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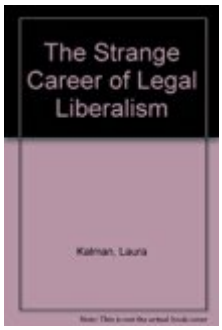
in the Humanities & Social Sciences

Laura Kalman. *The Strange Career of Legal Liberalism.* New Haven: Yale University Press, 1996. vii + 375 pp. $42.50, cloth, ISBN 978-0-300-06369-1.



Reviewed by Thomas M. J. Bateman

Published on H-Teachpol (July, 1997)

Laura Kalman's book is a stimulating panorama of American constitutional law, academic scholarship, and history in the wake of the United States Supreme Court's decisions in *Brown v. Board.* It is ostensibly about the search for an objective, non-political basis to justify the Court's decision, but Kalman's investigation leads her to the evolving relationship among the legal academy, other academic disciplines, the legal profession, and the bench. Ultimately, the book is about the uses to which history can and should be put in the attempt to ground constitutional decision-making.

The book revolves around the "counter-majoritarian difficulty", or more prosaically, the problem of judicial review in a democracy prizing rule by the majority (or at least rule by the representative branches of government). Traditionally, judicial review has been defended against its democratic critics with the argument that when judges measure a law against the standards of the constitution, they unproblematically discover the meaning of the constitution and apply it to the case at hand. Judges do not engage in a political or legislative exercise. They do not second-guess the will of the legislature; they merely declare the meaning of the constitution. In one popular formulation, the will of the legislature represents the temporary, momentary will of the people, whereas the constitution represents the enduring, fundamental, more dispassionate will of the people. Judicial review is the mechanism by which this more perfect will is asserted against the people's intemperate flights.

Legal realism changed all this. The realists of the early twentieth century claimed that the law does not dictate judicial conduct but the reverse. Judicial decision-making is always a matter of choice; precedents run in pairs; it matters who judges a dispute. If judges legislate, the older rationale for judicial review evaporates.

At first, legal realism was put in service of reform and progress. The *Lochner* era of the Supreme Court was characterized by the invalidation of scores of laws designed to temper the excesses of the market economy. Politically motivated judges, said the realists, used the constitution to do this. Realism exposed this judicial hubris as legislation against the will of the people expressed

in the New Deal. Courts should follow the legislative branch, they said, not second-guess it.

But when the Court handed down its decision in ***Brown***, a crisis of legitimacy loomed. How could we ground the principled constitutionalism of so progressive and reformist a decision in a post-realist age, especially when everyone was sure that the decision had to be made by a Court because the popular branches were too cowardly to act to end legal racial segregation? (***Roe v. Wade***, decided in 1973, only deepened the crisis).

Kalman's book begins with the long shadow cast by Earl Warren--the "judicial Camelot" (p. 57)--and the attempt to find a solid basis in post-realist constitutional theory for the decision. Specifically, the mission was, How can we get a ***Brown*** without also getting a ***Lochner***? Kalman reviews the many attempts to do this, ranging from the liberal theories of justice like those of John Rawls, Robert Nozick, and Ronald Dworkin, to John Hart Ely's attempt to understand judicial review as a means of securing the procedural requisites of democratic participation.

But she notes that realism proved an insurmountable obstacle to arid liberal theories seeking objectivity in judicial review. Liberals ran into interminable internecine difficulties over affirmative action cases like ***Bakke***. Noninterpretivist theories looked above and beyond the text for neutral, higher, more general principles of constitutional law to justify particular decisions which seemed to have no relation to the words of the constitution. These higher principles could not attract widespread agreement.

Law professors began to look to other disciplines for assistance. When they did so, they discovered hermeneutics and "the interpretive turn." In anthropology, objectivity did not matter, yet this did not seem to debilitate the discipline. Maybe objectivity was not crucial to constitutional theory either? Having found that objectivity was too high a bar to clear, legal liberals simply began lowering the bar.

Meanwhile, the Court became conservative and conservative critics of the Warren Court era made persuasive appeals to history, specifically to the founders' intentions, to suggest that the Court's "legal liberalism"--which Kalman defines at one point as the mixing in equal parts of judicial activism and political liberalism (p. 43), and at another as "the trust in the potential of courts, particularly the Supreme Court, to bring about 'those specific social reforms that affect large groups of people such as blacks, or workers, or women, or partisans of a particular persuasion ...'" (p. 2)--was so much partisan politics by judicial means. Borkian originalism had its day.

In response, legal liberals also appealed to history, arguing that the founding was actually a republican exercise in forging universal participation in a political community dedicated to the common good. ***Brown*** and other Warren Court gems could then properly be understood as fully consistent with American constitutional heritage.

The "turn to history" however, as Kalman notes, is a dangerous exercise at the best of times, and is especially dangerous when the demands of "advocacy" press so hard against disinterested historical inquiry, which is always full of maybes, perhapses, probabilities, and the inevitability of situatedness and interpretation. But if historical knowledge cannot be objective in the high sense, is not historical inquiry merely advocacy?

Kalman thinks not. She advances a "pragmatic, antifoundationalist hermeneutics" (p. 183). "Historicist in its recognition that historians must try to view the past through the eyes of those who lived through it, pragmatic hermeneutics acknowledges that historians never can. Antifoundationalist in acknowledging that no two people will write history the same way and that the historians' perspective on the same topic changes constantly and in accordance with context, pragmatic hermeneutics also discourages travel down that road toward the denial of the Holocaust" (ibid.). So she advances a highly constrained view of his-

torical knowledge, grappling with post-modern constraints while attempting to affirm the worth of the enterprise.

Kalman writes as a "legal liberal," one who is a historian as well as a lawyer. She is thus acutely sensitive to the legal abuse of history for constitutional, legal, and political ends. She adopts the currently fashionable approach that a constitution is like a conversation in which argumentative appeals are governed by pragmatic considerations. Claims are provisional, contextual, and always contestable.

This book is highly readable and truly remarkable in the breadth of research that went into it. She covers every major school of American constitutional theory in the last forty years. She also examines the place of the law school in university and society, engaging authors like Mary Ann Glendon who have written on the same subject. She also covers epistemological and methodological issues in historical inquiry, as these have become central in the last twenty years to constitutional debate. All these themes are engagingly woven together to examine the long shadow cast by the Warren Court over constitutional theory and politics.

The foregoing should make clear that this is not an exercise in constitutional theory but an intellectual history of constitutional theory in the post-Warren Court era. Accordingly, it assumes a familiarity with the many authors and theories it discusses. Its broadest purpose is to examine the relationship between the disciplines of history and law. Finally, it concerns the American experience exclusively.

These features limit the book's use as a text. It would most profitably be confined to upper undergraduate- and graduate-level courses in constitutional law/theory, constitutional history, and political science. That said, however, it can be used as a provocative examination of the intellectual crisis of American constitutional law and theory. Appeals to history, after all, were supposed to resolve differences, not exacerbate them.