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## Correspondence: The Stuff of Constitutional Law

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# Correspondence: The Stuff of Constitutional Law

Neal E. Devins\*

Are decisions of the United States Supreme Court “the ‘stuff’ of constitutional law?”<sup>1</sup> Authors of constitutional law casebooks seem to think so. Their books, in the words of Henry Monaghan, are organized around the “widely held and deep belief” that the study of constitutional law should be undertaken “through a detailed examination of Supreme Court decisions, albeit supplemented in varying degrees by authors’ questions and law review excerpts.”<sup>2</sup> Monaghan’s observation is fifteen years old, but the conformity in constitutional law texts persists. This placidity is rooted in the most basic premise of constitutional law instruction: “The Court is the ultimate arbiter of the Constitution.”<sup>3</sup> As a result, constitutional truth derives solely from the examination of Supreme Court opinions.

It is also true that the traditional case and academic commentary model, while hardly shaken, is now under fire. A spate of supplemental works in constitutional history, theory, and politics, designed to fill gaps in the traditional casebook, have been published in the past few years.<sup>4</sup> Several recent articles have also attacked the traditional model as incomplete and dangerous.<sup>5</sup> One of these attacks, Professors Thomas Baker and James Viator’s *Not Another Constitutional Law Course: A Proposal to Teach a Course on the Constitution*,<sup>6</sup> recently appeared on the pages of this journal.

Baker and Viator’s piece is part complaint and part solution. The complaint is that the teaching of constitutional law focuses too much on the

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1. Robert A. Sedler, *Constitutional Law Casebooks: A View from the Podium*, 79 Mich. L. Rev. 1020, 1021 (1981).

2. Henry P. Monaghan, Book Review, 90 Harv. L. Rev. 1362 (1977) (reviewing Paul Brest, *Processes of Constitutional Decisionmaking: Cases and Materials* (1975)).

3. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

4. See, e.g., Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution* (1990); Louis Fisher & Neal Devins, *Political Dynamics of Constitutional Law* (1992); John H. Garvey & T. Alexander Alienikoff, *Modern Constitutional Theory: A Reader* (2d ed. 1989); John H. Garvey & Frederick F. Schauer, *The First Amendment: A Reader* (1992); Michael J. Gerhardt & Thomas D. Rowe, *Constitutional Theory: Arguments and Perspectives* (1992); H. Jefferson Powell, *Languages of Power: A Sourcebook of Early American Constitutional History* (1991).

5. See Thomas E. Baker & James E. Viator, *Not Another Constitutional Law Course: A Proposal to Teach a Course on the Constitution*, 76 Iowa L. Rev. 739 (1991); Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 Suffolk U. L. Rev. 85 (1991); W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 Yale J. Int’l L. 1, 8 n.13 (1984); Wm. Bradford Reynolds, *Constitutional Education*, 1987 B.Y.U. L. Rev. 1023 (1987).

6. Baker & Viator, *supra* note 5.

reading of cases and too little on to the reading of historical materials that shed light on the framers' intentions.<sup>7</sup> For Baker and Viator, "[t]o surrender to this tendency and begin in 1803" with *Marbury v. Madison* is to ignore John Marshall's most important admonition "that 'we must never forget that it is a constitution we are expounding.'"<sup>8</sup> Their solution, however, is not to restructure the constitutional law course. Instead, Baker and Viator propose a set of lesson plans for a "three hour elective" in constitutional history.<sup>9</sup>

Baker and Viator's premise is that constitutional interpretation should not be confined to Supreme Court decisions and related commentary by legal academics. In many respects, it parallels former Attorney General Edwin Meese III's contention "that '[h]owever the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court.'"<sup>10</sup> Meese's distinction between the Constitution and constitutional law caused a firestorm by openly challenging the most basic premise of constitutional instruction.<sup>11</sup> Baker and Viator launch an identical challenge. They claim that, by failing to treat the framers' intentions as the first building blocks of constitutional law, the course is "upside-down, pedagogically as well as chronologically."<sup>12</sup>

Baker and Viator correctly criticize constitutional law casebooks. Constitutional decisionmaking cannot be traced solely to the efforts of nine Justices working in isolation. Other parts of government regularly interpret the Constitution and influence the judiciary. The fundamental role played by the elected branches in shaping constitutional values, however, is given little recognition in constitutional law texts.<sup>13</sup> Constitutional decisionmaking is also influenced by history, empirical study, policy analysis and editorial commentary. These sources help shape constitutional debate both

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7. *Id.* at 740 ("while reading cases is necessary, it is not enough.").

8. *Id.* at 742 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)). David Bryden and former Assistant Attorney General Wm. Bradford Reynolds, on separate occasions, have also emphasized that the constitutional law course should take "our constitutional heritage" into account. David P. Bryden, *Teaching Constitutional Law: Homage to Clío*, 1 *Const. Commentary* 131, 131 (1984); Reynolds, *supra* note 5, at 1030-31.

9. Baker & Viator, *supra* note 5, at 746, 747-61. At the same time, Baker and Viator indicate that law schools should make mandatory a course in constitutional history. *Id.* at 742.

10. Edwin Meese III, *The Law of the Constitution*, 61 *Tul. L. Rev.* 979, 983 (1987) (quoting 3 Charles Warren, *The Supreme Court in United States History* 470-71 (1923)).

11. Laurence Tribe warned that Meese's position "represents a grave threat to the rule of law. . . ." Stuart Taylor, Jr., *Liberties Union Denounces Meese*, *N.Y. Times*, Oct. 24, 1986, at A17. Michael Kinsley called Meese's speech a "jurisprudential stink bomb." Michael Kinsley, *Meese's Stink Bomb*, *Wash. Post*, October 29, 1986, at A19. Anthony Lewis said Meese's position was an invitation to anarchy. Anthony Lewis, *Law or Power?*, *N.Y. Times*, Oct. 27, 1986, at A23.

12. Baker & Viator, *supra* note 5, at 742.

13. Leading constitutional texts make occasional reference to political events surrounding landmark Court decisions. These references, however, are sporadic at best. Moreover, none of the leading constitutional texts make use of "notes and questions" materials to prod law students to think about the role of elected government in the shaping of constitutional values. One notable exception—although its principal audience is political science students—is Louis Fisher's *American Constitutional Law*. See generally Louis Fisher, *American Constitutional Law* (1990).

inside and outside the Supreme Court. Nevertheless, constitutional law texts omit virtually any reference to outside materials not written by legal academics.<sup>14</sup>

Baker and Viator are on solid ground in condemning existing casebooks for giving "short shrift to the political and intellectual history of the framers and their document."<sup>15</sup> Their criticism, however, is too limited in scope. The constitutional law course is in need of much more than a shot of constitutional history. Likewise, a three hour constitutional history elective will do little to remedy pervasive problems in the required constitutional law course. The solution to the inadequacies of the constitutional law course is not the creation of specialized electives. The solution is to change the constitutional law course itself.

Such changes cannot occur unless casebook authors extend the traditional case and academic commentary model to include substantial excerpts from constitutional politics, empirical studies, policy analyses, and editorial commentary.<sup>16</sup> This extension will make teaching materials more accurate, more useful, and more interesting.

**MORE ACCURATE.** Most landmark Supreme Court decisions cannot be understood without paying attention to the politics surrounding them.<sup>17</sup> First, Justices pay attention to politics in crafting their decisions. John Marshall's sequencing of merits and jurisdiction in *Marbury v. Madison* and Earl Warren's efforts at crafting a unanimous opinion in *Brown v. Board of Education* were both preemptive strikes designed to limit the political

14. Casebooks, of course, contain some references to the works of individuals in related disciplines. These references, however, are the exception and not the rule. My observation, moreover, should not be construed to suggest that nonlegal policy analysis and commentary is somehow superior to the work of legal academics. My point is simply that casebooks undervalue important and pertinent work not written by legal academics.

15. Baker & Viator, *supra* note 5, at 741.

16. The inclusion of material detailing the framers' intent on an issue before the Court would also be of value. Contrary to Baker and Viator's suggestion, such material should not become the focal point of the constitutional law course. First, there is reason to doubt that the framers' themselves perceived that their intentions should govern constitutional decisionmaking. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 903-04 (1985). Cf. Ronald D. Rotunda, *Original Intent the View of the Framers*, and the Role of the Ratifiers, 41 Vand. L. Rev. 507, 516 (1988) ("history does not support the position . . . that the framers and ratifiers did not intend the judiciary to look at original intent.") Second, the framers' intent on a particular issue is typically opaque or nonexistent. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980). Cf. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226, 252 (1988) ("The very breadth of this claim makes it implausible. It is essentially an attack on the possibility and validity of historical investigation."). Third, constitutional decisionmakers infrequently rely on the framers' intent. Consequently, irrespective of the accuracy or propriety of such analysis, law students would be poorly served by a constitutional law course that discounts the ways constitutional decisionmakers actually resolve constitutional disputes.

17. Lou Fisher and I have written a collection of twenty-two studies of the politics surrounding landmark Court decisions. See generally Fisher & Devins, *supra* note 4. The cases referred to in this Correspondence, for the most part, come from that collection. Consequently, rather than clutter this Correspondence with detailed footnote support, I have chosen to simply refer to those case studies.

repercussions of unpopular decisions.<sup>18</sup> *Second*, politics is informative in assessing Supreme Court doctrine. Legislation limiting the impact of *Garcia v. San Antonio Metropolitan Transit Authority* speaks to whether, as the Court held in *Garcia*, states' rights concerns are adequately represented in Congress.<sup>19</sup> Analysis of the decision to defer to military decisionmaking in *Korematsu v. United States* should take into account that the internment of Japanese-Americans was a subterfuge perpetuated by the military and approved by the Justice Department.<sup>20</sup> *Third*, political judgments shape Court doctrine. Congress' choice to ground the public accommodations section of the 1964 Civil Rights Act in the Commerce Clause as well as the Fourteenth Amendment allowed the Court to treat *Heart of Atlanta Motel v. United States* and *Katzenbach v. McClung* as commerce cases.<sup>21</sup> Likewise, amendments to the 1987 Ethics in Government Act proved critical to *Morrison v. Olson* by expanding Justice Department authority in independent counsel investigations.<sup>22</sup> *Fourth*, politics contributes to the ultimate meaning of Court action. The institutional dynamics that made the legislative veto so popular before *I.N.S. v. Chadha* explain why the device continues to be used, with well over two hundred legislative vetoes put into place in the past decade.<sup>23</sup> The limits of *Brown II*'s delegation of remedial authority to Southern district court judges are underscored by mid-sixties elected branch action which resulted in more desegregation in 1965 than in the decade following *Brown*.<sup>24</sup> And, *fifth*, once the Supreme Court has decided a case, a "constitutional dialogue" takes place between the Court and elected government, often resulting in a decision more to the liking of political actors. Congress ultimately persevered in challenging the Court's 1918 rejection of the Commerce Clause as the basis for child labor legislation.<sup>25</sup> Executive and legislative action to express disapproval of *Roe v. Wade* through funding restrictions were approved by the Court in both *Harris v. McRae* and *Rust v. Sullivan*.<sup>26</sup>

Congress, the White House, government agencies, and the states all play critical interdependent roles in interpreting Supreme Court decisions and the Constitution itself. The sweep and influence of these interpretations are broad and pervasive.<sup>27</sup> By giving short shrift to these interpretations, as well as to the interactions between elected government and the courts, constitutional law texts omit information critical to an understand-

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18. Fisher & Devins, *supra* note 4, at 27-38 (*Marbury*); 261-83 (*Brown*).

19. *Id.* at 107-20.

20. *Id.* at 245-61.

21. *Id.* at 98-107.

22. *Id.* at 142-60.

23. *Id.* at 141-42.

24. *Id.* at 261-83.

25. *Id.* at 78-85.

26. *Id.* at 212-32.

27. Constitutional decisionmaking is not simply politics. Politicians and judges are often governed by principles of decisionmaking as well as *stare decisis*. See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 *Geo. Wash. L. Rev.* 68 (1991). My contention is simply that political actors play a significant role in shaping constitutional values.

ing of both the shaping of constitutional values and Supreme Court decisionmaking.

**MORE USEFUL.** The practice of constitutional law must take into account that constitutional decisionmaking is the province of the elected branches as well as the judiciary. Therefore, good attorneys must be able to advance their interests in both sectors. Sometimes the courts will prove most responsive to a constitutional claim, but on many occasions constitutional claims are more effectively advanced outside of court. As a result, constitutional advocacy cannot be limited to arguments grounded in—often unhelpful—Supreme Court decisions. Rather, an advocate must also be prepared to advance claims before legislative committees and administrative agencies. Moreover, even in court, especially the Supreme Court, an advocate must be prepared to advance arguments rooted in policy as well as precedent.

The pivotal role played by nonjudicial actors is especially apparent today. The rulings of the Rehnquist Court increasingly defer to elected government decisions. Federal agency interpretations of often vague statutory language are likely to be upheld because substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it.<sup>28</sup> State action is also subject to less stringent inquiry, for the Court now appears unwilling to strike down “a neutral, generally applicable regulatory law” irrespective of its effects on individual rights.<sup>29</sup> Indeed, for many interest groups, the focus of constitutional advocacy has shifted from the courts to the executive branch and legislature. The National Abortion Rights Action League recently informed its membership that “[c]learly Congress is our Court of Last Resort. All hope of protecting our constitutional right to choose depends upon our elected representatives in Congress responding to the will of the American people.”<sup>30</sup>

Effective constitutional advocacy therefore encompasses familiarity with the manner in which elected government resolves constitutional disputes and an awareness of how to help government officials equate good constitutional decisionmaking with sound public policy. Exposure to empirical study, policy analysis, and editorial commentary, in addition to arguments rooted in constitutional theory and history, can be helpful. While the Court may defer to the military’s judgment to exclude women from combat, empirical evidence on the changing nature of warfare may well convince Congress to nullify such restrictions.<sup>31</sup> Likewise, the Supreme Court is unlikely to expand the list of suspect classes to include sexual orientation, but studies suggesting that the brain dictates sexuality may well

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28. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

29. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2518 (1991) (speech); *Employment Div., Dep’t of Hum. Resources v. Smith*, 494 U.S. 872, 880 (1990) (religion).

30. NARAL, Supreme Court Alert (June 27, 1991), *quoted in Fisher & Devins*, *supra* note 4, at 7.

31. *Fisher & Devins*, *supra* note 4, at 283-302.

prompt the adoption of antidiscrimination measures.<sup>32</sup> The channeling of such empirical evidence into effective arguments is often bolstered by reading policy analyses and editorial commentary. By marshalling facts, history, and values to advance a policy argument, these materials often exemplify the kinds of advocacy that constitutional lawyers will engage in before legislative and administrative officials.<sup>33</sup>

Nonlegal materials play a large role in constitutional decisionmaking. Constitutional law texts, by discounting the importance of such materials, send the wrong message. To become successful constitutional advocates, law students need to recognize the importance of nonjudicial forces in the shaping of constitutional values. The inclusion of constitutional politics, empirical studies, policy analyses, and editorial commentary in casebooks will contribute to that recognition.

MORE INTERESTING. The constitutional law class is significantly enlivened by the introduction of nonjudicial materials. These materials serve as a tangible benchmark against which Supreme Court decisions can be understood. Students will be better equipped to debate what should constitute a suspect class when they are familiar with a range of materials on the causes and consequences of homosexuality. Likewise, *Marbury* seems far less mysterious when viewed as a work of political strategy. Further, the inclusion of nonjudicial materials reassures students who have never studied government in college by providing all students in the class with a common base of information. Students are less likely to be intimidated by the Supreme Court, their classmates, or their professor when they are all on equal footing. Finally, when played against the backdrop of politics, empirical study, policy analysis, and editorial commentary, the constitutional law class becomes more vital and more urgent. Department of Defense guidelines governing press coverage of the Persian Gulf War and the related commentary of affected journalists improves class discussion on prior restraints. Similarly, the battle between the FCC and Congress over diversity preferences helps focus classroom discussion on the costs and benefits of affirmative action.<sup>34</sup>

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The inclusion of substantive nonjudicial materials makes the constitutional law class more accurate, more useful, and more interesting. Yet, as Baker and Viator correctly observe, constitutional law texts limit themselves to Supreme Court decisions, academic commentary, author notes and

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32. See, e.g., Curt Supplee, Brain May Dictate Sexuality; Node Seen as Key to Gay Orientation, Wash. Post, Aug. 30, 1991, at A1.

33. Paul Brest attaches a more noble label to this process, namely, "constitutional citizenship." Paul Brest, *Constitutional Citizenship*, 34 *Clev. St. L. Rev.* 175 (1986). For Brest, "If the classical idea of citizenship has any bearing on constitutional decisionmaking in our own time, it must be through a political discourse that recognizes the diversity of interests of a heterogeneous society and the inevitability of representative government." *Id.* at 192.

34. Fisher & Devins, *supra* note 4, at 283-302.

questions, and little else. Until casebook authors shake their belief that Supreme Court cases are the stuff of the constitutional law class, the current scheme will persist.

This Correspondence suggests that it is time to change the constitutional law course. To accomplish such change, casebooks will have to forego some edited decisions in order to provide a more complete view of how constitutional decisionmaking develops.<sup>35</sup> Yet, at the same time, Supreme Court decisions should remain the centerpiece of the constitutional law course. Students do need to learn constitutional doctrine and most of this doctrine comes from the Supreme Court. Students also need to understand the importance of precedent-based constitutional advocacy.

Cases are not enough, however. Constitutional decisionmaking often extends beyond the court room to legislative committees and administrative agencies. Constitutional litigation, moreover, often hinges on policy arguments. The tradeoff of case materials for nonjudicial materials is therefore appropriate; it will reflect the shaping of constitutional values more accurately than a Court-centered approach. That it is also more useful and more interesting should make this tradeoff irresistible.

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35. Doug Laycock, criticizing the inefficiency of the case method in law school instruction, has effectively argued that casebook editors should replace some case material with expository text in order to make way for substantial excerpts from nonlegal sources. Douglas Laycock, *Reflections on Two Themes: Teaching Religious Liberty and Evolutionary Changes in Casebooks*, 101 Harv. L. Rev. 1642, 1652-54 (1988). Admittedly, the choice of which cases to cut and which nonjudicial sources to add is extraordinarily difficult. *But* the critical importance of nonjudicial materials to the constitutional law course suggests that casebook editors at least try to innovate their texts.