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TEACHING CONSTITUTIONAL LAW IN A LEGAL REALIST WORLD

Eric J. Segall[*]

I think we're seeing almost a virtual collapse of the ability to teach con law as law.

Professor Jeffrey Abramson[1]

INTRODUCTION

Law professors and lawyers often ask me how I teach constitutional law given my hyper-critical, legal realist views about the Supreme Court.[2] For the purposes of this Article, I define "legal realism" as the perspective that Supreme Court decisions resolving important constitutional law questions are based primarily on the Justices' values, politics, and experiences, not on text, history, or precedent. In other words, personal preferences, rather than the prior law dictate most Supreme Court constitutional law decisions.[3]

I usually respond to this question about teaching constitutional law as a legal realist by saying the following: (1) constitutional law is on the bar exam so my

[*] Ashe Family Chair Professor of Law, Georgia State University College of Law. Thanks to the students and faculty at the University of Pittsburgh for a wonderful and enlightening symposium on legal education. This Article derives in part from and then adds to this blog post: https://www.dorfonlaw.org/2020/03/teaching-constitutional-law-in-world.html.

[1] More Just, *Teaching About Constitutional Law and the Supreme Court*, BERKELEY LAW, at 5:01 (Mar. 24, 2022), https://www.law.berkeley.edu/podcat-episode/teaching-about-constitutional-law-and-the-supreme-court/.

[2] *See* Eric Segall, *The Supreme Court is not a Real Court: This Year or Any Year*, JURIST (July 6, 2023, 10:02 AM), https://www.jurist.org/commentary/2023/07/supreme-court-not-real/.

[3] Legal realism extends far beyond the Supreme Court, but this Article is concerned with teaching constitutional law mostly from the decisions of our highest Court. Therefore, there is no need in this Article to discuss legal realism and the lower courts. For an excellent discussion of legal realism and legal formalism, see Chris Buckley, *Legal Formalism vs. Legal Realism: The Law and the Human Condition*, SCHWERD, FRYMAN & TORRENGA, LLP: CHOOSING A LAWYER (Feb. 4, 2013), https://sftlawyers.com/legal-formalism-vs-legal-realism-the-law-and-the-human-condition/.

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students need to learn the black letter "law" which is itself a challenging enterprise; (2) the incoherence of the Court's constitutional law cases helps students improve their critical thinking; (3) if a student is going to practice constitutional law, she needs to be able to manipulate formalism, history, text, and legal rules even if those tools do not drive results on the ground; and (4) I disclose my beliefs about the Court to students on the first day of class so they have an idea what the course is going to be like. My major premise is that the Court consistently and through different partisan make-ups has not taken positive law seriously for an exceptionally long time.

Nevertheless, how legal realists should teach constitutional law is an excellent question that I struggle with on a regular basis. As Professor Christopher Sprigman once said on Twitter, he tried teaching constitutional law but stopped "because my students were unhappy when I would point out how the Supreme Court was making it up, often incoherently. Students want to believe in what is in reality a bad discipline."

We need to unpack Professor Sprigman's charge that the Justices are just "making it up" because most Supreme Court experts would likely disagree or phrase what the Justices do less insultingly. But Sprigman is, unfortunately, exactly right. In most constitutional law cases, there is little helpful text or history and the Justices (and lower courts) spend most of their time discussing prior Supreme Court decisions (also devoid of helpful text or history). As one scholar put it, "[c]ontingencies like contemporary political dynamics, the characteristics of the parties, and the policy preferences of judges and Justices influence how the law gets formed."[4]

Other professors have complained about the frustrations they encounter teaching constitutional law. For example, one scholar observed that his students:

> . . . after one semester or one year of law school . . . have gotten a sense of how the law and legal doctrine work, and constitutional law has nothing to do with any of that. In the other classes, they learn "the law." In constitutional law, they learn

[4] G.S. Hans, *How Professors Can Teach Constitutional Law While the Supreme Court is Wrecking It*, BALLS & STRIKES: LEGAL CULTURE (Aug. 22, 2022), https://ballsandstrikes.org/legal-culture/how-professors-can-teach-constitutional-law/.

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> history, political science, political theory, and so on. Anything. Everything. Just not the law.[5]

Another legal academic has said that "[my] students [on the first day] were already asking whether judicial review, both historically and today serves any democratic purpose."[6] Dean Erwin Chemerinsky, another legal realist, has said this about teaching constitutional law in the Trump era:

> How do we teach how unique the events of the last year without sounding like we are against Trump? We've never seen anything like what occurred on January 6th. We've never seen anything like the attempt, to use the John Eastman memo to invalidate an election. We've never seen in this country's history a candidate who lost the presidency, continuing to claim victory, let alone the insurrection on January 6th. And yet as we teach all of that, does it not sound like we're taking a political position and whatever students we have who voted for Donald Trump would see us as just expressing sour grapes about his views. How do we teach that material?[7]

How we teach the "material" of constitutional law is the question this Article tries to address, at least for professors who are either semi- or hard-core legal realists. Part I supports my descriptive accounts of a lawless Court with representative examples showing how judge-made constitutional law is little more than the aggregate of the Justices' value preferences, or on occasion, the results of bargaining among the Justices to reach a five-vote result that makes little legal sense. I could provide 100 more examples of incoherent opinions if space and the readers' patience allowed. I did provide many more examples in my first book.[8]

Part II discusses the following challenging question: how professors should teach constitutional law if they believe little of it is actually law or even if it is a

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[5] Paul Horwitz, *Things You Ought to Know if You Teach Constitutional Law*, PRAWFSBLAWG (July 27, 2010, 11:34 AM), https://prawfsblawg.blogs.com/prawfsblawg/2010/07/things-you-ought-to-know-if-you-teach-constitutional-law.html (the author went on to say his students were not correct about those views, but he had to recognize and act on the fact that they feel this way. As this Article demonstrates, I agree with the students.).

[6] BERKELEY LAW, *supra* note 1.

[7] *Id.*

[8] ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 24–165 (2012).

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different kind of law.[9] Part III presents tentative thoughts on whether Donald Trump's presidency and his current candidacy should change how law professors teach constitutional law.

I. CONSTITUTIONAL LAW AS MADE BY THE SUPREME COURT IS OFTEN INDETERMINATE AND INCOHERENT

Here are ten representative examples of the almost complete incoherence of litigated constitutional law over the years.

(A) The law of affirmative action in higher education for several decades was that racial quotas in university admissions were *per se* unconstitutional but schools could seek a "critical mass" of minority students if other conditions were also satisfied.[10] I dare anyone to explain how a school knew whether it had enough minority students to constitute a "critical mass" without having a number representing a floor of minority students (in other words, a quota). I never heard a satisfactory answer to that question during all the years that the Court made a distinction between schools using forbidden illegal quotas and schools lawfully seeking a critical mass of minority students.

Alas, the incoherence of the "no quotas but a critical mass is okay" problem is no longer confusing because the Court held last term that universities may not use race at all in their admissions process.[11] If the Court had just said that all racial considerations are off limits to all public schools and to all schools that receive federal money,[12] at least we would have a coherent, if not truly unfortunate and anti-constitutional holding. But the Court reached two other conclusions that make little sense. The Justices said that the opinion had no effect on the use of race by military institutions such as West Point and the Naval Academy.[13] Why the Justices treated

[9] *See* Jaletta Long Smith, *Is Constitutional Law, Law?*, ABA.: APPELLATE ISSUES (Feb. 5, 2019), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2019/winter/is-constitutional-law-law/.

[10] *See* Grutter v. Bollinger, 539 U.S. 306, 315 (2003).

[11] Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023).

[12] Title VI says that institutions that receive federal funds cannot discriminate based on race. In *SFFA*, the Court again interpreted this statute to mean the same thing as the equal protection clause of the Fourteenth Amendment. *Id.* at 197 n.2.

[13] *See id.* at 355 (Sotomayor, J., dissenting).

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them differently than all other institutions of higher learning such as Harvard or the University of North Carolina at Chapel Hill went completely unexplained.[14]

The Court also issued this impossible to comprehend sentence given the rest of the opinion: "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[15] Universities are not allowed to take race into account, but they can read essays from applicants who are allowed to write about their race. What are admissions committees to do after they read about the race of the applicant—forget they read it? Only time will provide answers to this incoherent mess but in the meantime colleges and universities are taking huge litigation risks if they take into account racial considerations.[16]

(B) The law of taxpayer standing is that a plaintiff may challenge a statute passed by Congress under Article I, Section 8 that she claims violates the Establishment Clause even if she has nothing to gain from the lawsuit but the knowledge that her tax payments are being used by the government illegally, but a plaintiff may not challenge the expenditure of government funds by the President of the United States that allegedly violates the Establishment Clause if those funds come from general appropriations no matter how upsetting that decision is to the plaintiff.[17] There is absolutely no difference, however, between the respective personal stakes or injuries of the plaintiffs in those two cases. That problem is just the tip of the iceberg of the doctrinal mess the Court calls "standing."[18]

(C) On the same day in 2005, the Court held that two Ten Commandments displays in Kentucky courthouses violated the Establishment Clause, but a Ten Commandments display on public property near the Texas Capitol did not violate the Establishment Clause.[19] The Supreme Court building itself has a Ten

[14] *See id.*

[15] *Id.* at 230.

[16] *See id.* at 231.

[17] Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 593 (2007).

[18] *See* Eric Segall, *Standing: A Doctrine Like No Other*, DORF ON LAW (June 28, 2021), https://www.dorfonlaw.org/2021/06/standing-doctrine-like-no-other.html.

[19] McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 844 (2005); Van Orden v. Perry, 545 U.S. 677, 678 (2005).

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Commandments display.[20] I dare you to figure out whether the next Ten Commandments display that is challenged should be deemed by judges constitutional under the flexible standards and balancing tests set forth in those two cases (of course the Court as currently constituted will uphold all religious symbols on government property but that's a political not a legal prediction).

(D) The Eleventh Amendment prohibits suits against states by citizens of "another state" but the Justices have prohibited suits against states by citizens of their own states even though no constitutional text bars such suits.[21] The word "another" simply cannot mean the "same" in any sane world.

The Eleventh Amendment also applies to "any suit in law or equity," but the Court has said it does not prohibit requests for injunctive relief (equity) while it does bar suits for damages (law).[22] Thus, even though the Amendment treats law and equity the same, the Court treats them differently.[23] Again, there is no "legal" mode of analysis to justify the Court's ignoring and/or distorting clear constitutional text.[24]

(E) There is not a single word in the Constitution suggesting that Congress may not use its express powers to require state legislatures and executives to help enforce federal statutes, yet the Court has held that Congress may not, even pursuant to a specific grant of power, direct states to help enforce federal law (unless the law also applies to non-state actors as well as the states, maybe).[25]

(F) Congress may require state courts of general jurisdiction to hear cases involving federal issues even if state courts do not want to hear those cases.[26] In other words, Congress can tell state judges what to do despite the restrictions mentioned above in Section E that Congress cannot tell state executives or legislatures what to do.[27] Those distinctions make no historical, textual, or prudential sense.

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[20] Brief for the United States as Amicus Curiae Supporting Petitioners at 11, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005) (No. 03-1693).

[21] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 109 (1996); U.S. CONST. amend. XI.

[22] Edelman v. Jordan, 415 U.S. 651, 677 (1974).

[23] *See id.*

[24] *See id.*

[25] Printz v. United States, 521 U.S. 898, 925 (1997).

[26] Testa v. Katt, 330 U.S. 386, 391–92 (1947).

[27] *Id.*; *Printz*, 521 U.S. at 925.

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(G) There was a fairly lengthy period of years when the Court interpreted the Establishment Clause to allow states to provide textbooks free of charge to children attending private religious schools but not any other educational materials and equipment.[28] During this period, states could give atlases whose only content was maps to students attending religious schools but not just the maps themselves torn out of the books.[29] Now, not only is virtually all government aid to religious schools permissible, it is even required if the state supports nonreligious private schools.[30] That's a 180° shift in a fairly short period of time.

(H) A member of the military on trial for serious crimes arising out of his service is not allowed an Article III Court (and jury), but a person against whom a person in bankruptcy has filed a state law tort or contract claim has a right to an Article III Judge.[31] There is no plausible coherent basis for those differing results.

(I) A state may not require "pregnancy crisis centers" to inform their visitors of the availability of state resources for abortions because doing so is compelled speech that violates the First Amendment,[32] but a state does not violate the First Amendment by requiring doctors to provide materials to its patients describing abortion in ways that are often misleading or false.[33]

(J) Over the last few years, the Court has fabricated a new limit on the administrative state that when Congress wants to delegate power to the executive over a "major question," it must do so with great specificity.[34] What we do not know is how to decide if a particular issue is a "major question" or how specific Congress has to be when delegating power to the President over a "major question." This

[28] Wolman v. Walter, 433 U.S. 229, 254 (1977).

[29] *See id.*

[30] Carson v. Makin, 142 S. Ct. 1987, 2002 (2022).

[31] Stern v. Marshall, 564 U.S. 462, 502–03 (2011); Reid v. Covert, 354 U.S. 1, 5, 21 (1957); Exec. Benefits Ins. Agency v. Arkison, 573 U.S. 25, 39–40 (2014).

[32] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2375 (2018).

[33] Planned Parenthood v. Casey, 505 U.S. 833, 838 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2234 (2022).

[34] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

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principle is nowhere in the text and inconsistent with history.[35] It is impossible to predict its application and will cause tremendous incoherence in the years to come.[36]

The list could go on and on. On the one hand, because of this incoherence and much more, the constitutional law course is an excellent tool for teachers to use to improve the critical thinking skills of their students. On the other hand, it is quite difficult to teach constitutional law honestly and not admit to the students that it is all just "made up" by the Justices.

One may object to my descriptive account by arguing that Supreme Court-made constitutional law is indistinguishable from judge-made common law, which has a long and venerable pedigree.[37] There are, however, two major problems with that analogy. First, legislators may overturn common law decisions whereas it takes a constitutional amendment to reverse a Supreme Court decision.

Second, as a general matter, state court judges who issue common law decisions do not pretend "text and history" made us do it.[38] The policies driving the common law are usually discussed openly by judges whereas the Supreme Court likes to pretend its decisions are based on nonpolicy, formal considerations. This difference is important because it cuts to the heart of government transparency.

The reality is that the Justices do just "make up" most of constitutional law and maybe because the stakes are so high, a substantial amount of that law is incoherent. I sympathize with professors like Christopher Sprigman who just cannot bear to pretend otherwise and who do not want to spend their careers seeing how students are disappointed by this reality. For me, however, as I tell my students during the first day of every course I teach, my descriptive account of how the Supreme Court decides cases is not meant to make them cynical but to make them realistic. And the road to realism is paved with abundant tools to make them better critical thinkers and better lawyers.

II. TEACHING CONSTITUTIONAL LAW AS A LEGAL REALIST

On the first day of class, I tell my students that this course raises four fundamental questions: What kind of government do we want? What powers can it exercise? Who decides? With what tools?

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[35] *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 286 n.48 (2021).

[36] *Id.*; *see West Virginia*, 142 S. Ct. at 2609.

[37] *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

[38] *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

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I then introduce how we are going to try and discuss those questions through the articulation of three goals: (1) Learn the substance of constitutional law; (2) Improve critical thinking; and (3) Learn how to better articulate ideas.

As to number one above, I tell them that I will be clear about what the black letter law looks like and that the black letter law is what I will evaluate on the exam (mostly). As to number three above, I tell my students to say exactly what they mean in as few words as possible, and most answers should have a beginning, a middle, and an end. Students readily understand those goals and are more than willing to work on them.

It is number two, the goal of improving critical thinking, which is not only the main subject of this Article, but also the most important goal of the class because few students will practice constitutional law, but they will all need excellent critical thinking skills to become the best lawyers they can be. By critical thinking, I mean the ability to read a document or hear an argument and immediately have a skeptical view of the persuasiveness of what you are reading or hearing. This skill is most important when it comes to Supreme Court decisions. As Dean Chemerinsky has written, a "crucial message from the first day of law school must be that just because the Supreme Court says so does not mean that it is right. Students need to have the ability to critique (and praise) decisions and the tools for devising new and better approaches to the law."[39]

After discussing critical thinking generally, I ask my students to identify the sources of constitutional law in the context of a hypothetical federal law requiring braille on menus for restaurants serving over 10,000 customers a year. They usually say, "start with the text and structure," which is the right answer. Then they usually identify history and precedent as the next two sources. I respond that is correct and then ask what is missing from the list. It usually just takes a split second for the students to respond with words like values, politics, consequences, and results. I then say that is correct and that critical thinking is imperative here because the Justices across the partisan divide will talk the talk of text, history, and precedent, but the results in most constitutional law cases come down to values, politics, and life experiences. Their job in this class is to see the gap between the premises of the Justices' arguments and their conclusions and see what values are truly at play. This message scares the students, but they also understand what I am trying to accomplish in the class.

[39] Erwin Chemerinsky, *Teaching Law in this Difficult Time*, 46 ABA HUMAN RIGHTS MAG. (July 26, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-end-of-the-rule-of-law/teaching-law-in-this-difficult-time/.

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Then I turn to formalism. I ask the students (though due to the passage of time, I will change this example soon) which movie is better, *Godfather I* or *Godfather II*. Even recently, this triggered debates about who was better, Marlon Brando or Robert DeNiro; was Al Pacino's performance in the original better than the sequel, etc. Then I say to them, "when you say that Godfather I is better than the sequel (or vice-versa), what you really mean is that you *prefer* one movie to the other because no amount of logic or analysis can answer this question." It is a matter of taste after all. Then I discuss with them this paragraph from retired Seventh Circuit Court of Appeals Judge Richard Posner:

> Constitutional cases in the open area are aptly regarded as "political" because the Constitution is about politics and because cases in the open area are not susceptible of confident evaluation on the basis of professional legal norms. They can be decided only on the basis of a political judgment, and a political judgment cannot be called right or wrong by reference to legal norms. . . . When one uses terms like "correct" and "incorrect" in this context, all one can actually mean is that one likes . . . the decision in question or dislikes . . . it. One may be able to give reasons for liking or disliking the decision . . . and people who agree with the reasons will be inclined to say that the decision is correct or incorrect. But that is just a form of words. One can, for that matter . . . give reasons for preferring a Margarita to a Cosmopolitan. The problem, in both cases, is that there are certain to be equally articulate, "reasonable" people who disagree and can offer plausible reasons for their disagreement, and there will be no common metric that will enable a disinterested observer (if there is such a person) to decide who is right.[40]

After the introductory class, we start the case law with *Marbury v. Madison*,[41] not because of its historical significance or its justifications for judicial review but because it is a foreshadowing of the course to come. William Marbury was confirmed as a magistrate judge for the District of Columbia during the outgoing Adams administration, but the commission was never delivered to him.[42] When Thomas Jefferson became President, he refused to make Marbury a judge, so the latter sued in the United States Supreme Court.[43]

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[40] Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 40–41 (2005).

[41] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[42] *Id.* at 137.

[43] *Id.*

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Chief Justice Marshall should have recused himself from the case because he and his brother were responsible for and failed to deliver some of the commissions including Marbury's.[44] Marshall hearing the case was therefore highly questionable.[45] In addition, the Court in *Marbury* resolved the merits of the case (delivery was unnecessary for the commission to be legally valid) before discussing jurisdiction, which did not exist as Marshall eventually held.[46] But then why discuss the merits? Moreover, Marshall's reading of Section 13 of the Judiciary Act, that authorized original jurisdiction in the Supreme Court anytime a plaintiff seeks a writ of mandamus (the interpretation of Section 13 that led to the discussion of judicial review), was highly dubious if not completely wrong.[47]

In the first real discussion of judicial review in the Supreme Court, one of the most famous Chief Justices in history (John Marshall) should have recused himself, resolved the merits even though the Court lacked jurisdiction, and made up a statute that did not exist to further his political goal of strengthening the Court.[48] Welcome to constitutional law!

After we finish *Marbury*, I talk to my students about the differences between adopting a realistic view of constitutional law as opposed to a cynical one. We discuss the problem of government officials having life tenure, and with five votes, virtually unreviewable power. I try to find a strongly pro-choice student and ask them if they were on the Court, would text, history and precedent be enough to change their constitutional values? We end this segment discussing whether any constitutional democracy should give government officials a job for life and the implications of that question for the Supreme Court.

One recurring issue legal realist law professors face is how much back story and politics to present to their students. For example, it is my view that in *NFIB v. Sebelius*,[49] the first Affordable Care Act case, the Court decided every legal issue incorrectly under prior law. But for the purposes of this Article, it does not matter if

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[44] *See* James Sample, *Supreme Court Recusal: From* Marbury *to the Modern Day*, 26 GEO. J. LEGAL ETHICS 96, 106 (2013).

[45] *See id.* at 106–07.

[46] *Marbury*, 5 U.S. (1 Cranch) at 160.

[47] The most famous critique of *Marbury* is William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 2, 6–7 (1969).

[48] *See* Sample, *supra* note 44, at 106–07.

[49] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

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I am wrong or right. When I give talks about the wrongheaded spending power part of the opinion that invalidated the Medicaid expansion that was so crucial to the statute, I get pushback from students saying that part of the opinion was 7–2, not 5–4, so how could it have been so terribly wrong?[50]

I usually offer two responses. My first is that *Roe v. Wade* was also 7–2 while *Plessy v. Ferguson* was 8–1.[51] The Supreme Court eventually reversed both cases.[52] But I also tell them about the reporting by CNN's Joan Biskupic that Roberts pressured Justices Kagan and Breyer to join the Medicaid part of the opinion in exchange for his vote to uphold the rest of the law.[53] I always concede that we do not know how much horse trading like that actually happens, but then we talk about multi-member courts, collegiality, and the need for the Court to get to five votes. I ask my students if they see anything strange about that. I usually receive answers such as, "but that has nothing to do with the law itself." I then candidly admit that I do not have strong opinions about that kind of dealmaking which may be necessary to reach consensus and compromise, but I then put forward the idea that good or bad, those kinds of negotiations and adjustments by the Justices certainly seem to elide normal judicial decision-making and are not law related. Then we engage on that question not to make the students cynical, but to show them how the Justices on the Court behave and contemplate whether that is good or bad from the standpoint of the American people needing the highest court in the land to issue decisions on many important issues. I end this portion of the discussion by suggesting that we have abundant evidence that prior law does not constrain the Court, and if that is true, maybe this kind of politicking and negotiating is appropriate for an institution that must make general rules for the entire country to follow.

Another thorny issue for legal realist constitutional law professors is what to do with Supreme Court cases that just cannot be justified by a good faith review of prior law, no matter how hard one tries (and one should try hard). Perhaps the best example

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[50] *Id.*

[51] Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Ed., 347 U.S. 483 (1954).

[52] Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[53] *See* Tucker Higgins, *Chief Justice John Roberts bargained with liberals over fate of Obamacare's Medicaid expansion, new book claims*, CNBC (Mar. 22, 2019, 9:23 AM), https://www.cnbc.com/2019/03/22/new-book-shows-how-scotus-justices-bargained-over-fate-of-medicaid.html.

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of this (although there are many as I listed above) is *Shelby County v. Holder*.[54] In a 5–4 decision along partisan lines, the Supreme Court struck down a key section of the Voting Rights Act on the grounds that Congress used an old formula to determine which states and counties had to pre-clear election changes with either the United States Department of Justice or a three judge court.[55] A central part of the holding was that Congress needs a strong reason to treat states differently when exercising its powers under the Reconstruction Amendments.[56] There is simply no way to make sense of that holding.

It is not debatable that the dominant purpose of the Reconstruction Amendments was to force the confederate states to treat the newly emancipated people equally under the law.[57] If they did not, Congress could cure the problem pursuant to the clear text of the Reconstruction Amendments authorizing it to remedy the problem through "appropriate legislation."[58] There is nothing in the text or history of the Amendments suggesting Congress may not treat different states differently or that doing so would not be "appropriate."[59] There is no plausible argument to the contrary and the *Shelby County* decision had enormous implications for elections and voting rights. The title of one commentator's account of the case was "How Shelby County Broke America."[60]

Given that is my view, how should I teach the case? Should I try to give the opinion its best reading leading the students through the reasoning and inspiring them to decide for themselves what they think of the decision? That is my usual method. And it may well be the right answer. But I just cannot do it. At the end of the day, the Court added a non-textual, anti-historical limitation on Congress' powers to fight racial discrimination in voting that undercuts the very purpose of the Fifteenth Amendment.[61] There is nothing in law to justify such a pernicious result.

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[54] *See* Shelby Cnty. v. Holder, 507 U.S. 529 (2013).

[55] *Id.* at 556; Shelby County v. Holder, OYEZ, https://www.oyez.org/cases/2012/12-96 (last visited Nov. 17, 2023).

[56] *Shelby Cnty.*, 507 U.S. at 554.

[57] *See* Strauder v. West Virginia, 100 U.S. 303, 306 (1880).

[58] U.S. CONST. amend. XV, § 2.

[59] *Id.*

[60] Vann R. Newkirk II, *How* Shelby County v. Holder *Broke America*, THE ATLANTIC (July 10, 2018), https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/.

[61] *Shelby Cnty.*, 507 U.S. at 554.

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So, I take a hybrid approach (or try to). I present the case to the students through slides and discussion and hope they will see the problem themselves, and they almost always do. At that moment, I could try to play devil's advocate as I do for many cases, but I do not. I abstain from normal even-handedness for the specific purpose of allowing the students to see that even in a landmark case the whole country is watching, the Justices sometimes issue opinions for which there is no plausible legal reasoning supporting them. The case was obviously decided for partisan reasons having nothing to do with text, history, or precedent. There are not many cases for which I use this teaching method (standing cases maybe), and I am not sure it is the correct way to present the material. But I simply cannot find any sincere or honest words to say defending the opinion. Students over the years have tried to defend it but that normally lasts only a few minutes because other students in the class make convincing arguments that there just is no defense in law for the disaster that was *Shelby County v. Holder*.

One final thought about teaching constitutional law in a legal realist world. Even if one is a formalist who thinks legal realism does not adequately describe the Supreme Court of the United States, one still must produce a normative theory justifying or describing the many changes in constitutional law when the Justices on the Court change. Recently, the Court has completely changed the law of abortion,[62] affirmative action,[63] the Second Amendment,[64] the free exercise of religion,[65] the Establishment Clause,[66] and separation of powers,[67] among other fundamental issues of constitutional law. But over the course of American history, the Justices have gone back and forth and reversed themselves in virtually every field of constitutional litigation.[68]

These constant fluctuations make sense to me as a hard-core legal realist, but I cannot imagine how any professor could explain these shifts without some theory independent of text, history, and precedent. In thirty-three years of teaching, I have

[62] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[63] Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023).

[64] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

[65] Carson v. Makin, 142 S. Ct. 1987 (2022).

[66] *Id.*

[67] *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[68] *See* Eric J. Segall, *Constitutional Change and the Supreme Court: The Article V Problem*, 16 U. PA. J. CONST. L. 443, 445 (2013).

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yet to hear a serious argument sounding in law to justify these wholesale changes in constitutional law that have occurred now for centuries. As Dean Erwin Chemerinsky wrote long ago, constitutional law is about the balancing of often-conflicting values, and "there is nothing else."[69] Teaching constitutional law with an eye on that reality is not cynical but a realistic appraisal of how the Supreme Court of the United States decides constitutional law cases.

III. THE AGE OF TRUMP

The Trump era brought new challenges to the teaching of constitutional law because of how controversial he is and how much he added to America's already polarized politics.[70] One law professor summed up the problem like this:

> Like so much else, teaching Constitutional Law won't be the same after the presidency of Donald Trump. At least it shouldn't be. The election of 2016 brought to power an authoritarian demagogue who repeatedly assaulted American constitutional democracy in unprecedented ways. Trump's behavior triggered novel consideration of dormant constitutional provisions, trashed long-standing constitutional norms and conventions, and even challenged basic American constitutional ideals. And the enduring loyalty of his supporters notwithstanding these assaults raises existential questions for the future of American constitutional democracy.[71]

Even if one takes a less hostile attitude towards Donald Trump, there can be little debate that he changed important political norms (for better or worse), put three Justices on the Court in just one presidential term, and conducted the office in ways that most Americans have never experienced before.[72] The Trump presidency raised serious issues about the pardon power, the ability of Congress and state courts to subpoena the President and his financial organizations, the long-forgotten

[69] Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 104 (1989).

[70] Eric J. Segall, *Teaching Constitutional Law in the Trump Era*, DORF ON LAW (Sept. 4, 2023), https://www.dorfonlaw.org/2023/09/teaching-constitutional-law-in-trump-era.html.

[71] Joel K. Goldstein, *Teaching Constitutional Law After the Trump Presidency*, 66 ST. LOUIS U. L.J. 409, 410 (2022).

[72] *Id.*

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Emoluments Clause, and the President's use of social media to name just a few examples of difficult and novel issues raised by Donald J. Trump.[73]

The question is: should the Trump era change the way we teach constitutional law? It is perhaps too early to look at this problem with the right perspective; but, at a minimum, during his four years in office and then his second run at being President, the Supreme Court, with three new Justices all appointed by Trump, overturned and overhauled some of this country's most controversial issues of constitutional law including abortion, affirmative action, gun control, religious liberty, and the separation of powers.[74] If nothing else, constitutional law professors must acknowledge that, although the Court has consistently shifted its positions over the years on most litigated constitutional provisions, it is quite rare for the Court to overturn and change so much in such a short period of time. The implications of that overhauling need to be discussed by teachers in any of the foundational constitutional law classes.

Do constitutional law professors have to appear agnostic about Donald Trump in class? I do not have persuasive answers to this difficult question. It is crucial to remember, however, that most constitutional law classes will include students with varying social, moral, and political values.

My instinct is that because I see Trump as a serious threat to the constitutional order in ways unlike any past President (he is the only person to ever hold that office without spending any time in the military or government service), we should not avoid the elephant in the room. How to discuss the Trump presidency, however, without being partisan in the classroom is quite challenging. One tentative idea is to explain to the students that, at least in your opinion, the Trump presidency was unlike any other, as is his present candidacy, and that he is not the manifestation of normal partisan politics between the two major political parties. In a way, Trump is the *Shelby County* of Presidents; completely indefensible. If one takes that path, however, it is crucial to do so in a way that invites the students to completely disagree in a safe space.

CONCLUSION

Teaching constitutional law is challenging in normal times but when the Supreme Court is changing so much so quickly and a former President is implicated

[73] *See id.* at 417, 420, 426.

[74] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022); *see* Carson v. Makin, 142 S. Ct. 1987 (2022); West Virginia v. EPA, 142 S. Ct. 2587 (2022). *See* text accompanying footnotes 66–71.

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in criminality in different courts, the task is even harder. For those of us who believe that Supreme Court decisions resolving important constitutional law questions are based primarily on values, politics, and experiences, and not text, history, or precedent, the task is even more difficult. We need to teach our students the black letter law while at the same time making them aware of the political and personal content of the decisions. We do not want our students to become overly cynical while also hoping they walk away from the class with a more realistic perception of our highest Court. While this Article does not purport to provide persuasive answers for law professors struggling with teaching constitutional law in a legal realist world, I hope I have raised the relevant questions and provided a few helpful suggestions that make that task slightly less overwhelming.

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