How Constitutional Law Casebooks Perpetuate the Myth of Judicial Supremacy

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The more things change, the more they stay the same.

In 1977, Henry Monaghan spoke of 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." With Burger Court rulings on forced busing and abortion rights fueling a nationwide debate over judicial policymaking, the continuing vitality of this case-centered approach seemed secure.

More than two decades later, Professor Monaghan's depiction of constitutional law casebooks still rings true. Not only do Supreme Court decisions remain the stuff of the constitutional law course, casebook authors -- in providing context to Court decisions -- rarely venture outside the familiar terrain of academic commentary and author questions. Likewise, as was the case in 1977, the popular press still treats United States Supreme Court rulings as definitive. For The Washington Post's Joan Biskupic: "The Justices are the final arbiter of what is in the Constitution;" for The New York Times' Linda Greenhouse: "[T]he Supreme Court [is] the ultimate arbiter of constitutional boundaries."2

Unlike 1977, however, academics no longer see the Supreme Court as the leading (let alone ultimate) interpreter of the Constitution. Rather, academics now question the Court's ability to effectuate social change (some calling it a "hollow hope") and, as such, call for the Court to issue "minimalist" decisions -- decisions that allow popularly elected

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government to play a leadership role in defining constitutional norms.\(^3\) Relatedly, by seeing Court decisionmaking as the byproduct of social and political forces, academics increasingly speak of the constitutional dialogues that take place between the Supreme Court and elected officials.\(^4\) More striking, some academics speak either of "constitutional moments" in which the people — through elections and the like — effectively amend the Constitution or of populist constitutionalist discourse in which the courts would steer clear of constitutional interpretation altogether.\(^5\)

The gulf between what academics say to their colleagues (through scholarship) and their students (through casebooks) is truly remarkable. More to the point, one reason why the myth of judicial supremacy persists is that academics (who teach law students, undergraduates, and — on occasion — journalists) do not practice what they preach. In the pages that follow, I will sketch out some explanations for why it is that constitutional law casebooks treat Supreme Court decisions as final and definitive. Before doing so, however, I will call attention to the myriad ways that the elected branches shape constitutional values (and how it is that constitutional law casebooks give short shrift to elected branch influences).

Most landmark Supreme Court decisions cannot be understood without first paying attention to the politics surrounding them.\(^6\) What follows are seven explanations as to why this is so:

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 repercussions of unpopular decisions. Other examples include *Cooper v. Aaron* (where the Supreme Court declared itself "the ultimate interpreter of the Constitution" after President Dwight Eisenhower secured compliance with court-ordered desegregation by sending Army troops into Little Rock) and the *Steel Seizure* case (where the Court's willingness to invalidate President Harry Truman's war-time seizure of the steel mills was directly tied to public opinion).

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. 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 devised by the military and approved by the Justice Department.

Third, political judgments shape Court doctrine. In *Brown v. Board*, a highly influential Solicitor General brief emphasized how segre-
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gation undermined America's status as leader of the free world and, as such, strengthened Russia's hand in the Cold War. Even more significant, Congress's choice to ground the public accommodations section of the 1964 Civil Rights Act in the Commerce Clause allowed the Court to treat Heart of Atlanta Motel v. United States and Katzenbach v. McClung as commerce cases. Likewise, by expanding Justice Department authority in independent counsel investigations, 1987 amendments to the Ethics in Government Act proved critical to Morrison v. Olson.

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 explains why the device continues to be used - well over three hundred legislative vetoes have been put into place since the decision. Likewise, through funding and other restrictions, Court decisions on abortion and school busing were undercut by Congress and the White House. Moreover, the limits of Brown (where the Court delegated its remedial authority to Southern district court judges) are underscored by mid-sixties elected branch reforms which resulted in more desegregation in 1965 than in the decade following Brown.

Fifth, populist resistance to Court decision-making often prompts the Court to recalibrate its position. Public support of Roosevelt's New Deal initiatives prompted the so-called "switch in time" and, with it, the demise of the Lochner Court. On abortion and school busing, elected branch disapproval may well have contributed to the Rehnquist Court's moderation of Burger Court decisionmaking.

Sixth, even when the Court upholds governmental action, elected officials sometimes conclude that the Court was in error and that corrective action is necessary. Witness, for example, Andrew Jackson's declaration that, notwithstanding McCulloch v. Maryland, Congress was without authority to establish a national bank. More recently, Court decisions on women in the military, voting rights, and homosexual sodomy have been neutered through state and federal legislation.

And seventh, elected officials often spin Court decisions in partisan ways. On war powers, presidents have seized upon dicta in Curtiss-Wright to assert plenary authority over the decision to send troops into battle. On affirmative action, President Bill Clinton proclaimed that a decision mandating strict scrutiny review of race preferences did little more than reaffirm the need for affirmative action.

The lesson here is simple (and one, I think, that most authors of constitutional law texts agree with): 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 before legislative committees (where precedent-based arguments are often ineffective). Even in court, especially the Supreme Court, an advocate - at least some of the time - should take socio-political context into account.

Along these lines, the infusion of politics into the constitutional law course seems necessary, not simply a luxury. Exposure to nonjudicial interpretation helps students understand both Supreme Court decisionmaking and the critical role that elected officials play in shaping constitutional values.

7 For similar reasons, the Solicitor General played a critical role in Korematsu. Here, however, the Solicitor General perpetuated inequality by suppressing evidence suggesting that the internment was rooted in racial bias, not military necessity.
With so much scholarship now talking about the Constitution outside of Court, moreover, one would expect that recently published constitutional law texts would take nonjudicial interpretations into account.

Think again. Constitutional law texts (even those published in the past few years) pay scant attention to nonjudicial interpretations. Of the five leading texts I examined, only one (coauthored by Paul Brest and Sandy Levinson)\(^8\) treated nonjudicial interpretation as an important part of the constitutional law course. The other four\(^9\) barely mention nonjudicial interpretation. And even Brest-Levinson was highly selective in its consideration of nonjudicial interpretation. None of the five texts, for example, discusses elected government resistance to court-ordered busing or I.N.S. v. Chadha. None discusses the government's briefs in Brown or Korematsu (although two texts hint at government misrepresentations in Korematsu). None mentions legislative action undertaken in response to Court decisions on women in the military, voting rights, and homosexual sodomy. None mentions presidential interpretations of Court decisions on affirmative action or war powers.\(^10\) None mentions that the Court's claim of judicial exclusivity in Cooper occurred after federal troops took over the Little Rock school system. None sets out to demonstrate how it is that politics entered into John Marshall's decision in Marbury, although two of the five provide substantial background material about the political context of the decision. None mentions public opposition to Truman's seizing of the steel mills, although three of the five contain some contextual information about the seizure. Only one considers the factual context of Brown. Only one mentions legislative deliberations about grounding the 1964 Civil Rights Act in the Commerce Clause. Only one mentions legislation enacted in response to Garcia. Only two mention legislative efforts to undo Roe v. Wade (and both only consider proposed human life legislation). To their credit, most of the books mention Roosevelt's court-packing proposal, the pivotal role that Congress played in accelerating the pace of school desegregation, and Andrew Jackson's claim that McCulloch was wrongly decided. Overall, however, constitutional law texts do a poor to horrible job in calling attention to the myriad ways that elected officials shape constitutional values.\(^11\)

Why is it that casebook authors (some of whom have made significant contributions to the nonjudicial interpretation literature) adhere to the traditionalist case and academic commentary model? After all, the inclusion of substantive nonjudicial materials makes the constitutional law course both more accurate and more useful. Moreover, since legal academics no longer defend judicial supremacy in their scholarship, one would think that a retrofitting of the constitutional law casebook would be a welcome— even inevitable— development.

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9 Gunther & Sullivan (13th ed. 1997); Lockhart et al. (8th ed. 1996); Stone et al. (3d ed. 1996); Farber et al. (2d ed. 1998).
10 On war powers, however, all constitutional law texts contain some discussion of the War Powers Resolution. Some texts, moreover, provide information on presidential implementation of the Resolution.
11 Limitations in constitutional law texts will not always translate into limitations in the constitutional law course. For example, some constitutional law professors may discuss the role of nonjudicial interpretations in their classes. Most, however, will not consider the Constitution outside of courts. Unlike other disciplines, law professors (especially professors of mainstream courses) typically build their courses around the materials contained in comprehensive casebooks.
Having coauthored a supplemental text on the political dynamics of constitutional law (a book whose sales would skyrocket if academics saw nonjudicial influences as critical to the constitutional law course), I have thought some about the stagnancy of constitutional law texts. The simplest and, I suspect, most accurate explanation for this phenomenon is that old habits die hard. Law professors are used to teaching from casebooks dedicated to Supreme Court decisions and academic commentary. Casebook authors are used to writing such tomes. More to the point, most casebook authors are schooled in the reading of cases and academic commentary, not legislative and executive branch materials. Consequently, a significant retrofitting of an existing casebook would take a tremendous amount of time and energy. For a casebook author to make such an investment, she would need to be convinced (a) that it is the right thing to do, (b) that she has the time to invest in such an undertaking, (c) that her casebook would need to include such material in order to lead law professors to include it in their teaching, and (d) that her market share will not be harmed by such an investment. In other words, before there is a fundamental change in the constitutional law casebook, casebook authors and their law professor constituents must believe that nonjudicial interpretations are central both to Supreme Court doctrine and the practice of constitutional law. Indeed, in order to overcome the burden of inertia, professors of constitutional law would need to think that it would be professional misconduct not to teach their students about nonjudicial interpretations.

Perhaps this transformation is inevitable. The degree to which scholars now dismiss the Supreme Court as the predominant source of constitutional law prompted Mike Paulsen (in responding to commentators on his paper on executive branch power to interpret the Constitution) to ask: "Will nobody defend judicial supremacy anymore?" Over time, casebook authors – assuming the persistence of this burgeoning scholarly consensus – might see the incorporation of nonjudicial materials into their texts as an idea whose time has come.

I think not, however. My suspicion, instead, is that casebook authors will do little more than expand upon the few pages they now dedicate to the finality of Supreme Court decisions. In part, my skepticism is fueled by the fact that law professors who write on this topic focus on the legitimacy of nonjudicial interpretation, not the nuts and bolts of how it is that elected officials and the people shape constitutional values. "Unfortunately," as Sandy Levinson remarked, "there is no really good comprehensive presentation of the constitutional law that is made by presidents, congress, administrative agencies, and ordinary citizens in addition to that which is made by the courts." But there are more deep seated reasons for the persistence of the case and academic commentary model. The status of both casebook authors and professors of constitutional law is

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13 Unlike 1977-era authors of constitutional law texts, casebook authors today can access data sources (Westlaw, Lexis, and the like) that make it relatively easy to incorporate nonjudicial materials into their texts. Of course, as Gerry Rosenberg suggests, the thoughtful integration of political science into constitutional law texts may require more time and energy than law professors seem willing to invest. See Gerald Rosenberg, Across the Great Divide, 3 Green Bag 2d 267 (2000). Law professors, however, are skilled at preparing legislative histories and, consequently, are well positioned to integrate nonjudicial interpretations into their texts.

14 McCloskey, supra at 237.
enhanced by adherence to the Court-centered model. For law professors, the case and academic commentary model communicates that that which they are expert in matters the most in the teaching/practice of constitutional law. Specifically, if the Supreme Court is seen as a somewhat closed system (speaking the last word on constitutional issues), the language of lawyers becomes the language of constitutional law. In contrast, were the decisions of the Supreme Court seen as part of a broader socio-political mosaic, lawyer training and, with it, law professor expertise would matter less. Consequently, constitutional law casebooks are a celebration of what law professors were trained to do (read cases and write briefs) and what law professors do in their scholarship (write academic commentary – much of which assesses Supreme Court decisionmaking). For law professor authors of these casebooks, their status is similarly enhanced by the current regime. The case and academic commentary model validates both their lawyer training and their scholarship. Moreover, in selecting what academic writings are worth including in constitutional law texts, the case and commentary model enables casebook authors to serve as gatekeepers of academic writing and thereby enhances their status vis-a-vis other professors of constitutional law.¹⁵

In saying that the case and academic commentary model maximizes the status of constitutional law professors, I do not mean to suggest that there is a conscious conspiracy within the legal academic community to perpetuate the myth of judicial supremacy. Most law professors see the teaching of doctrine as their principal duty to their students and, as such, are reluctant to sacrifice the teaching of doctrine in order to make room for politics. In constitutional law, this is especially true. There is too much to cover in the course and, consequently, most of us have to eliminate cases that we consider monumentally important. Nevertheless, if judicial supremacy is a myth, professors of constitutional law should readily trade off the teaching of some doctrine. In particular, to the extent that politics explains doctrine, exposure to a case’s socio-political setting is necessary to the teaching of doctrine.¹⁶ For this reason, the line separating a commitment to only teaching landmark Supreme Court decisions from a deep seated belief in judicial supremacy is, at least, blurred.

The constitutional law casebook, while des-

¹⁵ At first blush, this analysis suggests that constitutional law texts written by and marketed to political scientists would pay considerably more attention to nonjudicial interpretation than law school texts. But it is also possible that the political science marketplace is affected by an incentive scheme that closely resembles the legal academic marketplace. For example, it may be that the political scientists who write constitutional law texts (and the professors who teach from these texts) see the reading of cases as a skill which separates them from their colleagues (who teach and write about Congress and the Presidency). ¹⁶ In this and other ways, the incorporation of nonjudicial materials does not stand in the way of the teaching of doctrine. My students, for the most part, are better able to understand a decision when they have a better sense of the case’s socio-political context. For some students, learning about context makes them more interested in the case; for other students, learning about context helps them understand the Court’s reasoning. Accordingly, I think Suzanna Sherry is wrong when she claims that the teaching of nonjudicial materials diverts a student’s attention away from the “law” in constitutional law. See Suzanna Sherry, The Law Professor as Schizophrenic, 3 Green Bag 2d 273 (2000). For identical reasons, Sherry goes too far in equating the teaching of nonjudicial materials (something which is inextricably linked to doctrine) with the teaching of game theory, comparative constitutional law, and the like (something which is “interesting and relevant”).
perately in need of a retooling, is likely to remain more-or-less the same. The burden of inertia and the status of legal academics both speak to the perpetuation of the case and academic commentary model. With that said, the more academics talk and write about the pivotal role that elected officials and the people play in shaping constitutional values, the more likely it is that (over time) the teaching of nonjudicial interpretation will be considered a necessary component of the constitutional law course.

My focus, of course, has been on the constitutional law course. But limitations in the case and academic commentary model apply to other subjects. Yet, like constitutional law, the case and academic commentary model persists (for reasons of inertia and self interest). Unless and until casebook editors replace some case material with expository text in order to make way for substantial excerpts from nonlegal sources, legal education will be somewhat inefficient and incomplete.17 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 legal training suggests that casebook editors at least try to innovate their texts. 