

## PUTTING THE LAW BACK IN CONSTITUTIONAL LAW

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Taking a cue from Professor Laurence Tribe's decision to abandon the third edition of his constitutional law treatise,<sup>1</sup> the organizers of this symposium have asked us to address whether constitutional law is in crisis. I am agnostic on that question, although I think that there has been a turn in the wrong direction. But if there is a crisis, I know who to blame.

If constitutional law is in crisis, it is *our* fault. The legal academy has erased the distinction between law and politics, used its expertise for political advantage rather than for elucidation, and mis-educated a generation of lawyers. We thus should not be surprised if judges have, as Professor Ristroph suggests, lost their faith in the Constitution. *We* have led them into the wilderness.

Law, especially constitutional law, and especially the hard cases that reach the Supreme Court, is neither fully determinate nor fully indeterminate. Legal decision making (including constitutional decision making) is, as I have argued elsewhere, constrained by precedent, by reason, by institutional structure and context, and by professional norms.<sup>2</sup> Those constraints are not perfect, nor do they eliminate discretion and disagreement. But to the extent that they remain influential, the constraints curb judicial excesses and ensure that constitutional doctrine remains, by and large, governed by the rule of law rather than by the whims of judges.

The first problem is that many legal academics have stopped believing in the efficacy of those restraints, and consequently see little distinction between politics and law. Following the lead of

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

2. DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* (2009).

“attitudinalist” political scientists, hordes of law professors now proclaim that constitutional law is nothing but politics, and judges are merely legislators in black robes.<sup>3</sup> (Ironically, political science scholarship is now moving away from attitudinalism<sup>4</sup>—as usual, law professors are ten or twenty years behind the discipline from which they are borrowing ideas.)

For some of these legal academics, the appropriate response is to attempt to reduce judicial discretion by imposing some overarching methodology of constitutional interpretation. But constitutional adjudication cannot be made mechanical, and all of these “grand theories” end up leaving judges with essentially as much discretion as they would have in the absence of the theory.<sup>5</sup> In addition, even the few judges who purport to adhere to one of these grand theories regularly depart from it. This attempt to eliminate discretion, then, is a dead end—although we still can’t seem to stop obsessing about it.

Other academics take the opposite approach. Instead of taking politics out of constitutional law, they want to take constitutional law away from the courts. The latest fad in constitutional theory seems to be popular constitutionalism.<sup>6</sup> Popular constitutionalists argue that because constitutional adjudication is

3. The classic attitudinalist work in political science is JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); see also Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995). For examples of endorsement by law professors, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (using the history of race-discrimination cases to argue that judges inevitably reflect popular opinion); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006) (arguing that courts reflect the views of popular majorities); Neal Devins, *Better Lucky Than Good*, 8 GREEN BAG 2D 33 (2004) (arguing that the most important factor in judicial decisions is political events outside the control of the litigants); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1284 (2004) (stating that the idea of separating law from politics “may not even be coherent”). The idea that politics overshadows law in legal decision making is not new, but for the past 70 years or so has been embraced by only by a handful of critical legal scholars. Today it seems to permeate conventional constitutional thinking to an extent not seen since the demise of the most extreme versions of Legal Realism.

4. See, e.g., *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* (Cornell W. Clayton & Howard Gillman eds., 1999); *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* (Howard Gillman & Cornell Clayton eds., 1999).

5. For an elaboration of this critique, see DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002).

6. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

equivalent to legislative policy making, constitutional interpretation should be done only by the people or their representatives. It is hard to know how popular constitutionalism would work, since few (if any) of its advocates make any concrete suggestions about how to implement popular constitutional interpretation. But in any case, my view is that leaving constitutional decisions to the majority carries an unacceptably high risk of majority tyranny. There is also the problem that many popular constitutionalists are fair-weather friends of populism: When the Supreme Court is making decisions they agree with, they are perfectly happy to leave constitutional interpretation to the courts.

The point, though, is not that both grand theory and popular constitutionalism are seriously flawed. The point is that their adherents share a cynical view of constitutional law: that it is *not* law, but politics. And the problem is that if even legal academics take that view, the conflation of law and politics is bound to infect politicians, judges, and the American public. If everyone stops believing in the rule of law, we *will* have a crisis. Perhaps some of the doctrinal inconsistencies noted in this symposium are the leading edge of the crisis, but if so, it is because judges have begun to believe what academics have been telling them about the judicial role.

The flip side of the focus on grand theory and popular constitutionalism, of course, is a decline in doctrinal scholarship. Once the mainstay of legal scholarship, it is currently in disrepute. But if legal academics are not carefully examining constitutional doctrine—including how it plays out in the lower courts—then it is no wonder that we think the doctrine is in shambles. To the extent that constitutional adjudication is akin to common law adjudication,<sup>7</sup> we cannot expect constitutional doctrine to be immediately and transparently coherent. It should be our task as academics to create coherence out of the mass of cases, and to uncover and rectify judicial lapses.<sup>8</sup> Again, however, if legal scholars believe that constitutional adjudication is more about politics than about law, they will be unable even to envision sophisticated doctrinal scholarship.

Legal academics compound the problem—the second of my three accusations—by practicing what they preach. Law profes-

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7. For support for this proposition, see, for example, David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 *YALE L.J.* 1717 (2003); David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. CHI. L. REV.* 877 (1996).

8. See RICHARD A. POSNER, *HOW JUDGES THINK* 210–11 (2008).

sors as a group have multiple opportunities to enhance the rule of law. The media and the public often rely on law professors to clarify and explain constitutional decisions, and legal academics also draft amicus briefs. But lately we have been squandering those opportunities by using them to advocate particular political viewpoints rather than to educate or elucidate.

Law professors publicly criticize judicial opinions as “activist” or “political” rather than critiquing them on the merits. A widely-distributed e-mail solicited law professors to sign—purportedly as experts—a letter interpreting an obscure clause of the Constitution, several even more obscure federal statutes, and “the laws of Florida,” based solely on expertise acquired through “teaching and writing about the Constitution” generally.<sup>9</sup> Legal academics become “experts” quoted by the media through sound-bites and political punditry rather than through actual knowledge or thoughtful analysis. If constitutional law is just politics in disguise, then all this makes sense. But again, the more that legal academics manipulate law for political purposes, the more they encourage judges to do so.

The third problem is that to the extent that we persuade our students that constitutional doctrine is political and therefore unprincipled, they will act on that belief as future lawyers, judges, elected officials, and citizens. This problem goes much deeper than simply teaching the legal realist or critical legal studies notion (now gradually taking over mainstream constitutional law) that the rule of law is really just the political preferences of the judges. The problem is built into the law school curriculum itself. By attempting to teach constitutional law in the first year, as so many law schools now do, we almost guarantee that students will be drawn to the cynical view.

Why? Because the vast majority of law students arrive at law school as either legal formalists or legal realists. Some of them think law is completely determinate, and some think it is completely indeterminate. They see the law as a matter of all correct answers or none. And if they are dissuaded from their initial approach, their first reaction is usually to jump to the opposite pole. If law is not completely determinate, it must be completely indeterminate (and vice versa). New students in any

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9. See Ward Farnsworth, *Talking Out of School: Notes on the Transmission of Intellectual Capital from the Legal Academy to Public Tribunals*, 81 B.U. L. REV. 13, 47–48 (2001).

discipline are intellectually immature, and for that reason are likely to see black and white instead of shades of gray.

It takes a while—usually more than just one semester—for law students to become comfortable with the middle ground between determinacy and indeterminacy, and to create for themselves a framework that accommodates both judicial discretion and the rule of law. It is easier for them to do this in courses that are neither as politically salient nor as politically controversial as constitutional law. If they see, for example, that the Federal Rules of Civil Procedure are neither linguistically determinate nor infinitely malleable, they can begin to grasp the inherent function of judges as principled interpreters of law.

Constitutional doctrine is the most intellectually difficult subject to fit into this middle ground. (As I suggested earlier, even many legal academics maintain that it does *not* fit.) If we throw constitutional law at students before they have constructed a nuanced framework, they will instead have to choose between formalism and realism. Since it is virtually impossible for even neophytes to read Supreme Court opinions and conclude that constitutional law is determinate, they conclude that it is completely indeterminate—in other words, that only the judge's politics matter. We create another generation of lawyers who will question the existence of the rule of law and lament the crisis in constitutional doctrine.

So I close with three suggestions: (1) Remove constitutional law from the first-year curriculum; (2) Take seriously the task of educating the public, the media, and the courts, and (3) Stop writing about constitutional theory and the perils of judicial review and start focusing on constitutional *law*.