THE CONSTITUTION AS LAW

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One who comes this far down in the alphabetical list expects that most—perhaps all—of the interesting things will already have been said. For example, it seems to me clear—and more than one of the other speakers has already said—that the posing of the topic is replete with false oppositions. The primary one, of course, is the distinction between hard law and mushy law, that is, between real law and constitutional law. Another version of that opposition counterposes private law and public law; a third opposes the rule-like approach of real law with the standard-like approach of constitutional law.

I suppose the first and most obvious thing to say is that these oppositions are plainly false. Constitutional law is neither harder nor more mushy, neither less rule-like or more standard-like, than any other area of law. Consider for example the obviously rule-like structure of the contemporary constitutional law of libel; there's a whole set of categories each with its own regulatory rule. But perhaps libel is an unfair example, because it is too closely derivative of the private law of libel. So consider instead the overall structure of the first amendment, which, as Fred Schauer has acutely argued, increasingly resembles something like the Uniform Commercial Code's structure. Or, finally, consider the often derided structure of equal protection law, which as developed by the Supreme Court is reasonably rule-like. These examples may be misleading, though, to the extent that they suggest that constitutional law is indeed like real law in being hard-edged and rule-like. So, one ought to introduce all those areas of real law—negligence, the duty of fair dealing, unconscionability—that are pervasively mushy and standard-like. And, I should add, the coexistence of rules and standards is inevitable. We can start with a rule-like doctrine—say *Miranda*—which, as is true of all rules, is over- and under-inclusive in terms of its purposes. That generates tension as soon as cases arise where the *Miranda* rule applies but its purposes do not, or when cases arise outside the scope of the rules where its purposes would be served by

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applying them. The result will be the production of a series of exceptions and subrules, which eventually becomes rationalized in terms of some standard that balances the interests overall.

In setting law off against justice—as in the criticism of the perfect Constitution and the like—the opposition between constitutional law and private law is also false. Here the answer seems to me to come from looking at the work of one of the most prominent perfectionists around, Ronald Dworkin. I assume, and Dworkin's occasional essays suggest, that an important motivating factor in Dworkin's work is to justify a certain approach to constitutional law. Yet, *Law's Empire*, which all the reviewers describe as Dworkin's first sustained and connected argument about jurisprudence, takes as its primary examples problems in private law; for example, his criticism of patchwork legislation lacking integrity takes off from an example of arbitrariness in products liability law. So, it would seem, if there is perfectionism around, if some people think that there ought be no distinction between law and justice, those concerns are just as important in discussions of real, nonconstitutional law as they are in discussions of mushy constitutional law.

Even so, there is no doubt that the false oppositions capture a sense prevalent in the legal academic profession that there's something different about constitutional law. Certainly we have all heard responses to discussions of perfectionism in constitutional law, or the "there's no there there" theme in critical legal studies, in which colleagues who teach tax or estates and trust say, "Since constitutional law is your speciality, what you say must be true, but over here, where we do real law, none of that seems right." I want to develop three reactions to that sort of comment.

The first is that, deep in my heart, I know—and I think that the colleagues who make the response know—that it is untrue. I believe, and I think that they know, that all of the moves that demonstrate the indeterminacy of constitutional law can be made in any other area of law. Part of the problem is that the "indeterminacy" argument has been widely misunderstood. No one denies that some firm predictions can be made about how some subset of problems in constitutional law will come out in the foreseeable future—the classic example being the thirty-five-year-old presidency. In just the same way tax lawyers can make firm predictions about how some subset of problems in tax law will come out. The bite of the indeterminacy thesis is that, just at the point when a claimant is backed up by some amount of political clout, at that point the claimant's constitutional arguments will be experienced as taking on enough cogency to introduce indeterminacy into an area that

theretofore had been thought completely settled. Perhaps we might take the renewed constitutional attack on rent control laws as an example. In the tax arena, surely it must be the case that, just at the point that a claimant is backed up by some amount of economic and political power, that claimant's arguments about how the tax law should be interpreted will begin to be experienced as more cogent than they had been.

The second response goes to the issue of "a government of laws not of men (and women)." Perhaps people experience a difference between the mushiness of constitutional law and the hardness of real law because they think they accept the tenets of positivism. It is not so much that private law *is* hard and rule-like, but that it *could be* if we wanted it to be. Any time judges introduce mushiness into private law, we—that is, a legislature—can eliminate the mushiness by adopting a new set of rules. If private law begins to be the product of a government of men and women, we can make it a government of rules. The contrast with constitutional law is obvious; there the judges are under no real constraints, and if they decide that they like standards and mush because that is what maximizes their power, very little can be done about it.

Yet, there are some obvious problems with this sense—it really doesn't amount to a thought—that the government of laws can be sustained in private law in a way that it cannot be sustained in constitutional law. The first is that it has an unrealistic premise about the constraints that a system of rule-like laws places on judges. It may be the case that, at least for a while (a qualification necessary because of the first response I offered above), a single rule can constrain judges. But there is no such thing as a single rule. All rules are parts of a complex rule system, in which it is always relatively easy to locate a counterrule to set off against the one suggested as constraining the judge. Sometimes these counterrules are pejoratively characterized as exceptions to the main rule, but their existence is indisputable, and they loosen the constraints that the main rule places on the judge.

The second problem with the sense that judges can be constrained in private law by legislative action is that it doesn't at all solve the problem of having a government of men and women rather than a government of laws. After all, our ordinary sense of legislatures is precisely that it is perfectly all right for them to be unprincipled and arbitrary, drawing lines simply on the basis of what the balance of political forces is at any particular time. To the extent that the arbitrariness of a mushy system of private law is thought to be limited by the availability of legislative revision, to

that extent we are counting on a government of men and women—legislators—to constrain a different government of men and women—judges. That is hardly a solution.

The third response to the expressed sense that constitutional law is different from private law moves away from the analytical points I have made so far, into the domain of intellectual history. Unfortunately, I don't have a good enough sense of discussions about the distinction between public and private law in, say, the 1920s, to be really confident about what I am about to say. With that caveat, I do get the sense that the opposition between constitutional law and real law is a relatively recent phenomenon. Perhaps like Dworkin, the Legal Realists of the early part of this century were probably motivated by concern about the Supreme Court's constitutional decisions, but their jurisprudence focused on demonstrating the mushiness of private law. That is, they apparently did not experience private law as distinctively rule-like when compared to constitutional law. The question, then, would be when and why did the distinction emerge?

In discussions of constitutional law, whenever one identifies a relatively recent phenomenon one attributes it to the Warren Court—so much so that the abortion decisions of 1973 are regularly characterized as really being Warren Court decisions despite the fact that Chief Justice Burger and two other Nixon appointees were in the majority. I suggest that the emergence of false oppositions between real law and constitutional law also has something to do with the Warren Court, but in a fairly complicated way.

Here's how I would tell the story. We entered the Warren Court era with a complex legacy from Legal Realism. At least among academics, the prevalent view was that all legal decisions, including constitutional ones, had to be reached by a process of balancing competing interests. Justice Black purported to believe in rules, but, we were assured by Charles Black and Kenneth Karst, he really didn't mean it; it was just that pretending there were rules was a better way of defending civil liberties than openly balancing the interests. The Warren Court advanced a particular legal-political program, fulfilling and to some degree extending the program of the New Deal coalition. It had done so by means of a combination of rules and interest balancing. Then, when the New Deal coalition collapsed in the late 1960s, its opponents had two targets that had historically been intertwined: the substantive decisions of the Warren Court, and its characteristic methods of rules and mushy interest balancing. They could undermine the Warren Court's decisions indirectly by arguing, first, that the Warren Court's rules were

vulnerable to the usual criticism of rules as being over- and under-inclusive in terms of their purposes, and second, that mushiness is not real law, so that the substantive decisions weren't real law either. The first argument characterizes the conservative attack on the Warren Court's doctrines about standing and political questions—for example, as articulated in Justice Harlan's 1968 dissent in *Flast v. Cohen* and the Court's 1984 opinion in *Allen v. Wright*—as well as in the erosion of the *Miranda* rules by the creation of exceptions like the public safety exception. The second argument is, in some ways, our topic today. (It should be obvious, incidentally, that the two arguments are fundamentally inconsistent. By abandoning a rule-like approach to standing in *Allen v. Wright*, the Court necessarily adopts a mushy standard-like approach, which commentators like Gene Nichol have criticized as basically lawless.)

Thus, I suggest, the false opposition between constitutional law and real law emerged at the point when opposition to the program of the Warren Court became politically respectable, and was one of the vehicles of that opposition. There are undoubtedly other, probably deeper reasons. For example, the false opposition plainly seeks to give more value to real, that is, private law than to mushy, that is, constitutional law, and it may be that valorizing private law in that way is one expression of a general conservative valorization of the private sphere.

If the preceding analysis is correct, I end up in the uncomfortable position of thinking that perhaps I ought not to have addressed the topic of our meeting, because to have addressed it is to have accepted the intellectual credibility of the implicit claims of the false oppositions, which is to say, to have accepted a political program that I reject.