The U.S. Supreme Court and Humble Opinion Writing

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Eric Berger, The Rhetoric of Constitutional Absolutism, 56 **Wm. & Mary L. Rev.** 667 (2015).

American politics is increasingly polarized. *The New York Times* recently published an article listing all of the people and organizations that Donald Trump has insulted during his Presidential campaign so far. Republicans and Democrats get in trouble just for working together in Congress. This makes the U.S. Supreme Court an especially interesting institution right now. Though unelected, it is made up of Republican and Democratic appointees who decide important constitutional and other cases together. Professor Eric Berger, of the University of Nebraska School of Law, has written an important law review article addressing a related problem that has emerged on the Court: a tendency towards "absolutism" in its judicial opinions. So, has political polarization somehow carried over to the Court? If yes, what are the explanations and solutions?

Professor Berger's article is well written, nicely organized, deeply researched, and comprehensively analyzed. Moreover, his article shows the value of traditional doctrinal legal scholarship, though the article includes abundant theory as well. The article was published before Chief Justice Roberts' dissent in Obergefell v. Hodges, 576 U.S. __ (2015), where Roberts wrote that gay people may celebrate the decision, but added derisively that the majority's decision has "nothing to do with the Constitution." Ironically, the point of Roberts's dissent was the lack of humility in Justice Kennedy's majority opinion. So Professor Berger is on to something. The late Justice Scalia frequently, and with increasing harshness, skewered the opinions of the other justices.

Berger's first section delineates five types of cases where judicial absolutism is present, though some of them are somewhat paradoxical. He starts with District of Columbia v. Heller, 554 U.S. 570 (2008), showing how the conservative majority found that the historical evidence unquestionably proved that the Second Amendment was an individual right, though the issue has been debated for over 200 years. The conservatives also dismiss the most relevant precedent. Then, the dissenting "liberals" examine the historical evidence and reach the exact opposite conclusion, and with a tone that is similarly confident and dismissive of competing interpretations. Perhaps the only saving grace is that several distinguished and generally conservative jurists, most prominently Judges Richard Posner and Harvey Wilkinson, excoriated the majority opinion's analysis as one sided "law office" history.

Even cases overturning binding precedent, such as Citizens United v. FEC, 558 U.S. 310 (2010), which caused monumental changes in our campaign finance system, use absolutist language. The Court actually concludes that the appearance of a conflict of interest does not raises serious corruption questions. Corruption can only be quid pro quo. In this typology section, Berger argues that there are certain cases, such as Brown v. Board of Education, 347 U.S. 483 (1954), and Loving v. Virginia, 388 U.S. 1 (1967), where absolutist language is necessary, though he treats this as somewhat self-evident when he could have elaborated further on this point. Presumably, he thinks the laws there were obviously outrageous, and the danger of public and political backlash real.

Berger proposes three possible explanations for the Court's absolutism: strategic considerations; institutional considerations; and psychological explanations. Among the strategic considerations are "Absolutism as Rule of Law," "Absolutism as Formalism" (e.g., the tendency of the United States

Supreme Court, as opposed to courts in other countries, to reject balancing tests), and more. Institutionally, he discusses "The Court's Internal Culture" as a factor. And on psychology, he relies on a currently fashionable view of decision-making, namely "Confirmation Bias and Cultural Cognition." Here, he also notes how the adversarial nature of the American legal system requires zealous representation.

Berger does a good job finding some of these criteria more likely to promote absolutism than others, though no categories are really dismissed outright. For example, he says there is abundant evidence that people and judges subconsciously seek to conform certain consequential facts to their worldviews. He is less impressed with the strategic argument that absolutism is a method of "persuading colleagues," as a modest judicial tone would be more likely to attract consensus.

Berger's last section argues that the costs of this absolutism outweigh the benefits. He lists four costs: a "politics of cultural disdain"; a risk to judicial legitimacy; misconceptions regarding the workings of constitutional law; and "misplaced piety" towards our framing charter. On the benefits side, he includes "legal stability and the rule of law," and civic engagement (since the public will know exactly where the Court stands). He also addresses the relationship between judicial supremacy and popular constitutionalism, as well as between absolutism and Cass Sunstein's minimalism.

Finally, drawing on the work of Dan Kahan, Berger advocates the Court employ a more "aporetic engagement" with its cases. Such an approach is characterized by intellectual humility, an acknowledgement of contrary evidence, and admission of the difficulty of the cases where both sides have powerful arguments. He proposes five concrete steps the Court should take:

1. Greater humility in their opinions and more appreciation for the losing side's evidence.
2. Recognition of the possibility that one side's loss may be tragic, and a fair articulation of this side's alternative constitutional vision.
3. Abandonment of reliance on the dissent to articulate the losing side's vision.
4. Greater candor and explicitness about the difficulty of the decision.
5. Better treatment amongst the Justices in their opinions and assumptions about each other's good faith.

Berger's arguments are reminiscent of an excellent book cited in the article. Emily Calhoun's fine book, *Losing Twice: Harms of Indifference in the Supreme Court,* argues that it is hard enough for a litigant—who often also represents a constituency or member of a minority group—to lose a case, let alone have a legal system treat you unfairly. She argues that, however inevitable it is that the Court's decisions will produce winners and losers, the Court has a duty to try to ease the harm suffered by citizens whose arguments about the meaning of the Constitution, and their own rights, are rejected. It is an important work, and Berger is right to see the connection to his own argument and advance the conversation.

Berger's article has certainly raised a very important issue, and one that has been noticed by the press, in the context of questions about the justices' civility—or lack thereof. A complication regarding Berger's recommendations is the prisoner's dilemma. If both sets of Justices (the "liberals" and "conservatives") are more humble, then we might all benefit. But if one side stays absolutist while the other follows Berger's approach, the absolutists would be making "stronger," or at least more emphatic, arguments in the public eye. Another potential problem is that a more reserved opinion might actually delegitimize the Court and make it look uncertain. That's the reason why Berger says his analysis does not apply to cases like *Brown* and *Loving*. But that means there is a complex question about which cases are suitable for humility and which are not. For example, in *Obergefell*, a hesitant endorsement of gay marriage would have been problematic given what was at stake. But even on gay marriage, the Iowa Supreme Court, in Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009), actually issued a more humble yet unanimous

opinion relying on equal protection, and acknowledging comprehensively the objections of some religious people to gay marriage.

To sum up, Berger has given us a superb article that suggests that there would be much value in the Supreme Court writing less absolutist and more nuanced candid opinions. It is well worth reading.

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