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## TOO CLEVER BY HALF: THE PROBLEM WITH NOVELTY IN CONSTITUTIONAL LAW

*Suzanna Sherry\**

As Robert Bennett's article illustrates, the "counter-majoritarian difficulty" remains—some forty years after its christening—a central theme in constitutional scholarship.<sup>1</sup> Indeed, one might say that reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing today, including Bennett himself. I have suggested elsewhere that scholars as diverse as Richard Epstein, Antonin Scalia, and Robert Bork on the one hand, and Akhil Amar, Bruce Ackerman, and Ronald Dworkin on the other, are all motivated by a desire to overcome the counter-majoritarian difficulty.<sup>2</sup> Bennett seeks to corral the difficulty by describing a difference between courts and other actors, which he finds more meaningful than references to "majoritarianism."

Bennett suggests that the academic fascination with the "counter-majoritarian difficulty" arises out of a mistaken view of democracy. Barry Friedman suggests that it comes from a combination of factors, including the rise of legal realism, the stature of many of the early counter-majoritarian theorists, and the dilemma faced by liberals when the 1930s Court's obstructionist interference with democratic processes gave way to the Warren Court's laudable interference with democratic processes.<sup>3</sup> All these explanations—especially Friedman's last—probably contain some truth.

But more worrisome than the cause of the obsession is the usual response to it. While the counter-majoritarian difficulty has inspired some excellent scholarship,<sup>4</sup> the ordinary response to the problem is more trou-

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<sup>1</sup> See Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845 (2001); see also Editor's Note, 95 NW. U. L. REV. 843 (2001) (providing a brief introduction to the *Northwestern University Law Review* Spring 2001 Symposium exploring the counter-majoritarian difficulty).

<sup>2</sup> See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (forthcoming 2002).

<sup>3</sup> Barry Friedman, *An Academic Obsession: The History of the Countermajoritarian Difficulty, Part Three* (forthcoming article, on file with author); Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 953 (2001).

<sup>4</sup> In addition to the sources cited in note 2, see also, for example, ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF*

blesome. In particular, the prominent scholars I mentioned earlier share not only an obsession with the counter-majoritarian difficulty, but a common response to it: they try to ground constitutional law on a single grand theoretical foundation. In this way they hope to cabin judicial discretion and thus minimize the tension between majoritarianism and judicial review. For Amar, this foundational theory is a close attention to text, informed by an underlying allegiance to popular sovereignty. For Ackerman, it is a theory of our “dualist constitution” and the rare “constitutional moments.” Scalia and Bork favor somewhat different versions of originalism. Epstein and Dworkin—an odd pair if ever there was one—both provide a philosophical foundation, although the two philosophies are, of course, polar opposites.<sup>5</sup>

Moreover, like the counter-majoritarian difficulty itself, all of these purported solutions to it contain valuable truths, but are ultimately unsatisfying because they attempt to turn small bits of wisdom into self-contained theories. The counter-majoritarian difficulty does exist: there is undoubtedly a tension between judicial review and some other aspects of our constitutional democracy, whether we describe that democracy as majoritarian, conversational, or even republican. But the tension has been blown all out of proportion. As Bennett points out, the courts’ counter-majoritarian aspects are less troubling if one views them as one part of the whole system. Considered in isolation, other parts of the system seem to lack full democratic legitimacy as well. The Senate, for example, with its gross disparities in popular representation, could not legitimately exercise sole governmental authority, but we do not see that as a problem in the context of our multifaceted constitutional system. Or take the Federal Reserve, which, like the courts, lacks much political accountability: its decisions arguably affect Americans more directly than do most Supreme Court rulings, yet no one suggests that the Fed is unconstitutional or even problematic. And recently, for the first time in 112 years, the Electoral College served its counter-majoritarian function by electing a president who lost the popular vote. Comparisons between the judiciary and other institutions, then, show that the courts are not the only “undemocratic” or “counter-majoritarian” parts of government.<sup>6</sup>

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JUDICIAL REVIEW (1980); Rebecca Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) [hereinafter Friedman, *Dialogue*]; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996); Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881 (1991).

<sup>5</sup> For an elaboration and critique of the theories of each of these six scholars and of foundationalism in general, see FARBER & SHERRY, *supra* note 2.

<sup>6</sup> In addition to viewing the courts in isolation, those who focus on the counter-majoritarian difficulty overlook the many ways in which the courts are themselves linked to, and limited by, majoritarian

An analogy may help illustrate the exaggeration inherent in the counter-majoritarian difficulty. One of the core tenets of the American legal system is the importance of the jury. One key function of the jury is to bring community values and judgment to bear on a case, rather than relying on the opinions of elite judges. Juries thus perform a valuable democratic function. For this and other reasons, everyone agrees that judges should not lightly overturn jury verdicts. Still, not infrequently, judges *do* overturn a jury verdict they find unsupported by the evidence. But no one obsesses about the “counter-juritarian” difficulty. No scholar finds it necessary to design a whole theory of civil procedure around the problem of explaining the legitimacy of the practice. Constitutional scholars are apparently much more frightened of judges overturning legislation than judges overturning jury verdicts.

Just as the focus on the counter-majoritarian difficulty isolates one aspect of our constitutional democracy, many of the responses to it isolate one aspect of constitutional interpretation. Text and context, history and structure, legitimacy and losers, and the core values underlying a protection of individual rights on the one hand and a respect for majority rule on the other, are all valuable sources of constitutional interpretation. Where the foundationalist scholars go wrong is in inflating a single source—or at most two or three related sources—into a Delphic oracle that will answer every question in constitutional law. Thus, Ackerman is right to notice that something remarkable was going on in American constitutionalism during the New Deal, but wrong to try to shoehorn it into the same pattern as the Founding or Reconstruction—and still more off-track in trying to draw from this theory an impregnable defense of such Warren Court cases as *Griswold v. Connecticut*.<sup>7</sup> Amar wisely points us to textual connections between different parts of the Constitution, but then focuses his textual lens so narrowly—to the exclusion of other sources—that it leads him to such startling conclusions as that the Fifteenth Amendment protects the right to “vote” on juries and that the Thirteenth Amendment prohibits parental child abuse.<sup>8</sup> Epstein’s emphasis on the dangers that government regulation poses to individual rights, Dworkin’s urging that the Constitution be read as a moral document, and Scalia’s and Bork’s insistence that the intent of the founding generation is relevant to today’s interpretation are all similarly important reminders—and are all taken far beyond their useful roles.

Many current “solutions” to the counter-majoritarian difficulty, then, seem to take on aspects of a crusade. Uncomfortable with compromise,

politics. See generally Friedman, *Dialogue*, *supra* note 4 (arguing for an understanding of the role of courts that emphasizes the interplay of all three branches of government in constitutional interpretation). For a fuller critique of the focus on counter-majoritarianism, see FARBER & SHERRY, *supra* note 2.

<sup>7</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965); 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 152 (1991).

<sup>8</sup> Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992) (child abuse); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789-92 (1999) [hereinafter Amar, *Intratextualism*] (right to vote on juries).

messy accommodations, and fuzzy lines of demarcation, modern constitutional scholars search for purity and certainty. They draw sharp lines between courts and Congress, representation and deliberation, interpretation and authorship, judging and legislating. They seek an overarching heuristic device to ensure that activities in the one category cannot leak into the other. With this narrow base, on which they attempt to build an entire constitutional edifice, mainstream constitutional scholars thus begin to describe a Constitution—and a polity—unrecognizable to the typical American judge, lawyer, or citizen.

These theories are unrecognizable partly because they fail to take into account that constitutionalism is not a theoretical construct but a complex of human institutions, trying to achieve several, often contradictory, goals at once. In reducing the Constitution to the reflection of a single value, they are inevitably forcing square pegs into round holes. There is no doubt that in attempting the artificial task they have set for themselves, these constitutional scholars are often dazzlingly clever. One cannot help but admire the coherence of Epstein's theory of property rights or the technical wizardry of Amar's analysis of constitutional language. It is no small feat to devise an entire constitutional theory on the notion that the government has no more collective rights against individual property than each citizen does,<sup>9</sup> or to construct an argument that the requirement that the president be thirty-five years old is actually meant to protect us against the sons of presidents becoming president themselves.<sup>10</sup>

But cleverness can take a theory only so far. At some point, a scholar must use judgment or common sense to evaluate the results. One flaw common to all of these theories is a lack of judgment and common sense. Their authors have forgotten that "it [i]s more important to be right than to be clever [and] [i]t is the thinkers with all the razzmatazz who are likely to get it wrong."<sup>11</sup>

It is certainly clever to note, as Amar does, that the word "speech" appears both in Article I, section 6—protecting legislators from being "questioned in any other place" regarding any speech or debate in Congress—and in the First Amendment. But it borders on absurdity to suggest, as Amar does in some detail, that therefore similar rules apply to restrictions on pub-

<sup>9</sup> See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

<sup>10</sup> See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 129-33 (2000). Amar appears to believe that this is especially true where the father and son bear the same name, and the younger is known by his middle initial. See *id.* at 132.

<sup>11</sup> Richard Epstein, *Life Boats, Desert Islands, and the Poverty of Modern Jurisprudence*, 68 MISS. L.J. 861, 887 (1999). It is ironic that this quotation comes from Epstein, one of the cleverest of the foundationalist scholars. What explains the divergence between his advice and his own theories is a part of the first sentence that I left out of the quotation: "[I]n most moral or legal disputes the right answer will be simple and straightforward." In fact, as I note in the text, constitutional answers are not likely to be simple or straightforward, and a search for a single foundation that makes them so is doomed to fail.

lic speech as apply to restrictions on speech on the floor of Congress. Because Congress can limit the content of debates, he says, “reserving Tuesday for a campaign-finance debate and Wednesday for a discussion of nuclear proliferation,” this means that “content-based discriminations are not themselves (even presumptive) violations of the freedom of speech.”<sup>12</sup> A little bit of common sense would expose the absurdity of applying Robert’s Rules of Order to public speech doctrine. A similar absence of judgment plagues many other prominent constitutional scholars. If we step back from the theory, would we find plausible Epstein’s insistence that the New Deal, virtually in its entirety, is “inconsistent with . . . constitutional provisions”;<sup>13</sup> Ackerman’s contrary suggestion that the New Deal, far from being unconstitutional, was itself an unwritten amendment and thus is a part of the Constitution;<sup>14</sup> or even Bennett’s description of *amicus* briefs—written by lawyers on behalf of organized interest groups—as analogous to ordinary civic conversation by ordinary citizens?<sup>15</sup>

These responses to the counter-majoritarian difficulty pose a further puzzle: what has happened to common sense in constitutional scholarship? One possibility is that adherence to grand theory, in an attempt to constrain judicial discretion, inevitably diminishes the capacity for judgment. Judgment is what judges use to decide cases when the answer is *not* tightly constrained by some interpretive theory. It is an aspect of what others have called prudence, or pragmatism.<sup>16</sup> It is a recognition that while almost no answers are certain, some are more plausible than others—and that it is critical to possess the ability both to make sophisticated judgments about plausibility and to live with uncertainty. As Anthony Kronman puts it:

A prudent judgment or political program is, above all, one that takes into account the complexity of its human and institutional setting, and a prudent person, in this sense, is one who sees complexities, who has an eye for what Bickel called the “unruliness of the human condition,” but is nevertheless able to devise successful strategies for the advancement (however gradual or slow) of his own favored principles and ideals.<sup>17</sup>

But if one has a theory of constitutional interpretation that is supposed to produce clear answers in a relatively mechanical way, there is little room for the exercise of judgment, and judgment thus tends to atrophy.

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<sup>12</sup> Amar, *Intratextualism*, *supra* note 8, at 816-17.

<sup>13</sup> EPSTEIN, *supra* note 9, at 281.

<sup>14</sup> 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 268-361 (1998).

<sup>15</sup> Bennett, *supra* note 1, at 883-88.

<sup>16</sup> On prudence, see Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 *YALE L.J.* 1567 (1985). On pragmatism, see, for example, *PRAGMATISM IN LAW AND SOCIETY* (Michael Brint & William Weaver eds., 1991); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 *MINN. L. REV.* 1331 (1988).

<sup>17</sup> Kronman, *supra* note 16, at 1569 (citation omitted).

This solution to the disappearance of common sense, however, is not complete. It does not account for the initial move toward grand theory as a response to the counter-majoritarian difficulty. Indeed, the work of Alexander Bickel, who gave the problem its name and reinvigorated the modern academic focus on it, was much more nuanced than the work of his followers has been. As Bennett points out, Bickel did not see the straightforward distinction between courts and legislatures that some of his intellectual heirs have described.<sup>18</sup> Kronman wonderfully illustrates Bickel's approach, which he calls "prudence," and laments that more contemporary lawyers and scholars have strayed from it. That approach relies not on hard and fast rules or abstract philosophical principles to which judges must be faithful regardless of the circumstances; instead, it asks judges not only to discern principles but also to exercise prudence in implementing them. So despite Bickel's pivotal role in defining the counter-majoritarian difficulty, he, unlike his successors, saw no need to resort to clever schemes to cabin judicial discretion and eliminate the tension.

Why, then, have so many of the most prominent constitutional scholars since Bickel focused on cleverness instead of complexity? I suspect it is part of a phenomenon that has come to pervade legal scholarship: the idea that novelty is the ultimate test of an idea's worth. It often seems today that proposing counterintuitive ideas is the fastest way up the academic ladder. As one young scholar puts it: "It is the intellectually innovative candidate who is most likely to get hired and succeed professionally, and ingenuity is not the same as dependable judgment."<sup>19</sup> The more radically an article departs from conventional wisdom, the more likely it is to be published in a prestigious law review. This perverse incentive is likely to create exactly the sort of scholarship we now see so often in constitutional law: original, creative, even brilliant, but quite obviously wrong.<sup>20</sup>

Bickel and most of his contemporaries were less willing to jettison accumulated wisdom. Scholars like Harry Kalven, Herbert Wechsler, and, a little later, John Ely left their mark on constitutional scholarship by breaking new ground—sometimes brilliantly—without completely severing ties to the past. As Kronman notes, "Bickel dismiss[ed] as philosophical romantics those who promote sweeping institutional reforms for the sake of achieving a closer approximation to some ideal, and vastly simplified, conception of representative democracy."<sup>21</sup> One law professor describes his legal education in the 1960s as emphasizing "that law must be separated from

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<sup>18</sup> Bennett, *supra* note 1, at 845-52.

<sup>19</sup> Ward Farnsworth, *Talking Out of School: The Transmission of Intellectual Capital from the Legal Academy to Public Tribunals*, 81 B.U. L. REV. 13 (2001).

<sup>20</sup> For other critiques of this privileging of novelty, see Daniel A. Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367 (1987); Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986); Daniel A. Farber, *Gresham's Law of Legal Scholarship*, 3 CONST. COMMENT. 307 (1986).

<sup>21</sup> Kronman, *supra* note 16, at 1598.

politics and that good arguments are seldom more than one step beyond existing arguments.<sup>22</sup>

The scholars I am discussing, by contrast, reject gradual change in favor of wholesale adoption of first principles (and damn the cost to precedent). While some—including Kronman—have suggested that there is a political component to the modern preference for novelty,<sup>23</sup> I think it derives at least as much from the academic milieu that creates incentives to climb out on limbs. As one commentator—not an academic himself—describes Amar and his co-author: “Their engine is not a political agenda, but an academic one: two law professors searching so desperately for a ‘new’ way to look at the Constitution that they don’t mind ignoring two hundred years of accumulated thought on the subject.”<sup>24</sup> And the strategy seems to pay off: it is no coincidence that some of the most prominent scholars are also those who stray farthest from common sense.

The obvious next question is why novelty has become the coin of the realm in the academy. Any thorough answer probably requires more knowledge of human psychology than I possess, but I can certainly point to exacerbating factors.

The structure of the legal academy has changed. Law schools have become both more academic and more interdisciplinary. Scholarship (especially non-doctrinal scholarship), once largely the province of faculty at a few elite institutions, is now widespread, leading to more competition among both scholars and law schools. If a young faculty member brilliantly turns prior wisdom on its head, she is more likely to be published and more likely to be noticed than the poor toiler in an already well-plowed field. While scholars looking to advance try to stand out by being different, schools looking to improve their reputation—and their ranking, another innovation since Bickel’s time—often hire or reward the scholars with the most notoriety rather than the soundest ideas.

The move toward interdisciplinary work, while salutary in many ways, also contributes to the elevation of novelty as a criterion of worth. After all, if a scholar writes in an area unfamiliar to many readers, the work seems more original. Unfortunately, while good interdisciplinary work educates and informs readers, much of what is currently published in law reviews is woefully inadequate by the standards of other disciplines.<sup>25</sup> But once the

<sup>22</sup> John Henry Schlegel, *An Endangered Species?*, 36 J. LEGAL EDUC. 18, 19 (1986). Schlegel believes that little has changed since then. See *id.* at 19-20.

<sup>23</sup> Kronman, *supra* note 16, at 1609-10. Kronman also suggests that it arises out of legal realism and its heirs. See *id.* at 1607.

<sup>24</sup> Morris B. Hoffman, *Populist Pabulum*, 2 GREEN BAG 2D 97, 98 (1998) (reviewing BRUCE ACKERMAN, *WE THE PEOPLE* (1998); AKHIL REED AMAR, *THE BILL OF RIGHTS* (1998)).

<sup>25</sup> For recent critiques of the pseudo-interdisciplinary legal scholarship, see, for example, Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Mark A. Graber, *Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship*, 16 CONST. COMMENT. 293 (1999); Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 YALE L.J. 253



subject matter of legal scholarship moves outside the ken of the third-year law students who select the articles, it is more difficult to sort the wheat from the chaff; student editors, perhaps understandably, may place more reliance on whether the article proposes a novel idea.<sup>26</sup>

The dominance of student-edited law reviews, of course, further exacerbates the problem. Not only are the students less capable of evaluating nonlegal contributions, they often lack the wisdom and experience to evaluate even legal contributions.<sup>27</sup> To some extent this has been true since the *Harvard Law Review* began publishing its "magazine"<sup>28</sup> in the 1880s. But besides the effects of the move toward interdisciplinary scholarship, anecdotal evidence suggests that student editors are more reluctant than they once were to seek or rely on faculty advice in selecting articles.<sup>29</sup> Unmoored from the larger world of legal academia, students are thus likely to prefer cleverness over thoughtfulness, invention over elaboration and application.<sup>30</sup> The trend feeds upon itself: as nonradical scholarship becomes passé at the *Harvard Law Review*, less prestigious journals follow suit, often soliciting contributions by the same authors who have already published numerous articles on a particular topic, but are pressed to come up with yet another "brilliant" idea.

A further change is that legal academics have become public persons. Tocqueville was right when he noted that "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial

(1996); Jack Rakove, *Two Foxes in the Forest of History*, 11 *YALE J.L. & HUMAN.* 191 (1999); Mike Townsend, *Implications of Foundational Crises in Mathematics: A Case Study in Interdisciplinary Legal Research*, 71 *WASH. L. REV.* 51 (1996).

<sup>26</sup> Cf. Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 *STAN. L. REV.* 1131, 1133-34 (1995) (suggesting that when students cannot evaluate articles, they rely on other indicia, including the reputation of the author, the article's political stance, the prestige of the author's school, and the length of the article, among other things).

<sup>27</sup> For similar critiques of student-edited law reviews, see, for example, Arthur D. Austin, *The "Custom of Vetting" as a Substitute for Peer Review*, 32 *ARIZ. L. REV.* 1 (1990); Richard A. Epstein, *Faculty-Edited Law Journals*, 70 *CHI.-KENT L. REV.* 87, 88 (1994); John G. Kester, *Faculty Participation in the Student-Edited Law Review*, 36 *J. LEGAL EDUC.* 14 (1986); James Lindgren, *An Author's Manifesto*, 61 *U. CHI. L. REV.* 527 (1994); Fred Rodell, *Goodbye to Law Reviews*, 23 *VA. L. REV.* 38 (1936).

<sup>28</sup> The pejorative reference comes from Learned Hand, who resigned from the *Harvard Law Review* with the statement that he had not enrolled in law school "to edit or write parts of a magazine." GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 44-45 (1994). Felix Frankfurter voiced similar sentiments, but quickly changed his mind. See Thomas E. Baker, *Tyrannous Lex*, 82 *IOWA L. REV.* 689, 710 (1997).

<sup>29</sup> Cf. Kester, *supra* note 27 (suggesting that faculties are so divided about the merits of various types of scholarship that they can offer no guidance); Elyce H. Zenoff, *I Have Seen the Enemy and They Are Us*, 36 *J. LEGAL EDUC.* 21, 22 (1986) (suggesting that law schools have "eliminated or reduced the role of faculty advisors and faculty-led law review seminars").

<sup>30</sup> Of course, peer-reviewed journals may be no better at sorting. See, e.g., Paul D. Carrington, *The Dangers of the Graduate School Model*, 36 *J. LEGAL EDUC.* 11 (1986); Schlegel, *supra* note 22.

one.”<sup>31</sup> Since Tocqueville wrote, we have made progress: lately, there is hardly a judicial question that does not turn into a public circus. With the explosion of media coverage of legal events—helped by a series of high profile audience-attracting events such as the Simpson trial, the Clinton impeachment, and the 2000 election litigation—every legal academic can become a pundit. With rare exceptions, however, punditry is a game for the clever, not the thoughtful. In an endless cycle, those who have already proven themselves given to rash but unique proposals are sought after by the media, who reward the most original sound-bites regardless of their accuracy or relevance, which gives further incentives to those and other academics to keep making off-the-wall proposals.

The interaction among several of these factors magnifies the effect. The move toward interdisciplinary scholarship, without the check provided by peer review, encourages the “law professor as astrophysicist” model of legal academics: one can master any field in the time it takes to research and write an article. The lure of national exposure (sure to warm the heart of the dean when he or she sets salaries) tempts us to venture away from our areas of expertise. Thus, we see such phenomena as 430 law professors—most of whom are not constitutional scholars, let alone constitutional historians—signing a letter purporting to instruct Congress on the original meaning of the impeachment clauses of the Constitution,<sup>32</sup> and an environmental and criminal law scholar (who apparently does not even teach constitutional law) pontificating as an expert on impeachment.<sup>33</sup> Similarly, a recent e-

<sup>31</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1966).

<sup>32</sup> See Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165 (1999) (describing and critiquing the circumstances of the letter). I must advise the reader that I signed that particular letter because I considered its topic within my area of expertise. I have written extensively on constitutional history, including co-authoring a casebook. See DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* (1990). Prior to the Clinton impeachment, I had written on judicial impeachment. See Suzanna Sherry, *Judicial Independence: Playing Politics with the Constitution*, 14 GA. ST. U. L. REV. 795 (1998).

An appropriate standard for judging expertise sufficient to justify signatures of this sort may be found in Farnsworth, *supra* note 19: legal academics “should use the same care and have the same expertise called for in their published professional work” and “should not sign documents unless they would be ready to defend them orally in the tribunals to which the documents are being presented.”

<sup>33</sup> I refer to The George Washington University Law School Professor Jonathan Turley. For Turley’s media status, see Lars-Erik Nelson, *Party’s Over: Take the Hint, Kenneth Starr*, N.Y. DAILY NEWS, Feb. 14, 1999, at 2 (calling Turley an “ubiquitous impeachment expert”). Turley’s biography in THE AALS DIRECTORY OF LAW TEACHERS (1999-2000) lists him as teaching Criminal Procedure, Environmental Criminal Law, Environmental Law, Legislation, Prisoner Project, Property, and Torts. A search of Westlaw (“AU: JONATHAN PRE/3 TURLEY”) in early December 2000 revealed 10 law review articles prior to 1999. None were on impeachment. None were on core questions of constitutional law, interpretation, or history, although one discussed the idea of a Madisonian dualist constitution in the context of international law and several addressed constitutional criminal procedure issues. The remainder had nothing to do with the Constitution. Since 1999, however, Turley has published four essays on impeachment and three others with at least peripheral connections to constitutional law. On the dangers of such unknowledgeable pontificating, see Farnsworth, *supra* note 19.

mail solicitation to law professors advised them to sign a letter interpreting Article II of the Constitution, 3 U.S.C. §§ 2, 4, and 5, and “the laws of Florida” if they simply had “a background teaching and writing about the Constitution,” because that was “all the expertise” needed.<sup>34</sup>

In short, the quickest route to publication—and thence to fame and fortune—for legal academics is to be dazzlingly clever and propose some completely novel thesis. Therein lies a possible explanation for the academic focus on the counter-majoritarian difficulty. In search of a problem to which they can propose increasingly ingenious solutions, modern constitutional theorists could hardly do better than the counter-majoritarian difficulty. Its banality provides an easy and malleable foil against which to offer profundities, and thus allows brilliance free rein. Because counter-majoritarianism is built into our constitutional system, we are not likely to find a “solution” to the difficulty any time soon; its insolubility thus allows generations of scholars to try their hands, like countless knights tugging on the rock-embedded Excalibur.<sup>35</sup> Prior failures only make the prize more valuable and the suggested solutions more bizarre.

That leaves the question of how to change the academic culture. I have several clever proposals in mind: a moratorium on constitutional scholarship by anyone whose last name falls in the first half of the alphabet, on the theory that the Equal Protection Clause requires equal opportunity for scholars whose name is always last on co-authored work,<sup>36</sup> or a Free Speech right of access guaranteeing at least one annual publication in a top ten law review for every scholar at a school ranked below, say, the top seventeen,<sup>37</sup> to compensate for the inevitable biases of law review editors.

More serious suggestions are that student editors consult with faculty when considering whether to publish submitted articles, that law professors treat scholarship as a serious intellectual endeavor rather than as sport or politics, that law faculties and deans consider the merits of a scholar’s work rather than his or her notoriety when making personnel decisions, and that

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<sup>34</sup> Farnsworth, *supra* note 19.

<sup>35</sup> Lest any reader infer that the counter-majoritarian difficulty only awaits its Arthur, let us remember that the story of King Arthur is largely mythical. One might say the same of the counter-majoritarian difficulty.

<sup>36</sup> See DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997); MARTIN H. REDISH & SUZANNA SHERRY, *FEDERAL COURTS: CASES, COMMENTS, AND QUESTIONS* (4th ed. 1998); Paul H. Edelman & Suzanna Sherry, *All or Nothing: Explaining the Size of Supreme Court Majorities*, 78 N.C. L. REV. 1225 (2000); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119.

<sup>37</sup> See *Best Graduate Schools: Schools of Law*, U.S. NEWS & WORLD REP., Apr. 10, 2000, at 73, available at <http://www.usnews.com/usnews/edu/beyond/grad-rank/law/gdlawt1.htm> (ranking Vanderbilt eighteenth).

all of us cultivate what Alexander Bickel called “good practical wisdom.”<sup>38</sup>  
But I guess those ideas are just as absurd as my first two.

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<sup>38</sup> ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 23 (1975).

