry about the significance of what we do as lawyers, as legal academics, and as citizens of a constitutional democracy. In some cases, the worries may be silly handwringing, born of an overblown sense of self-

8. *See, e.g.*, Mark Tushnet, *Renormalizing* Bush v. Gore*: An Anticipatory Intellectual History*, 90 GEO. L.J. 113, 113 (2001) (attributing the claim that CLS is "dead, dead, dead" to Duncan Kennedy).

9. As first put almost 25 years ago, and reiterated much more recently, "we are all [legal] realists now." Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1152 (1985); *see also* Michael C. Dorf, *After Bureaucracy*, 71 U. CHI. L. REV. 1245, 1249 (2004) (quoting Peller). Of course, the indeterminancy widely acknowledged by law professors is regularly—and unconvincingly—denied in judicial nomination hearings.

10. Perhaps Pierre Schlag is finally getting under the skin of the legal academy. *See, e.g.*, Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803 (2009); Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

11. *See* WALTER KAUFMANN, EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE (1968).

importance. But the worries may also reveal deep and worthwhile questions about the nature and function of law.

I. NOTHING NEW UNDER THE SUN?

A. DOCTRINAL "CRISIS"

We hear whispers of a crisis, or a crisis that might be. What would produce such claims with respect to American constitutional law? There is no shortage of American constitutional *decisions*—the Supreme Court and lower federal courts continue to hear cases and announce outcomes. And each decision comes accompanied by reasons, a written opinion that explains the relevant constitutional provisions, gives some account of prior decisions in the area, and purports to apply principle to fact to reach an outcome. The institutions remain in place, more or less. The Constitution has not been burnt, the U.S. Reports have not been lost, the courthouses are still open, and the bench is still peopled with men and women who seem to understand themselves as jurists and their activity as the application of law. Whence the talk of crisis?

The specter of crisis is not produced by a change in the number or even the basic form of constitutional decisions. Rather, the worry arises among those who believe that law, properly so called, is something more than a collection of decisions. The worry arises among those who try to reconcile each new decision with prior cases in the same area, and especially among those whose reconciliation efforts are by necessity more comprehensive than the Supreme Court's own discussions of precedent. I speak of academics and, to a lesser but still significant extent, lower federal court judges. Members of these groups are increasingly critical of the Supreme Court for its seemingly contradictory opinions and for its lack of clarity on many central questions of constitutional law. With respect to the establishment clause, free exercise, equal protection, the commerce clause, and still other constitutional provisions, the Court has (it is charged) created a mess that leaves lower court judges and law professors increasingly uncertain about their ability to give a positive, descriptive account of what the law is.[12]

12. In the contexts of the First Amendment, equal protection, due process, and the commerce clause, doctrinal disorder is widely noted and well documented. In a context

Among legal academics, one of the most widely publicized indictments of constitutional doctrine came in April 2005, when Laurence Tribe announced that he was suspending work on the second volume of his constitutional law treatise for the foreseeable future. Tribe explained that "conflict over basic constitutional premises" had reached a "fever pitch," and as a consequence, this was (is) a "peculiarly *bad* time . . . to propound a Grand Unified Theory—or anything close."[13] According to Tribe, "we find ourselves at a juncture where profound fault lines have become evident at the very foundations of the enterprise, going to issues as fundamental as whose truths are to count and, sadly, whose truths must be denied."[14] In particular, Tribe emphasized the fault lines around constitutional issues of literal life and death—the "deep and thus far intractable divisions" over questions such as whether the Constitution protects rights to abortion or assisted suicide.[15] These divisions "between wholly different ways of assessing truth and experiencing reality . . . have become too plain—and too pronounced—to paper over by routine appeals" to constitutional procedures, the separation of powers, and methods of interpretation.[16] Tribe's account is one of crisis in the ordinary sense of that word—a critical moment of instability, a time when the continued existence of law-as-we-know-it is at stake.

Tribe is right to identify disputes over issues such as abortion and assisted suicide as the result of profound disagreements over what counts as truth. The question, though, is whether the fact of deep disagreement is new, whether the early twenty-first century is in fact a *peculiarly* bad time to attempt a grand theory of constitutional law. After all, the decision that Tribe labels (probably accurately) most controversial—*Roe v. Wade*[17]—is hardly a recent one. And though Tribe claims that the fissures

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less often scrutinized by constitutional law scholars, consider then-Judge Michael McConnell's frustration with the Supreme Court's recent Sixth Amendment sentencing decisions:

> The *Booker* opinions, taken in tandem, do not get high marks for consistency or coherence. If that seems a presumptuous thing for an inferior court judge to say about the product of his superiors, I take comfort in the fact that eight of the nine Justices agree with me that [at least one of two prongs of the Sixth Amendment jurisprudence] is wrong, and the two do not fit together.

Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 677 (2006).

13. Tribe, *supra* note 3, at 292–93 (emphasis in original).

14. *Id.* at 295.

15. *Id.* at 302.

16. *Id.*

17. 410 U.S. 113 (1973).

Roe opened have only recently become sufficiently "prominent as to preclude unified treatment," he acknowledges that in 1973, the year *Roe* was decided, John Hart Ely denied that the decision was "constitutional law" at all.[18] The Supreme Court's assisted suicide decisions are somewhat more recent, but the deep normative and epistemological disagreements found in the public reactions to *Washington v. Glucksberg*[19] and *Vacco v. Quill*[20] were also present several years earlier in the reactions to *Cruzan v. Director, Missouri Department of Health*.[21] Such disagreements relate to the nature of the questions at stake in those decisions, not to a particular historical moment. If Tribe had looked for evidence of constitutional disagreements that reflect "different ways of experiencing reality," he could have found it long before 2005.[22] Indeed, Tribe's image of contested truths recalls Robert Cover's "Nomos and Narrative"[23]—and Cover published his account of fundamental legal disagreements, polynomia, and "jurispathic" courts more than 20 years before Tribe diagnosed the present crisis. Already in 1983, Cover did not understand himself to be diagnosing a new condition; nineteenth century "antislavery constitutionalism" was one of his central examples of alternative legal understandings.[24]

As Tribe is unquestionably aware, the appearance of doctrinal disorder is not itself new. For as long as there have been professors of American constitutional law, there have been scholarly efforts to identify doctrinal inconsistencies and then to reconcile them. Rather, Tribe's abandonment of his treatise seems to reflect a newly developed suspicion that there is no order obscured by the disorder. If this suspicion is correct, doctrinal inconsistencies cannot be resolved by returning to constitutional text or restatements of constitutional principles. If the suspicion is correct, constitutional disagreement goes all the way down,

18. *Id.* at 296; *see* John Hart Ely, *The Wages of Crying Wolf*, 82 Yale L.J. 920, 947 (1973) (arguing that Roe v. Wade "is *not* constitutional law and gives almost no sense of an obligation to try to be").

19. 521 U.S. 702 (1997).

20. 521 U.S. 793 (1997).

21. 497 U.S. 261 (1990).

22. "To maintain its credibility, the law must accurately reflect the reality it purports to govern. Measured by this standard, the Court's recent 'right to die' decision, *Cruzan v. Director, Missouri Department of Health*, was an abysmal failure." Tom Stacy, *Death, Privacy, and the Free Exercise of Religion*, 77 CORNELL L. REV. 491, 491 (1992).

23. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); *see* Tribe, *supra* note 3, at 300 n.1.

24. Cover, *supra* note 23, at 35–40.

and there is no distinctively legal way to resolve those disagreements.[25] Maybe our constitutional faith has begun to falter.[26] Maybe the crisis is an existential one—a deep anxiety that we are not tied to the mast after all, that we never were so tied, that constitutional law, *qua* law, doesn't even exist.

I explore this possibility further in Part II; for now I note only that it too is not really new: for decades, strands of legal scholarship have emphasized the indeterminancy of legal rules and corresponding doctrinal incoherence, and many scholars have made related claims about the inseparability of law and politics.[27] Conceptually, indeterminancy and disagreement are separate issues, but one always makes the other more evident. It may be true that constitutional rules are presently too indeterminate to settle political disagreements, but this situation is not new. There has long been widespread acceptance of the view that constitutional decisions are at least *under*determined.[28] Indeed, the cries of "doctrinal chaos" might even appear somewhat disingenuous, coming from an academy that has for years largely rejected legal formalism and emphasized the political, contingent nature of many legal decisions. Has not the role of law professors always been to digest what the judge ate for breakfast? Maybe the new crisis is not the discovery of indeterminancy, but the academy's indigestion.

B. INSTITUTIONAL OR SYSTEMIC "CRISIS"

Distinct from (but related to) the concern about doctrinal chaos, a second discourse of constitutional crisis looks beyond judicial opinions to institutions in all branches of government. Several leading scholars have recently considered failures or near-failures of the constitutional system in terms of "constitutional crisis," "constitutional hardball," or "constitutional showdowns." For the most part, the scholars have rejected the possi-

25. *See* Tribe, supra note 3, at 304–05.

26. *Cf.* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

27. For a few of the classic arguments in this vein from legal realists, see Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

28. *See, e.g.*, Lawrence B. Solum, *On the Indeterminancy Crisis: Critiquing Legal Dogma*, 54 U. CHI. L. REV. 462, 494–95 (1987); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). As Tribe put it, the earlier editions of his treatise did not assume constitutional determinancy, but only "determinate indeterminancy." "There were no provably right answers . . . but there were clearly wrong ones." Tribe, *supra* note 3, at 303.

bility that we are now at a point of constitutional failure—so even if we think of crisis in systemic or institutional terms, it does not seem that the concept of crisis distinguishes our present moment.

Defining a constitutional crisis proves a bit tricky. If we specify the concept narrowly enough, real-world examples become few and far between. Keith Whittington has identified two types of constitutional crisis: the crisis of operation, "when important political disputes cannot be resolved within the existing constitutional framework,"[29] and the crisis of fidelity, "when important political actors threaten to become no longer willing to abide by existing constitutional arrangements," or when they "systematically contradict constitutional proscriptions."[30] Depending on how these definitions are interpreted, nearly everything—or nearly nothing—might be a constitutional crisis. For example, if the thesis of constitutional underdeterminancy is correct, if many or most constitutional disputes cannot be resolved by the Constitution itself, then one could argue that crises of operation happen very frequently. But Whittington rejects the claim that the mere appearance of indeterminancy constitutes a crisis: "To the extent that existing political actors, such as the judiciary, can resolve apparent textual contradictions or indeterminancies without appeal to extraordinary measures, then they need not lead to constitutional crises."[31] In its invocation of a distinction between the ordinary and the extraordinary, Whittington's account is consistent with other recent scholarly accounts of crisis (or related constitutional instability).[32] And once the concept of crisis is properly limited to moments of *extraordinary* dispute or infidelity, we find that "actual constitutional crises have been exceedingly rare . . . at the national level."[33]

To Whittington's categories of operational and fidelity crises, Jack Balkin and Sandy Levinson add a third category: radical

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29. Whittington, *supra* note 4, at 2101.

30. *Id.* at 2109–10.

31. *Id.* at 2101 n.29.

32. A somewhat similar distinction between ordinary constitutional decisions (by government officials) and extraordinary "constitutional moments" (in which a large portion of the populace is involved in constitutional decisionmaking) is developed by Bruce Ackerman in 1 WE THE PEOPLE: FOUNDATIONS (1991) and 2 WE THE PEOPLE: TRANSFORMATIONS (1998). Though the terminology is similar, Ackerman's account is different from the line that Whittington, and other scholars, draw between ordinary and extraordinary to elucidate constitutional crisis. The "extraordinary" moments that mark constitutional crises are not characterized by mass participation.

33. Whittington, *supra* note 4, at 2119.

disagreement among government actors about their respective power under the Constitution.[34] Here again, the difference between the ordinary and the extraordinary is key. "The Constitution is designed to keep political disagreements—including disagreements about the Constitution's proper interpretation—within the bounds of normal politics. In type three crises, the Constitution fails at this task, and one or more of the parties moves outside the ordinary boundaries of politics in an effort to win."[35] More than Whittington, Levinson and Balkin offer guidance on how to distinguish ordinary politics from the extraordinary: "extraordinary" struggles appear to be those that involve force or violence, those in which people put bodies (their own or others') on the line. Military force, by national or state forces, mass demonstrations, civil disobedience, and "taking to the streets" are all marks of type three crises.[36] In a type three crisis, we see "extraordinary forms of protest beyond mere legal disagreements and political protest: people take to the streets, armies mobilize, and brute force is used or threatened in order to prevail."[37]

The suggestion that politics doesn't ordinarily involve the use of brute force merits further consideration, but first, note that the line between the ordinary and the extraordinary also shapes Mark Tushnet's account of "constitutional hardball" and Eric Posner and Adrian Vermeule's account of "constitutional showdowns." Tushnet describes constitutional hardball as "political claims and practices . . . that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings."[38] Constitutional hardball can be perilous, Tushnet suggests, and we should prefer the "ordinary

34. Levinson & Balkin, *supra* note 4, at 738. Levinson and Balkin divide their schema into type one, type two, and type three crises. A type one crisis, in which "political leaders publicly claim the right to suspend features of the Constitution in order to preserve the overall social order," *id.* at 721, corresponds to Whittington's crisis of fidelity, *see id.* at 721 n.53. And the type two crisis, which occurs when everyone abides by the Constitution, but doing so "fails to resolve an existing political crisis or leads to disaster," corresponds to Whittington's crisis of operation. *See id.* at 729 & n.87.

35. *Id.* at 739.

36. *Id.* at 741, 746.

37. *Id.* at 714.

38. Tushnet, *supra* note 4, at 523. "Pre-constitutional understandings" are those that "go without saying" and are for that reason "hard to identify outside times of crisis." *Id.* at 523 n.2. There is a danger of circularity in this account. Hardball is defined in terms of challenges to pre-constitutional understandings, but we can identify those pre-constitutional understandings only when people are playing hardball.

means of politics."[39] Posner and Vermeule describe a "constitutional showdown" as a "disagreement between branches of government over their constitutional powers" that ends in one branch's acquiescence and creates a precedent.[40] The difference between the ordinary and the extraordinary is again critical, though underspecified here. Posner and Vermeule assert (by "fiat") a distinction between the *acquiescence* that ends a showdown and a *compromise* that avoids one, but they do not elaborate the difference between acquiescence and compromise, and they acknowledge that "the line between a showdown and ordinary mechanisms of constitutional development is a fine one."[41] The extreme form of a showdown—when each branch asserts its power and refuses to acquiesce—is a "full-blown constitutional crisis" and "[n]o ordinary political or legal means exists for resolving the dispute."[42]

If these theories of crisis, hardball, and showdowns are to help us decide whether we are now in a moment of constitutional crisis, two observations are in order. First, of the scholars just discussed, only Tushnet seems to argue that the present moment is distinctively close to crisis; others suggest that the term "constitutional crisis" is overused (or lament the fact that "constitutional showdowns" don't occur often enough).[43] And second, as already suggested, these recent accounts of crisis, hardball, and showdown all invoke a distinction between ordinary politics and extraordinary conflict. To ascertain whether we presently face constitutional crisis, it seems that we must know how to distinguish between politics as usual and politics by other means.

39. *Id.* at 551. Tushnet refers to Ackerman's distinction between the ordinary and extraordinary, but he does not seem to draw this distinction in the same manner as Ackerman.

40. Posner & Vermeule, *supra* note 4, at 997.

41. *Id.* at 998.

42. *Id.* at 1005.

43. *See* Tushnet, *supra* note 4, at 523 (arguing that "there is a sense in which [constitutional hardball] is new"). *See also* Levinson & Balkin, *supra* note 4; Whittington, *supra* note 4. And Tushnet may be able to make the case that constitutional hardball is distinctive to the present period only by blurring the distinction between "constitutional normalcy" and "constitutional transformation." *See* Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIPIAC L. REV. 579, 597 (2008). Posner and Vermeule do not directly address the question whether constitutional showdowns are more prevalent today, but they do argue that the supply of showdowns is probably less than the "socially optimal rate and distribution of showdowns." Posner & Vermeule, *supra* note 4, at 1023-38.

It is war, of course, that is often said to be the continuation of politics by other means.[44] The aphorism often prompts debates about whether war and politics, despite their different means, aspire to the same goals. But rarely, if ever, do those who invoke the aphorism specify what distinguishes the means of politics from the means of war, and almost never do we consider the possibility that war and politics use the same means. We contrast, for example, "political solutions" with military ones. In common perception, politics as usual—the "ordinary means" of politics that are contrasted to the extraordinary struggles at times of crisis—is non-violent. That is certainly consistent with Levinson and Balkin's emphasis on "brute force" as the distinctive means of constitutional crisis.

Is the use of force really so extraordinary? There is a fascinating literature on the place of violence in domestic politics, and on the possibilities that war is politics by other means or that politics is war by other means.[45] I leave aside this literature here.[46] For purposes of diagnosing constitutional crisis, I will say only that the characterization of ordinary politics as an alternative to force and violence is a characterization that needs to be defended. The characterization usually goes unquestioned, but this is only because most contemporary political thought ex-

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44. The one-liner has enjoyed considerably more attention than Clausewitz's actual argument, which is somewhat opaque. "War is a mere continuation of policy by other means . . . . War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means." CARL VON CLAUSEWITZ, ON WAR 119 (Anatol Rapoport ed., J.J. Graham trans., 1982).

45. "[P]eace is the continuation of war by other means." Hannah Arendt, *On Violence*, *in* CRISES OF THE REPUBLIC 111 (1972). Arendt is describing the position of the author of the *Report from Iron Mountain*, a pamphlet published in 1967, allegedly authored by U.S. government officials but later determined to be the work of Leonard C. Lewin, a freelance author. The *Report* considers the possibility of permanent peace and concludes that peace is against the interests of the United States. A few years after the publication of the *Report* and Arendt's essay *On Violence*, Michel Foucault taught a course at the Collège de France in which he sought to examine the hypothesis that "politics is the continuation of war by other means." *See* MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE, 1975-1976, at 15 (David Macey trans., Mauro Bertani & Alessandro Fontana eds., 2003). Before either Arendt's *On Violence* essay or Foucault's lectures, Carl Schmitt had considered Clausewitz's claim in THE CONCEPT OF THE POLITICAL (George Schwab trans., 1996).

46. As do many authors who invoke the phrase. For example, John Yoo has long favored the "by other means" formulation in the titles to his work, but the works themselves do not explain his understanding of the phrase. *See, e.g.*, JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006); John Yoo, *The Continuation of Politics By Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996). For a somewhat different use of the phrase that implicates the broader questions of this essay, see Pierre Schlag, *Law As the Continuation of God By Other Means*, 85 CAL. L. REV. 427 (1997).

cludes punishment and policing from its conception of politics. Similarly, a great deal of contemporary constitutional theory all but ignores the provisions of the Constitution that address the state's use of force against its own citizens.[47] The Fourth, Fifth, and Eighth Amendments have been excised from mainstream constitutional law and are instead covered in separate criminal procedure or criminal law courses. This outcome seems necessary as a matter of pedagogical and textbook economy, but it may have had unfortunate consequences for constitutional theory. It may leave constitutional scholars blind to ordinary violence, to the fact that legal decisions put bodies on the line every day.[48]

Of course, I do not mean to equate the use of force to police and punish with the sorts of violence that the scholars label constitutional crisis—the Civil War, or the deployment of federal troops to enforce racial integration in public schools. The broad category *violence* can encompass many different means. But the distinctions between these events and "ordinary" politics turn on much more than the presence or absence of brute force. And when we think of the functions of the U.S. Constitution, we should not count among its achievements the elimination of violence from politics. Indeed, as I argue elsewhere, the Constitution as currently interpreted provides little regulation of the use of force.[49] That claim is unsurprising to many scholars and teachers of the Fourth, Fifth, and Eighth Amendments, but it should be emphasized in mainstream constitutional law scholarship as well.

To return to the question of crisis: whether we think in terms of doctrinal indeterminancy or institutional conflict, it seems difficult to make the case that the United States is presently at a distinctive moment of constitutional crisis. If we are in crisis now, we have been for a long time. If a crisis is simply a turning point, a moment at which things could go in either of two or more very different directions, then constitutional law is always in crisis. If a crisis is more than a mere turning point, but a

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47. *See* Louis D. Bilionis, *Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law*, 52 UCLA L. REV. 979 (2005) (describing, and criticizing, the tendency to segregate criminal justice cases from the rest of constitutional law). Bilionis notes that Balkin and Levinson decried this segregation in 1998, only to continue it in their own work. *See id.* at 985 n.32.

48. *Cf.* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

49. Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353 (2008).

point at which continued survival is in real jeopardy, then American constitutional law is rarely if ever in crisis. Of course, one could give an account of crisis that included some historical moments and not others if we focused on *threats* to survival—but then the question would be how great the threat of collapse must be for a conflict to count as a crisis. I suspect that present threats to the American constitutional system are relatively slight, but I will leave that discussion for the first section in Part II.

II. THREE FORMS OF ANXIETY

This much is clear: scholars of American constitutional law—and many commentators beyond the academy—*speak* of constitutional crisis. In the remainder of this Essay, I explore possible reasons for the perception and discourse of crisis. Crisis talk may stem from one or more forms of existential anxiety—about personal or national survival, about constitutional law itself, or about the role of the constitutional law professor. To examine these anxieties (even the third) is not mere omphaloskepsis, I hope: it may help us treat the crisis or dispel the worries.

A. EXISTENTIAL THREATS AND SELF-PRESERVATION

Perhaps references to constitutional crisis reflect a deeper existential crisis—namely, a sudden awareness of our own vulnerability, and a worry that life in the United States as we know it may soon cease to exist. The attacks of September 11, 2001, and the subsequent "war on terror" may be perceived as an existential threat to the nation as a whole and to each of its citizens. An existential threat prompts talk of constitutional crisis not so much because the Constitution dies if the nation does (though that seems true), but because of a strongly held intuition that law must yield to the necessities of self-preservation. If national survival is at stake, the Constitution means little.

The most familiar expression of this idea today is probably the quip that the Constitution is not a suicide pact.[50] It's a memorable quip, and a misleading one. The Constitution is not a

50. *See, e.g.*, RICHARD POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006); *cf.* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."); Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

homicide pact, either. Unfortunately, the "suicide pact" line is too often invoked to imply that Americans have only two choices: they may insist on constitutional fidelity and thereby doom themselves, or they must accept whatever course of action the commander-in-chief chooses, however murderous it may be. This binary should be questioned for several reasons: because there is dubious empirical support for the claim that constitutional fidelity now will lead to national destruction or great risks thereof; because we are not always sure what counts as "constitutional fidelity," anyway; because it is far from clear that total deference to the executive is the best means of ensuring our own survival; and perhaps most importantly, because we are creatures who care not just about being preserved, but about preserving ourselves.[51]

At any rate, it seems unlikely that a sense of existential danger is the primary source of references to constitutional crisis today. First, the intense fear that followed the September 11 attacks has faded considerably. But more importantly, when they are convinced that self-preservation is really at stake, jurists and constitutional theorists tend to find ways to make law accommodate self-preservation. For this reason, we rarely if ever see a political leader announce that he must violate the Constitution to save the nation—crises of fidelity are more or less nonexistent.[52]

So present references to crisis are probably not provoked by the belief that the Constitution must be ignored in order to preserve the nation. The more typical argument runs something like this: A given defensive (or aggressive) measure is necessary to survive, and fortunately, the Constitution permits it. Consider, for example, Justice Scalia's dissent in *Boumediene v. Bush*.[53] The rhetoric of existential threat is at full volume: "America is at war... I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today."[54] The majority's extension of the right of habeas corpus to Guantanamo detainees "will almost certainly cause more Americans

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51. *See* Alice Ristroph, *Professors Strangelove*, 11 GREEN BAG 2d 245, 258–59 (2008).

52. *See* Whittington, *supra* note 4; Levinson & Balkin, *supra* note 4, at 721–23; *id.* at 724–25 ("American constitutional history after George Washington's inauguration has produced no unequivocal examples of type one crises.... [O]ur tradition of constitutional interpretation allows such flexibility in making constitutional arguments that no President ever need admit that he or she is disobeying the Constitution.").

53. 128 S. Ct. 2229 (2008).

54. *Id.* at 2294 (Scalia, J., dissenting).

to be killed."[55] On this account, denying those rights was necessary as a matter of survival. But Scalia did not rest his argument on a claim of necessity. Instead, he argued that the denial of habeas rights was also required by existing constitutional doctrine: some American deaths "would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional republic. But it is this Court's blatant abandonment of such a principle that produces the decision today."[56] Scalia's account is consistent with other defenses of controversial national security policies. We rarely hear the argument that the administration has violated the Constitution but was compelled by necessity to do so. Instead, the claim is that the Constitution permits the administration's measures.[57] Necessity does not supercede law; it defines the scope of the president's legal authority. And, on this account, the president himself determines what is necessary for national survival. The upshot is that there's no such thing as an unconstitutional president, and it's a good thing too.[58]

A second notable decision from the October 2007 Term suggests that for individuals as well as for the nation, law is more likely to accommodate than be superceded by the needs of self-preservation. I speak of *District of Columbia v. Heller*, the instantly (in)famous decision identifying an individual right to bear arms under the Second Amendment.[59] So far, most academic commentary on *Heller* has focused on its methodology—there is no shortage of defenders or critics of Justice Scalia's originalism

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55. *Id.*

56. *Id.*

57. For another illustration, consider the exchange between Justices Scalia and Thomas in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Both dissented from the plurality holding that a U.S. citizen held as an enemy combatant must be given an opportunity to challenge his detention. Scalia argued that the plurality did not go far enough; he reasoned that the government was required to file criminal charges against the detained citizen or to suspend the writ of habeas corpus. 542 U.S. at 554 (Scalia, J., dissenting). Thomas worried that if charging or suspension were really the only two options permitted by the Constitution, a crisis of operation could arise: Congress may "have to choose between acting unconstitutionally and depriving the President of the tools he needs to protect the Nation." 542 U.S. at 594 (Thomas, J., dissenting). Thomas concluded that the Constitution must permit other options beyond suspending the writ and charging the detainee. To this, Scalia replied that whenever security was so greatly threatened that indefinite detention was necessary, the conditions for the suspension of the writ of habeas corpus would be met. 542 U.S. at 578 n.6 (Scalia, J., dissenting). Though they disagreed about what necessity required in this particular case, both Justices agreed that whatever necessity demanded, the constitution would permit.

58. This argument may be understood as a narrower version of Richard Nixon's infamous claim that "[w]hen the President does it, that means that it is not illegal." The narrower claim is that when the president acts on his good-faith determinations of national necessity, his actions are never unconstitutional.

59. 128 S. Ct. 2783 (2008).

in the majority opinion. More interesting than the interpretive methodology, in my view, is this substantive implication of the majority opinion: it appears to constitutionalize a right of personal self-preservation. Before *Heller*, the Supreme Court had never held that the Constitution required states to recognize a right of self-defense.[60] But according to the *Heller* majority, self-defense is no mere "subsidiary interest" of the Second Amendment right to keep and bear arms, but "the *central component* of the right itself."[61] The Second Amendment codified a preexisting "inherent right" to self-defense.[62] And though Justice Scalia does not explain in detail the source of this "inherent right," others have suggested that any system of law must acknowledge the basic human desire for self-preservation and accommodate a right of self-defense.[63]

In my view, *self* more than *defense* is the critical term. What is fascinating about the *Heller* majority opinion—and what made its arrival in 2008, when American leaders still referred to the "war on terror," so intriguing—is its unrelenting insistence on a right of *self*-defense as opposed to a mere entitlement to be defended. There is a difference, recognized in the majority opinion, between preserving oneself and being preserved by someone else. *Heller* insists that individuals have a right to be agents of their own preservation; it is not sufficient for the state to promise an effective constabulary or military. (Indeed, the historical materials discussed in *Heller* seem to raise the possibility that the constabulary or military will create the threat against which the individual needs arms to defend himself.) So, while *Heller* was

60. But a four-Justice plurality opinion authored by Justice Scalia had raised the possibility that the right to self-defense may be "fundamental." Montana v. Egelhoff, 518 U.S. 37, 56 (1996).

61. *Heller*, 128 S. Ct. at 2801 (emphasis in original).

62. *Id.* at 2817.

63. "In one sense, the right of self-defense is beyond the law. A legal system which failed to recognize the right . . . could have no valid claim on the allegiance or obedience of those it sought to bring within its sway. But in recognizing the right, the law brings self-defense within its ambit; while it may not deny the right, it may and must, of course, delimit it." David Gauthier, *Self-Defense and the Requirement of Imminence*, 57 U. PITT. L. REV. 615, 616 (1996). One could interpret the claim that the law must recognize self-defense as the individualist version of the claim that the Constitution (or the social contract) is not a suicide pact. Thomas Hobbes offers one of the most sophisticated—and uncompromising—defenses of a pre-legal, pre-political individual right to self-preservation. As I show elsewhere, the commitment to a right of self-preservation has surprising implications in Hobbes—most notably, a right to resist even legitimate, authorized punishment. *See* Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601 (2009).

surely not written to appease civil libertarian critics of the war on terror, the opinion nevertheless offers a libertarian alternative to the suggestion that when faced with threats to personal security, individuals must sit back and let their leaders decide how to defend them.

There are important distinctions, of course, between existential threats to *nations* that warrant defensive actions by political leaders and threats of harm or death to *individuals* that warrant the use of force in self-defense. Even if law must accommodate a right to individual self-defense, it does appear to regulate that right in meaningful ways—by requiring that threats be imminent, for example, or by permitting deadly force only in response to deadly threats.[64] That is, the law's prohibition of private violence does yield to necessity, but the law itself also offers a framework to evaluate individuals' claims of alleged necessity. It is difficult for law to regulate a nation's use of force in the same way. We can ask a jury to determine whether an individual had a reasonable belief that her life was in danger, but it's not clear who we should ask to evaluate whether a government had a reasonable belief that the nation's survival was at stake.[65] This difference, between regulating individual persons and regulating governments, leads to a second form of existential anxiety. When law must yield to official claims of necessity *and* has no way to cabin or evaluate those claims, we have reason to doubt about the ability of law to regulate governments. Those doubts produce in turn doubts about the relevance of constitutional law itself.

B. RESISTING THRASYMACHUS

One reason to care whether law is in "crisis" concerns our own expectations of the function of law. A possible achievement is to offer an alternative to violence—as we saw in Levinson and Balkin's account of the Constitution as enabling nonviolent dispute resolution.[66] This might be called the anti-Thrasymachus view of law. Early in Plato's *Republic* (before Socrates has tamed him), a young man called Thrasymachus describes justice as "the advantage of the stronger."[67] The claim is that might

64. *See* Gauthier, *supra* note 63; Ristroph, *supra* note 63.

65. For an illuminating examination of "self-defense" arguments by nations in the context of self-defense doctrine, see Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 216 (2004).

66. *See* Levinson & Balkin, *supra* note 4, at 714–15, 721.

67. PLATO, THE REPUBLIC 338c (R.E. Allen trans., 2006); *cf.* THUCYDIDES, THE

makes right, and Western political and legal thought has produced many efforts to prove Thrasymachus and his heirs wrong. If law distinguishes right from might, then it becomes important to say what law is, and to show that it exists. Hence, many ongoing jurisprudential debates about the criteria for a valid and functional system of law (including worries about legal indeterminancy) are motivated by worries about arbitrary power and violence.[68] To show Thrasymachus to be mistaken, we want to show that the rule of law is really different from the rule of (the strongest) men.

In legal theory, we could view John Austin's positivism—law as commands backed by threats of punishment—as a descendant of Thrasymachus's claim.[69] Here, I want to examine briefly one of the most influential, and most plausible, efforts to show that law is something more and different from the commands of a gunman: H. L. A. Hart's response to Austin. Hart framed his discussion around the question, "What is law?".[70] But perhaps, as the Stoppard passage that opened this essay suggests, beginning with this question led us to conjure an image of law with various predicates that do not, as it turns out, include existence. A second form of existential anxiety, one that I suspect shapes present talk of crisis, is the anxiety that Thrasymachus and Austin were right and law, if it is anything more than command and force, does not exist.

For my purposes here, the critical features of Hart's account are the rule of recognition and the internal point of view. Since, in most of *The Concept of Law*, Hart takes law's existence for granted, it is helpful to look at the passages where law's existence, or at least the existence of a particular form of law, is up for grabs. In his classic discussion of the question, "Is international law really law?", H. L. A. Hart deployed the concepts of a rule of recognition and the internal point of view to conclude that international law was at most in a state of transition toward fully legal law, moving toward law properly so called but certainly not yet there.[71] At the time he wrote *The Concept of Law*,

PELOPONNESIAN WAR 351 (Richard Crawley trans., 1982) ("[T]he strong do what they can and the weak suffer what they must.").

68. *See* Nicola Lacey, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 N.Y.U. L. REV. 1059, 1072–78 (2008).

69. Austin claimed that sanctions were "the key to the science of jurisprudence." JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 13 (1954).

70. HART, *supra* note 2, at 1.

71. *Id.* at 230-31.

Hart believed that international law departed from domestic (or "municipal") law in that it lacked a widely accepted rule of recognition and in that states could not be said to take the internal point of view toward international obligations. (Hart's argument has been challenged by many contemporary scholars of international law, but that particular dispute need not occupy us here.[72]) For law *qua* law to exist, Hart argued, there must be a rule of recognition under which the authoritative status of other rules was accepted or denied, and the officials who would apply the rule of recognition must themselves take the internal point of view toward it. That is, the officials needed to view the rule of recognition as a binding, authoritative guide to their own decisions.

Suppose Hart was right and the rule of recognition and the internal point of view are conditions for the existence of law. Two questions arise: what is the rule of recognition for constitutional law, and who must hold the internal standpoint toward that rule? The Constitution itself initially seems a candidate for the rule of recognition, though the fact that the Constitution must itself be interpreted leads some theorists to amend this account and say that the rule of recognition must include authoritative statements of the meaning of the Constitution, under prevailing interpretive standards.[73] As for the internal point of view, we might hope that *all* state officials would take this point of view toward constitutional rules.[74] In other words, we might hope that every state actor would comply with the U.S. Constitution because it is the Constitution, not simply to avoid injunctions, or judicial invalidation of legislative action, or liability under 42 U.S.C. § 1983. But Hart's theory does not demand universal adherence to an internal point of view. Even if legislators and other public officials complied with First or Fourth or

72. For example, Harold Koh has argued that transnational actors do actually take the internal point of view toward international law. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2659 (1997).

73. *See* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1129–33 (2003) (describing the U.S. Constitution as setting forth the conditions under which enactments will count as law, and thus as analogous to a Hartian rule of recognition); Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 659–60 (1987). *See also* THE RULE OF RECOGNITION AND THE UNITED STATES CONSTITUTION (Adler & Himma eds., forthcoming 2009).

74. To use Matthew Adler's phrase, the question is the identity of the "recognitional community." Matthew Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 726 (2006). As Adler notes, answers to the question "who must hold the internal point of view vis-à-vis the rule of recognition" vary from "all judges," to "all officials," to "all citizens."

Fourteenth Amendment doctrine only to avoid invalidation or § 1983 liability—even if these public officials were the equivalent of Holmes's bad man—Hart might find that constitutional law still existed in a meaningful sense so long as the judges applying constitutional rules believed *themselves* to be bound by a constitutional rule of recognition.[75]

Here is a possibility, one I believe we must take seriously and one that prompts anxiety about the existence of constitutional law itself: there is no common rule of recognition toward which judges and other officials take an internal point of view.[76] Individual judges may adhere to their particular understandings of the rule of recognition—the Constitution as interpreted by proper originalist methods, for example, or the Constitution as elucidated by popular understandings. But the fact that individual state actors follow their own rules of recognition in good faith does not satisfy Hart's account of law, and it does not provide a satisfying alternative to Thrasymachus. (There is no reason, on the might-makes-right account, that the mighty cannot hold the good faith belief that they are pursuing a common good or acting pursuant to rule-governed authority. What matters is that their power is *in fact* traceable to their superior strength.)

There is reason for academic observers to doubt the existence of a single rule of recognition in American constitutional law. There are too many core interpretive disputes, as discussed in Part I, and it is now widely accepted that constitutional rules are at least underdeterminate. Should there be doubt about this claim, consider this feature of constitutional law textbooks: they include majority and dissenting opinions, and questions after each case frequently ask the reader which opinion was more persuasive. Those questions are not posed as rhetorical. For most constitutional decisions, we can say, it could have been otherwise. With a few votes switched, with a different line-up of Justices, the same precedents (and in some cases, the same interpretive methodology) could have produced a different outcome. Moreover, these suspicions of indeterminancy or underdetermi-

75. How we interpret Hart depends in part on whether we focus on the original text of *The Concept of Law* or the Postscript. *See id.* at 731–32 (discussing the competing interpretations of Hart).

76. Adler argues that U.S. constitutional law operates with multiple rules of recognition. *See id.* at 746. Jeremy Waldron goes further, suggesting that constitutional law doesn't need a rule of recognition at all. *See* Jeremy Waldron, *Who Needs Rules of Recognition?* (NYU Sch. of Law, Pub. Law Research Paper No. 09-21, 2009), *available at* http://ssrn.com/abstract=1358477.

nancy are not the unique province of the academy. Think of the discussions of Supreme Court appointments in presidential elections. Many voters, law professors or not, understand their vote for president to be also a vote for a certain kind of Justice *and for certain kinds of constitutional outcomes.* Discussions of Supreme Court appointments are often framed in terms of judicial methodology—"I will appoint judges who are faithful to the text of the Constitution"—but that language may be more a matter of decorum than of real constitutional faith.

Judges, of course, are not ignorant of the charges of indeterminancy or of the politicization of judicial appointments. And it seems possible that the erosion of constitutional faith has reached the judiciary itself.[77] I claim no special insight into judicial psychology, but it seems implausible that the reasons for constitutional skepticism—the discussions of underdetermined rules, the contingency of outcomes based on 5-4 votes, and the great attention to swing justices such as Sandra Day O'Connor or Anthony Kennedy—have not influenced judges themselves. Here again it seems worthwhile to consider dissenting opinions. Justice Scalia's polemics come to mind immediately; he has often accused his colleagues of acting lawlessly.[78] Yet he keeps his post and continues to participate in a system that treats as law the determinations of five (potentially lawless) Justices. It is possible, I suppose, that Justice Scalia's dissents express earnest outrage, that he is shocked (shocked) by decisions like *Lawrence v. Texas*[79] and *Boumediene.* It is possible that he believes himself to be the last best hope of constitutional law properly so called. But it seems more likely that he shares the skepticism of academic observers of the Court.

Though one can't help but wonder whether judges are still constitutionally devout, I should emphasize here that my argument does not turn on a claim that judges are acting in good or bad faith. Individual judges may well take the internal point of view, in Hart's terms, and strive faithfully to apply the principles they recognize as law. But it seems clear that American judges do not all hold the internal point of view toward a *single, shared* rule of recognition, given the nature of disagreements among judges themselves. If there are multiple rules of recognition, varying from judge to judge, then legal outcomes will depend on

77. *See* RICHARD POSNER, HOW JUDGES THINK (2008).
78. One example is his *Boumediene* dissent discussed above.
79. 539 U.S. 558 (2003).

which judge is empowered to make the critical decision, and Thrasymachus is not so far off the mark.

Contemporary judicial disagreement is profound, and it is not just a matter of Justice Scalia's flair for colorful rhetoric. Consider *Scott v. Harris*, the recent decision granting summary judgment (on the basis of qualified immunity) to a police officer who had rammed a passenger car during a high-speed chase, causing an accident that left the driver a quadriplegic.[80] Like most use-of-force opinions, the decision applies a deferential Fourth Amendment standard that gives police officers wide leeway. What is unusual about *Harris* is that, because the case arose as a civil suit under 42 U.S.C. § 1983, the critical question (whether the driver, Victor Harris, posed a sufficient threat to others' bodily safety such that the use of deadly force was reasonable) was nominally a jury question, and at summary judgment, the court should have taken the facts in the light most favorable to the non-moving party—the injured driver. Thus, in earlier use-of-force cases that reached the Court as § 1983 claims, the Court articulated the Fourth Amendment standard and then remanded the case to the trial court.[81] But in *Harris*, the Court had access to videotapes of the chase recorded by cameras on the dashboards of the police vehicles involved.[82] In the view of the eight-Justice majority, the videotape "spoke for itself": it made Harris's threat to the public so clear that no reasonable juror could conclude that the officer's use of force was unreasonable.[83] Accordingly, the Supreme Court found the officer to be entitled to summary judgment.[84]

Doubtless there are many instances in which a court grants summary judgment to one party though non-judicial observers believe a reasonable juror could find for the other party. *Harris* is of particular interest, though, because the "reasonable juror" who might have found in favor of Victor Harris was clearly visible to the majority—in fact, this juror had a spokesman on the Court. Justice Stevens, the lone dissenter in *Scott v. Harris*, viewed the same videotape and found it to confirm the factual findings of the district court (which had denied the police offic-

80. 127 S. Ct. 1769 (2007).
81. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 397–98 (1989).
82. *Harris*, 127 S. Ct. at 1775.
83. *Id.* at 1775 n.5.
84. *Id.* at 1779.

er's motion for summary judgment).[85] Though Justice Stevens was careful not to base his argument on an actual determination of the substantive Fourth Amendment question (chiding his colleagues for doing just that and thereby acting as "jurors" rather than judges),[86] he viewed the video evidence and explained how one might conclude, perfectly reasonably, that Scott had used excessive force.[87] In order for the eight Justices in the *Harris* majority to believe their own opinion, they would have to conclude that Justice Stevens lived outside the realm of reason.

Harris is nominally a dispute about what reasonable jurors could conclude, rather than a direct argument about the meaning of a particular constitutional provision. But the two reactions to the videotape should call to mind Larry Tribe's worry that American constitutional law is plagued by "deep and thus far intractable divisions between wholly different ways of assessing truth and experiencing reality."[88] It is not just abortion and assisted suicide that reveal profound disagreement about what is true and real. A videotape that "speaks for itself" in the eyes of eight Justices says something entirely different to the ninth.

Looking beyond the judiciary, consider the consequences of constitutional disagreement and constitutional indeterminancy for other government officials and for would-be critics of those officials. Earlier I noted that with sufficient constitutional indeterminancy, there's no such thing as an unconstitutional president. A more extreme version of this argument is that with sufficient legal indeterminancy, there's no such thing as illegality. When John Yoo wrote the Office of Legal Counsel memos that defend practices formerly known as torture, he was simply doing to bans on torture what critics had long argued it was possible to do for any law: he was trashing them.[89] This was the spawn of CLS put to work in the OLC; deconstructions on the left are now deconstructions on the right.[90]

85. *Id.* at 1781–82 (Stevens, J., dissenting).

86. *Id.* at 1781 (Stevens, J., dissenting) ("[E]ight of the jurors on this Court reach a verdict that differs from the views of the [lower court judges]."); *see also id.* at 1782 ("my colleagues on the jury saw . . .").

87. *Id.* at 1781–83.

88. Tribe, *supra* note 3, at 302.

89. *Cf.* Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

90. *Cf.* Dorf, *supra* note 9, at 1247 ("[T]he association of skepticism with the political left lasted only so long as courts were more conservative than legislatures. When the Warren Court invoked abstract constitutional language in support of racial equality, the rights of criminal suspects, and sexual freedom, the left and right switched positions.").

And that, of course, is cause for anxiety among those who would like to argue that George W. Bush or members of his administration acted illegally. As I suggested in the Introduction, this may be the Pyrrhic victory of critical legal studies: If the crits were correct, then there is no distinctively legal form of critique. About torture, indefinite detention, warrantless wiretapping, and so on, we can say *I don't like it* or *it doesn't correspond to my vision of the good*, but we cannot say *it's illegal*. To argue that the Bush administration violated the rule of law, we need to believe that the rule of law exists. But for 30 years or more, we have found reasons to doubt that it does.[91]

Perhaps it will seem that I am overstating the influence of legal realism and critical legal studies, or the doubts about law's existence. I'm willing to entertain those possibilities, but I do want to emphasize that the focus is on constitutional law. It's easy enough to believe in law when we see it applied and enforced by figures of authority in a recognized hierarchy. That is, the sentencing judge or the prison warden can believe in law—he has applied it himself. And the criminal should believe in law—he has felt its force. But these examples illustrate Austinian law: commands backed by force. What remains elusive, on my account, are laws that are truly laws given to oneself, and especially law given by a state to itself.[92] That is why, in Part I of this essay, I suggested that brute force is a poor candidate to distinguish ordinary politics, or ordinary legal decisions, from extraordinary moments of crisis. What would be truly extraordinary is not the use of force, but its absence: a system of law truly based on consent and independent of sanction.

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91. Others have made similar observations about the consequences of deeply critical legal scholarship. Roscoe Pound warned that legal realism would threaten Progressive reform efforts by undoing law itself. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931). Twenty-five years ago, Paul Carrington warned of the dangers of "legal nihilism" and suggested that nihilists had no place in the academy. *See* Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984). Much more recently, Mike Seidman has claimed that events in the United States after September 11 "provide a stunning confirmation of the claims critical constitutionalists made during the last century," and yet the critics find it difficult to develop a legal critique of the Bush administration. Louis Michael Seidman, *Critical Constitutionalism Now*, 75 FORDHAM L. REV. 575, 583–84 (2006).

92. Jack Goldsmith and Daryl Levinson offer a similar descriptive account of the difficulty of regulating *states* through law. *See* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

The Constitution, in theory, is a law given unto oneself. By this I mean not simply that the Founders gave the Constitution to future generations, but that each successive generation must give the Constitution to itself: each generation must adopt the internal point of view toward the Constitution in order for it to be effective. Even once we have accepted the written text as authoritative, all but the strictest constructionists acknowledge that many meanings can plausibly be extracted from that text. (And even the strict constructionists must acknowledge that as a factual matter many meanings have been extracted; they deny only the plausibility of those varied readings.) Any law given unto oneself requires what Hart called the internal point of view, and what one more cynical might describe as self-delusion: it requires a belief that one is bound though one could at any minute walk away. It is possible, I think, that we have outwitted the Constitution: that we have become too clever, too quick to notice indeterminancy, even too post-modern to believe ourselves bound.

C. CONSTITUTIONAL THEORY: WHAT IS IT GOOD FOR?

A third possible explanation for contemporary references to crisis is professional malaise. It could be, as I suggested earlier, that after too many years of chewing what judges had for breakfast, professors have lost their appetites. It could be that the problems of originalists and historicists and popular constitutionalists don't amount to a hill of beans in this crazy world. And if these possibilities have not crossed the law professor's mind, they probably should.

We might consider again Larry Tribe's explanation of his decision to stop work on his treatise of American constitutional law. There are two questions of meaning there, one of which Tribe confronts directly and the other which he brushes off quickly. Most obviously, there is the search for constitutional meaning, as Tribe acknowledges, a search that cannot be concluded within the Constitution's own text. "I see no escape from adopting some perspective . . . external to the constitution itself from which to decide questions not indisputably resolved one way or the other by the text and structure . . . ."[93] Tribe goes on to wonder where these extra-constitutional criteria come from, and "who ratified the meta-constitution that such external crite-

93. Tribe, *supra* note 3, at 304–05.

ria would comprise?".[94] Supreme Court Justices (and other judges) must struggle with these questions, given "the public authority that they have the enormous responsibility and privilege to wield."[95] But Tribe need not. He can simply decline to finish the treatise.

If he declines to finish the treatise, though, we can't help asking ourselves what was at stake, and what remains at stake. If the law professor lacks the responsibility of a judge, is his constitutional theory just an amusing hobby? What was the point of the constitutional law treatise, or of other efforts to discern coherent principles of constitutional law? The significance of a treatise is the question of meaning that Tribe brushes off quickly: he says a treatise is an "attempt at a synthesis of some enduring value" and insists that his decision is not based on doubts about whether constitutional treatises are ever worthwhile.[96] But Tribe's letter leaves the "enduring value" of a treatise rather underspecified, and it is possible that current references to constitutional crisis in the academy stem from uncertainty about such questions of value.

Is constitutional theory good for absolutely nothing? Only if we believe that the effort to resist Thrasymachus is futile or pointless. Constitutional theory is a species of legal and political theory, and the most intriguing forms of such theory are produced by worries that law and violence are too closely intertwined.[97] Thus I suggested at the outset of this essay that existential anxiety is not always to be regretted, cured, or mocked. Such anxiety may be an important indication that we have noticed the ways in which Thrasymachus seems right, and we still care enough to try to prove him wrong.[98]

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94. *Id.* at 305.

95. *Id.*; *see also* POSNER, *supra* note 77, at 79–80 (describing "the imperative duty of judges to decide").

96. Tribe, *supra* note 3, at 295.

97. In response to Pierre Schlag's latest indictment of legal scholarship, two commentators note that the enterprise is meaningless only if we are indifferent to arguments about justice, or the claims of moral and political theory. *See* Richard H. Weisberg, *Daniel Arises: Notes (Such as 30 and 31) from the Schlagaground*, 97 GEO. L.J. 857, 861–64 (2009); Robin West, *A Reply to Pierre*, 97 GEO. L.J. 865, 874–75 (2009).

98. In other words, existential anxiety seems preferable to existential nihilism. The contrast is clear in Camus's "Letters to A German Friend," in which he explains that his recognition of the absence of ultimate meaning led him not to nihilistic violence but rather to the pursuit of justice and human solidarity:

> For a long time we both thought that this world had no ultimate meaning. . . . You supposed that in the absence of any human or divine code the only values were those of the animal world—in other words, violence and cunning. . . .

CONCLUSION

After so much talk of crisis and anxiety, consider an illustration from the dramatic genre. Tom Stoppard's play *Jumpers* features a troupe of philosophy professors who double as acrobats: "Logical positivists, mainly, with a linguistic analyst or two, a couple of Benthamite utilitarians . . . lapsed Kantians and empiricists generally . . . and of course the usual Behaviorists . . . a mixture of the more philosophical members of the university gymnastics team and the more gymnastic members of the Philosophy School."[99] The Jumpers seem to practice what we would now identify as post-modern nihilism: One shoots and kills another, then conceals the murder with cheerful aplomb. Against these intellectually and physically adroit colleagues, the clumsy and old-fashioned Professor George Moore struggles to defend "the irreducible fact of goodness,"[100] the possibility of a "moral conscience," and the claim that "there is more in me than meets the microscope."[101] "Is God?" Moore wonders. He can neither shake nor defend his faith.

Law schools, I think, are filled with moral sympathizers to Professor Moore who possess the skills of modern-day Jumpers.[102] The current discourse of crisis is the latest manifestation of an old struggle between faith and doubt, and it is not one that we will resolve. On one hand, we have observed too much to believe (in law) unquestioningly. And on the other hand, we are determined to have law, even if we must make it ourselves. There was at least a smidgen of truth in John Finnis's claim that scholars of critical legal studies were "disappointed . . . absolutists."[103] But it is not just crits that are disappointed when they look for law and see nothing. Few scholars of any stripe want to vindicate Thrasymachus. All of this is just to reiterate the difficulty, and perhaps the necessity, of

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> Where lay the difference? Simply that you readily accepted despair and I never yielded to it. Simply that you saw the injustice of our condition to the point of being willing to add to it, whereas it seemed to me that man must exalt justice in order to fight against eternal injustice . . . . I merely wanted men to rediscover their solidarity in order to wage war against their revolting fate.

Albert Camus, *Letters to A German Friend: Fourth Letter*, *in* RESISTANCE, REBELLION, AND DEATH, 27–28 (Justin O'Brien trans., Vintage Books 1974).

99. STOPPARD, *supra* note 1, at 50–51.

100. *Id.* at 55.

101. *Id.* at 67.

102. Here again, Pierre Schlag has diagnosed at least the first half of this condition. Schlag, *supra* note 46. Schlag displays little empathy for those who yearn for God, or law.

103. *See* J. M. Finnis, *On "The Critical Legal Studies Movement"*, 30 AM. J. JURIS. 21, 37 (1985).

giving a law unto oneself. If constitutional law did not exist, it would be necessary to invent it.