

## COMMENTS ON ALEXANDER'S *LAW AND POLITICS: WHAT IS THEIR RELATION?*

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Professor Alexander delivers on his promise to bring clarity to the question of the relation of law and politics, although I am afraid that by the end of these remarks I will attribute to him a confusion or two. Fortunately, I do not agree with his supposition that confusion always leads to political disaster,<sup>1</sup> much less that clarity is a necessary condition for wise policy<sup>2</sup>—though I do agree that we are obliged as professors to do our best to be clear. I want to begin with a point of agreement between us, then suggest where I think he errs and what can be done to repair the fault.

I agree that what Alexander calls “rule-sensitive particularism”<sup>3</sup> is the most promising way to close the “gap” he identifies between legislated rules and what “first-order reasoning tells you you should do,”<sup>4</sup> that is, the gap between law and conscience. As he was counting through the strategies to close the gap, I was looking for this one and was pleased when I saw it. It corresponds, I think, to Aquinas’s reason why, although there is no strict obligation to obey an unjust law, obedience ought sometimes to be given “to avoid scandal,” that is, to avoid leading others, perhaps of less refined conscience, to think that laws can be disobeyed whenever they want.<sup>5</sup> I do not think the distinction is so rigid between the “rule-sensitive” and the “rule-fetishists,” despite my reference to refinement. As Tocqueville noted that even the best philosopher relies on

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1. Larry Alexander, *Law and Politics: What Is Their Relation?*, 41 HARV. J.L. & PUB. POL’Y 355, 355 (2018).

2. *Id.*

3. *Id.* at 362.

4. *Id.* at 359.

5. 1 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* 1020 (English Dominican Friars trans., Benziger Bros. ed. 1947) (1265–1274) (I-II, q. 96, a. 4).

other minds for a million things,<sup>6</sup> so most of us find it necessary or convenient to rely on thousands of rules without inquiring too precisely into their desirability or justice, even if from time to time we raise objections to one or another. I like to think of myself as sensitive to the rules that govern the classroom and the duties and privileges of students and faculty, but I leave to others to worry about the details of paychecks and pensions and parking, and just follow the rules, however grudgingly—and that is just to consider university regulations, which are only a fraction of the rules I encounter in life.

Part of the gap between general rules and judgment in circumstances is what Aristotle identifies as properly settled by equity, the ability of a judge to recognize when the letter of the law would do an injustice against the intention of the author of the law.<sup>7</sup> Acting equitably requires good judgment, a little learning (to discern the legislator's intention), and good faith (to follow it), but it seems to me to be a step that an experienced judge learns to take, not a leap in the dark. Nor do I think, with Ronald Dworkin, that when a judge steps beyond the letter of the law, he necessarily substitutes his own opinions (that is, first-order judgments), unless of course he is looking for opportunities to do so.<sup>8</sup> If we can recognize bad faith in the marketplace, why can we not see the same in courts?

The error in Professor Alexander's argument, I think, is in equating politics with first-order judgments by individuals, or toggling back and forth between "a group or a part" and between "a particular actor" or "all or many actors."<sup>9</sup> Political life involves essentially thinking and acting in common, and if this sometimes issues in partisanship and even "groupthink," it is also the very source of political authority and political power, at least if Hannah Arendt is to be believed.<sup>10</sup> Because we are not only rational beings but also political animals, we tend to reason in groups, and thus imperfectly, accepting opinions as axioms and persuasive arguments as proofs. If this means that po-

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6. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 408 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835 & 1840).

7. ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 99–100 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000) (c. 384 B.C.E.) (1137a–1137b).

8. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81–130 (1977).

9. Alexander, *supra* note 1, at 355.

10. HANNAH ARENDT, *THE HUMAN CONDITION* 200 (1958).

litical actors think less clearly than angels, I concede the point, but also note that in better polities and political movements, the thought of individuals bonded together is probably stronger than the thought of most every one of them on his own, as we learn reasons from one another, direct our imaginings to what others can similarly imagine, and develop a shared vocabulary for articulating our hopes and fears. I do not mean that this is merely an organic process of fellow feeling, though friendship and fellowship in politics should not be ignored. I do think that the gap between the group and the individual is not endemic but rather rare, and that what appears to be such a gap is more likely to be the friction at the interface of different groups or parties, where individuals find themselves separated, so to speak, from their usual pack.

Law emerges from shared thought and common opinion, not independent of them. This is obvious in the case of customary law, or common law, as we still call it, but it is also true of legislation, which generally passes only as a result of widespread agreement, not merely a momentary coincidence of wills. No small part of the confusion in our society between law and politics today results from our misunderstanding of the legislative power, which, when described as the law-making power, gives rise to the idea that law can be made from scratch, like a pie, or hewn from a mass, like a sculpture, typically best when done by a single artist. Instead, I think the legislative power should be defined as it is in Blackstone as the power to declare or to change the law.<sup>11</sup> That definition supposes that law always exists in any society—that, so to speak, authoritative public opinion abhors a vacuum—and the objective of legislative action is to encapsulate and settle that understanding in writing or, when wrongs or mischiefs are discovered, to remedy them by new enactments.

Thinking about law in that way—which, I think, reflects its reality—ought to discipline our expectations of political change and perhaps also our process of lawmaking, urging us to understand the state of the law before any new enactment and to carefully consider what needs reform and why. It ought to make us skeptical of grand schemes to refashion whole areas of law and policy, seeing that they need to be woven into the fab-

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11. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*86.

ric of the law if they are to persist and accomplish their purpose. Sometimes striking reforms succeed and grow widely accepted—think of workers' compensation statutes in the early twentieth century, which replaced tangled webs of liability,<sup>12</sup> or maybe bankruptcy law, which was meant to allow individuals to disentangle themselves from their shortcomings without succumbing to them<sup>13</sup>—but reforms fail, I think, both when they create tangled webs of their own or when they pay scant attention to the need for law to be embedded in common, or at least widely shared, opinion, to win consent. And it would not be the least of the advantages of such a view of legislation that it might remind judges that changing the law is not *their* function. Applying established law to existing cases, jumping the inevitable gap between general rules and the myriad circumstances that differ person by person and case by case, in a way that does justice and attends to equity, is itself a noble task. Why do they not think so any more?

So to venture to answer Professor Alexander's concluding question about the relation of law and politics: Law is possible only when it emerges from politics, and ordinarily politics is most respectable when it acts to preserve and improve the law.

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12. *See generally* PETER M. LENCIS, *WORKERS COMPENSATION: A REFERENCE AND GUIDE* (1998).

13. *See generally* CHARLES J. TABB, *LAW OF BANKRUPTCY* (4th ed. 2016).