

OF JUDICIAL SUPREMACY AND ACADEMIC INADEQUACY

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The ultimate supremacy or exclusivity of the Supreme Court's constitutional interpretations has been a matter of incremental but predictable accretion—a sort of multi-phase leviathan. Almost two centuries after *Marbury*, the horrifying reductio of this incrementalism has finally come to pass. In *Kazmier v. Widmann*—a decision that could bring constitutional scholarship as we know it to a halt—the Fifth Circuit has bluntly declared that “the support of even so prominent an academician [as Professor Laurence Tribe] is an inadequate substitute for rigorous adherence to recent Supreme Court precedent.”¹

Ouch! Laurence Tribe “inadequate”? At first, one might surmise that the court's declaration is just a slip of the pen, a momentary indiscretion, and not a considered rule of constitutional authority. So benign an interpretation, however, is belied both by the specificity and by the absoluteness of its phrasing. Undaunted, one might then insist that obviously it relates only to Professor Tribe. Expressio unius, right? Wrong. As the greater includes the lesser, one can only assume that the Fifth Circuit's rule applies not only to Tribe, but that the rest of us, too, are also “an inadequate substitute for rigorous adherence to recent Supreme Court precedent.” To be sure, the Supreme Court itself had previously suggested as much, remarking in 1995 that a congressional enactment may still be unconstitutional even if “supported by *all* the law professors in the land . . .”²

There's no way around it. The writings of constitutional scholars may no longer be on par with Supreme Court opinions. At best

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1. 225 F.3d 519, 531 (5th Cir. 2000).

2. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) (emphasis added); see also *Velasquez v. Frapwell*, 160 F.3d 389, 394 (7th Cir. 1998) (noting that certain Supreme Court decisions on the Eleventh Amendment “take one side of the historical controversy and by doing so have made it law, whatever law professors or even professional historians may say”), vacated in part on other grounds, 165 F.3d 593 (7th Cir. 1999) (*per curiam*).

such a rule is disheartening; at worst it portends the demise of legal academic writing. How difficult it already is, on a sunny summer day or a cool autumn evening, to sit in our home offices and churn out legal scholarship. Now we must toil away knowing full well that these writings, the very fruit of our labor, will not be binding on the courts—that our status as constitutional interpreters has in effect been reduced to that of the states and of Congress, if not lower.³

Even more troubling is that the Fifth Circuit's rule appears to be unfounded. To my knowledge, not one article of legal scholarship—in contrast to some of these very same judges' decisions—has ever been reversed or overruled or formally abrogated, even on other grounds. (Preempted, rejected, and criticized perhaps—but never reversed, overruled, or abrogated.) Of course, by the same token, not one article of legal scholarship to my knowledge has ever been affirmed, even summarily or by an equally divided court.

Is there no silver lining to this dark judicial cloud? Two possibilities suggest themselves. First, the careful reader will note that the court's language leaves open the possibility that academic writings might still be an adequate substitute for *less-than-rigorous* adherence to recent Supreme Court precedent.⁴ In turn, we must now make every effort, when sending reprints to judges, to target those who do not rigorously adhere to Court precedent. The Association of American Law Schools could even develop a list of such judges and include it as an appendix in the next directory.

Second, the passage is by all indications a dictum and therefore nonbinding in future cases, even those in which the authority of Laurence Tribe is directly implicated. To the extent that it is precedential, moreover, it should have no binding effect on federal courts outside of the Fifth Circuit, let alone on state courts, tribal courts, courts of foreign nations, or multinational tribunals. And, being merely the view of two panel judges (one judge dissented), in time it may very well be overruled by the en banc Fifth Circuit.⁵

3. Unlike governmental interpretations, academic interpretations may not enjoy a presumption of correctness. State courts, moreover, have been deemed to “have the same responsibility and occupy the same position” as lower federal courts in the field of constitutional interpretation. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970) (quoting *State v. Coleman*, 214 A.2d 393, 403 (N.J. 1965)). Apparently, however, we are assumed to be more legally fluent than the “ordinary citizen[.]” *Taylor v. Kentucky*, 436 U.S. 478, 484 (1978), or “the average school board member.” *Wood v. Strickland*, 420 U.S. 308, 329 (1975) (Powell, J., concurring in part and dissenting in part).

4. The careful reader will also note that academic writings might still be an adequate substitute for rigorous adherence to *not-so-recent* Supreme Court precedent.

5. It is interesting to note that the dissenter, Judge Dennis, has previously voiced

Let us hope, in the end, that the *Kazmier* rule is repudiated outright for the simple reason that it is wrong. As the Clinton impeachment proceedings so convincingly demonstrated, and as our scholarship so often presupposes, law professors are obviously vital to discerning the true meaning of the Constitution. By denying scholars their rightful interpretive authority, *Kazmier* upsets the delicate constitutional equilibrium and needlessly invites a showdown between the federal bench and the legal academy. (Indeed, one shudders at the prospect of having to impose on judicial nominees an ideological litmus test concerning the authority of legal scholarship in constitutional interpretation.) By rejecting the *Kazmier* rule, and thereby resisting the leviathanical temptation towards judicial supremacy, courts can in turn restore this equilibrium and ultimately spare the American people from yet another constitutional crisis.

his support for according interpretive authority to legal scholarship. See, e.g., *Krummel v. Bombardier Corp.*, 206 F.3d 548, 553 (5th Cir. 2000) (Dennis, J., dissenting) (arguing that “[t]he majority’s decision should not be considered a valid precedent . . . because it radically departs from . . . [among other things] the virtually unanimous view of . . . legal scholars”); *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 328 (5th Cir. 1999) (per Dennis, J.) (chastising the district court and appellee for “pay[ing] no heed to any of the other authorities contrary to their position, such as the decisions of the United States Supreme Court and the learned works of civil- and common-law scholars”).