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April 9, 2017: What I learned at Pepperdine

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Title: What I learned at Pepperdine

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4/9/2017—I wanted to hear what the brightest and most thoughtful—and most established—thinkers in American law, especially constitutional law, had to say at this time in addressing the problems of American political life. I was not disappointed in the sense that the best thinking really was present here at Pepperdine. And before I say anything else, if my readers wish to hear for themselves what was said, you can access it [here](#).

But I was disappointed in that the depth of the emergency in American public life was not addressed.

Here is how I ended my talk—it was an ad lib inspired by what I had been hearing all day. So I do not have an exact quote:

“Ladies and gentlemen. This room, this symposium, the law schools that it represents, have lost the country. The American people have descended into atavistic fury, on both sides of the political divide. This is in part our failure. We have to learn to offer healing to America and I do not think we yet know how to do this. But we have to learn. And we will never learn how to offer healing until we admit that offering healing is our job.”

In response to this ending, a law student asked about the relationship of the theme of the symposium to Brexit and the tide of populist revolt sweeping the West. That student had her finger on the nature of the crisis. But among the speakers, there was a curious complacency. Mostly, the speakers were offering what they had been offering for years and certainly were not responding to any sense of crisis in American public life. This was not responsive to the call of the question for the symposium, which, although muted, contained the seed of reference to a crisis in the courts and in public life.

This complacency itself is significant. It shows that as yet American law professors do not understand that something terrible has happened in American public life and that law has a responsibility for healing.

Yet, there were hints of the crisis that we are in. Michael McConnell opened the symposium with a very thoughtful recounting of the politics of the judiciary. Professor McConnell is not the type of person who yells fire. But, in answer to a question, he admitted, “we have been lurching from worse to worse.” The vote against judge Gorsuch, he said, was shamelessly partisan and the Republicans would probably do worse in retaliation in some future time.

Why did Professor McConnell not begin here? He was describing a very bad situation as if it were the weather and no one could do anything about it. But this is where his thoughtfulness is needed.

Similarly, Dean Erwin Chemerinsky, who spoke at lunch, acknowledged the unprecedented ideological divisions that led to the election of Donald Trump. However, he rather airily dismissed any concern about this in saying, “there will be a time when these ideological divisions are healed.” Gee, thanks a lot Dean Chemerinsky. I guess we will just hold on till then.

From my point of view, and this was more or less stated by Douglas Kmiec in response to Akhil Amar, you could divide all the speakers along the lines of those who defended a rule of law and those who claimed that politics plays a role and should play a role. This was also pointed out more generally by my fellow panelist Stephen Feldman.

This is of course what justice Scalia was claiming in his dissent in Casey. Only a rule of law, untainted by values, can save us from the politicization of the Supreme Court and thus the destruction of constitutional democracy.

Notice, however, that where justice Scalia used the term, value judgments, the speakers, because of the call of the question, substituted the word politics. Thus, I learned that you could more or less substitute fact for law and values for politics. So, for justice Scalia, politics, like values, is subjective and law is objective. Regardless of the terms used, subjectivity leads to conflict. (Professor Feldman also noted a quote from Randy Barnett to the effect that original public meaning "is a fact." This also shows the connection between textualism and the felt need for objectivity.)

The speakers yesterday who defended politics as inevitably part of law did not deny that politics is subjective. But, as illustrated by Dean Chemerinsky, they claimed that value neutral judging is not possible and suggested that the claim that it is masks a more subtle political agenda.

None of the speakers realized that they were all operating under the aegis of the fact/value distinction. Thus, they did not feel it necessary to defend that distinction. But, as Hilary Putnam has helped us see, that distinction has collapsed and its continued employment is harmful. It is part of the positivism that has helped destroy the institutions of American public life.

So I returned from Pepperdine more convinced than ever that fundamental change is needed, that such change could begin in law school, but that American law professors do not yet see the need or the path.