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## CRITICAL CONSTITUTIONALISM NOW

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In the fall of 1999, Mark Tushnet published a celebrated foreword to the Supreme Court edition of the *Harvard Law Review* arguing that the Rehnquist Court's decisions could be understood as part of an era marked by divided government and sharply reduced ambitions for the transformative potential of constitutional law.<sup>1</sup> Almost exactly two years later, on September 11, 2001, airplanes crashed into the World Trade Center. For the next three or four years, Tushnet's characterization of our times seemed exactly backward: We appeared to be in the middle of an era of united government and of quite dramatic constitutional transformation. More recently still, things may have shifted yet again. As I write, in early fall of 2006, there has emerged a fragile possibility of a Democratic resurgence coupled with constitutional retrenchment.

I cite these facts not to criticize Tushnet, who has been my constant friend and mentor and sometimes co-author for over thirty years. The massive intelligence bureaucracy of the United States government could not predict the World Trade Center attack, so Tushnet can hardly be blamed for failing to foresee it and its aftermath. Instead, I cite them to support one of the great lessons that Tushnet has taught me. The lesson is that we are always in the middle of things and that meaning, therefore, always extends backward rather than forward across time. We embed meaning in texts and events retrospectively, and no actor can control (or at least completely control) the meaning that subsequent generations will give to her words and actions.<sup>2</sup>

Tushnet has famously made this point with regard to court precedent.<sup>3</sup> The meaning of judicial decisions cannot be fully discerned at the time they are decided. Rather, they develop meaning over time as future judges use the cases—often in quite unexpected ways—for their purposes. If this view is correct, and I am persuaded that it is, then it should come as no surprise

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1. See Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 Harv. L. Rev. 29 (1999). For an expanded and updated version, see Mark Tushnet, *The New Constitutional Order* (2003).

2. For Tushnet's best known articulation of this point, see Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 794-804, 809-15 (1983).

3. See *id.* at 809-15.

that the “meaning” of the Rehnquist Court’s work was different in 2004 than it was in 1999, and different in 2006 than it was in 2004. Tushnet created one meaning for Rehnquist jurisprudence that made sense at the time he wrote, but it is open to us to make something else of that jurisprudence now, and others will give it still a different meaning in the future.

The starting point for this essay is the claim that if this is true of the texts that critical scholars like Tushnet studied, then it must also be true of the studies themselves. There is no reason to suppose that the critical perspective, uniquely among all possible perspectives, reflects timeless and context-less truth. The question I want to ask, then, is what meaning the critical perspective has for us now in our new and dramatically transformed environment. I will proceed in four parts. First, I will address the meaning that critical scholars attributed to constitutional law in the late twentieth century. Second, I will describe some of the features of the situation that produced this meaning. Third, I will describe salient features of the current constitutional situation and how it differs from the situation from which critical constitutionalism emerged. Finally, I will offer some suggestions for what critical constitutionalism means today.

#### I. LAST CENTURY’S CRITICAL CONSTITUTIONALISM

The emergence of critical legal studies (CLS) was accompanied by a remarkable outpouring of creativity, energy, and anger.<sup>4</sup> For at least a brief period, it was at the center of the legal academy. Over a wide range of legal fields, one simply could not write or think seriously about a subject without taking some account of the critical (crit) interpretation.<sup>5</sup> Yet critical legal studies was also a notoriously fractured and amorphous movement. Even in its heyday, there were some canonical critical texts but few, if any, core, undisputed tenets. Critical scholars were not only in disagreement among themselves; their writing was sometimes unnecessarily obscure and

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4. For examples of the creativity and energy, see Mark Kelman, *A Guide to Critical Legal Studies* (1987); *The Politics of Law: A Progressive Critique* (David Kairys ed., 3d ed. 1998); Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (1983); *Critical Legal Studies Symposium*, 36 *Stan. L. Rev.* 1 (1984); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 *Harv. L. Rev.* 1669 (1982). For bibliographies, see Richard W. Bauman, *Critical Legal Studies: A Guide to the Literature* (1996); Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 *Yale L.J.* 461 (1984). For a taste of the anger, see Paul D. Carrington, *Of Law and the River*, 34 *J. Legal Educ.* 222 (1984); Calvin Trillin, *A Reporter at Large: Harvard Law*, *New Yorker*, Mar. 26, 1984, at 53.

5. This is not to say that many people did not try. Although they enjoyed parodying Critical Legal Studies (CLS) scholarship, see, for example, David L. Shapiro, *The Death of the Up-Down Distinction*, 36 *Stan. L. Rev.* 465 (1984), it is remarkable how little serious attention many mainstream academics paid to important critical work. For notable exceptions, see Andrew Altman, *Critical Legal Studies: A Liberal Critique* (1990); Owen M. Fiss, *The Death of the Law?*, 72 *Cornell L. Rev.* 1 (1986).

polemical, and they were sometimes unwilling to tell outsiders what implications, if any, their work held for policy on the ground.<sup>6</sup>

Given its ambiguity, crit scholarship is, perhaps, even more malleable over time than ordinary texts. Nonetheless, it is possible to isolate some key features of the corner of critical legal studies that concerned itself with constitutional law.<sup>7</sup> What follows is a very brief sketch of the central claims of critical constitutionalism together with an even briefer description of an internal dispute that arose from these claims.

Most critical constitutional scholars did not distinguish sharply between Warren, Burger, and Rehnquist Court jurisprudence. Instead, they saw arguments between liberals<sup>8</sup> and conservatives, on the Court and off, as internal to the mainstream constitutionalism that they rejected. Although mainstream practice might tilt left or right, it remained defined by a set of assumptions and constraints that sharply limited its potential. These limits were captured by the famous crit slogan—powerful, if obviously overly simple—that law is politics. In their more analytic moods, critical scholars elaborated on this slogan with two overlapping critiques of standard constitutional practice—the critique of determinacy and the critique of rights.

In its narrowest form, the indeterminacy claim was that standard legal materials—statutes, constitutions, and precedent—often failed to dictate a single outcome. Critical scholars demonstrated over and over again that legal rules and conventional methods of interpretation could, in the right hands, produce wildly different results.<sup>9</sup> Some scholars went beyond this claim to assert that not just legal materials, but also underlying ideologies, were indeterminate. On this view, Liberalism itself contained

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6. See Neil Duxbury, *Patterns of American Jurisprudence* 479 (1995); Kelman, *supra* note 4, at 275.

7. I acknowledge a problem in my effort to recover these features. I am writing in the twenty-first century, so, if my claim about the transitory nature of texts is true, I am necessarily producing a twenty-first-century version of twentieth century critical legal studies. I return to this problem at the close of this essay.

8. So as to avoid confusion I will use the word “Liberalism” (capitalized) to refer to classical Liberalism—that is, a general theory defined by a concern for individual liberties protected by a rule of law—and “liberalism” (lower case) to refer to the modern political position.

9. For the classic statement of this proposition in the constitutional context, see Tushnet, *supra* note 2. For more recent, generalized restatements, see Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* 60 (1997) (“[T]he whole point of the critique has been the claim that in many cases in which the ideological stakes are high, legal actors have had a choice between two (or more) interpretations or definitions of a particular rule, and that the choice has had the effect of disposing of the ideological stakes.”); Mark Tushnet, *Survey Article: Critical Legal Theory (Without Modifiers) in the United States*, 13 *J. Pol. Phil.* 99, 108 (2005) (“As critical legal studies developed, bold and overstated claims that *all* results were underdetermined were replaced by more defensible ones, to the effect that many results were underdetermined, or that results in many interesting cases were, or . . . that enough results were underdetermined to matter.”).

contradictions and ambiguities that could be exploited for radical purposes.<sup>10</sup>

In one sense, the critique of rights was an extension of the indeterminacy critique. If all legal doctrine was indeterminate, then, obviously, free speech, equal protection, and due process doctrine was indeterminate as well. The critical take on rights went beyond arguing for their plasticity, however. Some critical scholars argued that reliance on legal rights was harmful. Liberal rights both grew out of, and reinforced, the public-private distinction at the core of Liberal legal ideology. Liberal rights were almost always conceptualized as claims by private persons against the state, rather than as claims to state resources to combat private oppression. Claims to Liberal rights therefore both ignored and obfuscated the extent to which the private sphere was, itself, constructed by public decisions. This failure to detect state responsibility had the effect of taking off the table constitutional claims to radical redistribution of “private” resources and power.<sup>11</sup>

Liberal rights were harmful in a second sense as well. The rhetoric of rights tended to objectify and distort the actual situation in which people found themselves. Rights were abstract, alienating, and individuating rather than concrete, liberating, and unifying.<sup>12</sup> These deficiencies were, in turn, reinforced by what might be called the “Lucy-and-the-football” phenomenon. The possibility of vindicating legal rights was endlessly dangled before the dispossessed. Rights were in fact vindicated frequently enough so as to keep people in the game. However, the indeterminacy of rights allowed courts to yank them away just when any truly meaningful reform seemed within reach. Consequently, endless time and energy were wasted in the pursuit of legal remedies, when the time might better have been spent organizing nonlegal popular resistance.<sup>13</sup>

As already noted, the critique of determinacy and the critique of rights reinforced each other. Along another dimension, however, there was tension between the two arguments, and that tension, in turn, gave rise to a central fissure within critical legal studies. The tension arises because if rights are really indeterminate, then it is hard to see how they can also invariably support the status quo. More generally, how could critics take Liberal constitutionalism as its enemy if Liberal constitutionalism itself had no determinate content?

At the risk of considerable oversimplification, it is possible to identify two competing critical schools that developed in response to this

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10. See James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685, 721 (1985) (“[T]he absence of essences of words implied the collapse of the liberal theory of adjudication, . . . [y]et this idea itself seemed to depend on a sort of essentialism; after all, it did invoke the ‘deep structure’ of liberalism.”).

11. See, e.g., Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363 (1984).

12. See, e.g., Peter Gabel, *The Phenomenology of Rights—Consciousness and the Pact of the Withdrawn Selves*, 62 Tex. L. Rev. 1563 (1984).

13. See Tushnet, *supra* note 11.

challenge—schools that I will label “structural” and “existential.”<sup>14</sup> The structural approach, which has obvious roots in both American Legal Realism and Marxist legal thought, maintained that legal texts were indeterminate only insofar as they were separated from economic, social, and cultural structures that gave them meaning. On this view, it was wrong to claim that legal actors did not have the subjective sense of being bound by legal rules or that legal decisions were completely unfettered and, therefore, unpredictable. On the contrary, legal actors regularly had the internal perception of constraint, and one could predict with a high degree of accuracy how particular cases would be resolved. The point, though, was that this sense of constraint and predictability was not internal to law, or, at least, not entirely internal to law. Rather, it was the product of nonlegal structures that determined outcomes regardless of the law’s content.

According to the structural view, then, legal rights were neither good nor evil when abstracted from a surrounding social environment. Given the particular structure of our society, they functioned in a certain way, but in another society with a different structure, they might function very differently. Indeed, it was even possible that legal consciousness itself might serve the ends of justice in certain environments. The problem was that in our environment, it served instead to enforce a deeply unjust status quo.

The structural theory stands in sharp contrast to the existential view. Existential theorists were ready to follow the indeterminacy critique all the way to the bottom. On this view, the supposed structures that gave legal rules meaning were themselves contingent, indeterminate, and vulnerable. Surrounding structures sometimes constrain the choices open to legal actors, but often in ideologically charged cases, the sense of constraint is an illusion that exists only because of another choice—the choice to hide one’s freedom from oneself. On this view, the status quo remains unchallenged only because people lack the courage or insight to challenge it.

## II. HOW WE WERE THEN

Because this is an essay about the indeterminate meaning of critical legal studies itself (a critical take on critical theory, if you will), there is no way to avoid recursive self-reference. Hence, one must ask whether one should analyze the meaning of critical legal studies from a structural or existential perspective, and, of course, that decision itself will either be determined by a structure or result from unmediated freedom. For now, at least, I want to

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14. For obvious reasons, these labels are problematic. For a much more careful (and quite brilliant) taxonomy, see Duncan Kennedy, *A Semiotics of Critique*, 22 *Cardozo L. Rev.* 1147 (2001). I have used the word “existential” to describe what Kennedy calls “decisionist,” see *id.* at 1161-69, while my “structuralism” roughly corresponds to his “paranoid structuralism.” See *id.* at 1169-75.

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avoid this morass by simply asking the reader to accept provisionally a structural approach. In other words, in this section, I want to historicize critical legal studies by investigating the structures to which it responded in the past. In the next section, I explore how critical constitutionalism might have changed its meaning in response to a different set of structures. At the conclusion of the essay I will reintroduce the conflict between structural and existential approaches.

What, then, were the features of mid- to late twentieth century constitutionalism that gave critical constitutionalism determinate content? The question might be investigated sociologically (in terms of the career paths and options open to crit academics) or psychoanalytically (in terms of the unconscious needs to which CLS responded), but for present purposes, it is productive to think of critical constitutionalism in terms of intellectual history. From this vantage point, critical constitutionalism made sense of, and, in turn, was given meaning by, the collapse of reformist liberalism.

One can more or less pinpoint the moment when the collapse began: the awful spring and summer of 1968, when Lyndon Johnson withdrew from the presidential race, Martin Luther King and Robert Kennedy were assassinated, the urban streets erupted in nihilistic violence, Hubert Humphrey was nominated for President amidst the stench of tear gas, and the liberal consensus came unstuck.

Another event in 1968, much less well remembered today, marked a turning point for the constitutional branch of reformist liberalism. Chief Justice Earl Warren announced his retirement, and President Johnson nominated his longtime friend and counselor, Associate Justice Abe Fortas, to replace Warren as well as another longtime friend, District Judge Homer Thornberry, to replace Fortas. After a bitter confirmation battle, the Fortas nomination was blocked in the Senate amid charges of cronyism and corruption. The result was that Warren served an extra year, and his replacement was named by the newly elected Richard Nixon rather than Johnson. Meanwhile, Fortas's troubles only intensified and, within a short time, a growing scandal forced his resignation as well.<sup>15</sup>

This change in the Court's composition both caused, and was caused by, the collapse of liberal legalism. As a practical matter, the loss of these two seats ended liberal control of the Court and, with it, the promise of sweeping, left-leaning reform through the medium of constitutional adjudication. The departure of Fortas and Warren, however, also had symbolic significance. Warren, a genial and reform-minded moderate Republican, was the chief representative of atheoretical and unreflective liberalism based upon good intentions, sound judgment, and common

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15. For accounts of these events, see Fred P. Graham, *The Self-Inflicted Wound* (1970); Laura Kalman, *Abe Fortas: A Biography* (1990); Robert Shogan, *A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court* (1972).

sense.<sup>16</sup> His departure symbolized the failure to complete a liberal legal project premised on these virtues. Fortas's forced exit suggested the same failure, but also something much uglier. Fortas had direct ties to the New Deal and to American Legal Realism, which provided its intellectual underpinnings. Yet he was also linked to the Vietnam debacle and to the corruption and cynical manipulation central to the interest group politics that had arisen in the New Deal's wake. His departure suggested not just failure, but moral and intellectual bankruptcy as well.<sup>17</sup>

Thus, one part of the background structure that supported critical constitutionalism was the demise of liberal constitutional reformism. There is another half of the story, however, that proved equally important. It turned out that conservatives were unready to occupy the space that the liberals had vacated. Although the Goldwater movement had begun the process of creating a modern conservative critique of the liberal order, the effort was still in its infancy and, with regard to constitutional theory, had not yet even been born.<sup>18</sup> The replacements for Warren and Fortas again symbolize the nature of the transformation. To be sure, Harry Blackmun, and, especially Warren Burger were critical of aspects of Warren Court reformism, particularly with regard to criminal procedure, but neither Justice had anything like a worked-out conservative constitutional theory. They pushed the Court marginally to the right on some issues, but the Court also drifted to the left on others, most prominently, of course, with regard to abortion and women's rights. Their tenure was famously and accurately characterized as a "counterrevolution that wasn't."<sup>19</sup>

These characteristics of liberal and conservative constitutionalism, in turn, go a long way toward explaining the emergence and shape of critical legal studies. Crit scholars responded to the decay of liberal constitutionalism. The civil rights movement had lost steam, the labor movement had become conservative and complacent, and the Great Society had collapsed. In this environment, it is no wonder that the dream of moderate reform achieved through respect for rule-of-law values lost credibility. To emerging crit scholars in the 1970s, liberalism seemed entirely hollowed out, characterized by drift, interest group capture, and a kind of elitist authoritarianism.

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16. See Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* 7 (1983) (quoting a contemporary observer listing Warren's outstanding characteristics as "decency, stability, sincerity, and lack of genuine intellectual distinction").

17. See Shogan, *supra* note 15, at 262 (quoting contemporary observers as stating that the Fortas affair was a "staggering blow" to liberalism and that it was "in many ways the culmination of New Deal liberalism").

18. The key event—the creation of the Federalist Society—did not occur until 1981. See George W. Hicks, Jr., *The Conservative Influence of the Federalist Society on the Harvard Law School Student Body*, 29 Harv. J.L. & Pub. Pol'y 623, 647 (2006). The Society was founded in part because of the perception that conservative legal thought had virtually no presence at major law schools. See *id.*

19. *The Burger Court: The Counter-Revolution that Wasn't* (Vincent Blasi ed., 1983).

Had liberal reformism been replaced by a coherent conservative movement, left-leaning scholars might have devoted their energy to combating that movement. Of course, left-leaning scholars *did* spend some time attacking conservatives, especially when intellectually respectable versions of conservative theory—principally law and economics and originalism—began to make headway in law schools. At the moment when critical constitutionalism took shape, however, these movements had little purchase outside the academy. The conservatives who actually made constitutional law had no unified or coherent vision. The movement, such as it was, was populated mostly by discredited proponents of states' rights left over from the civil rights struggle, Frankfurtian fallen-away liberals, and legal patricians embracing a vaguely Burkean unease regarding the pace of social change.<sup>20</sup>

To be sure, there was an ominous shift occurring beneath the surface. By the 1980s, more sophisticated legal conservatives were beginning to move out of the academy and into positions of power.<sup>21</sup> On the broader stage, the Democratic Party had begun its secular decline. Even into the 1990s, however, conservative legal thought had minimal representation on the Supreme Court, and the long-term descent of the Democratic Party was masked by two aberrational events: the self-inflicted wound of Watergate, and the emergence of an obscure Arkansas governor who turned out to have once-in-a-generation political skills.

Viewed in retrospect, then, it is the 1970s, 80s, and early 90s, rather than the period beginning in the late 90s, that seem dominated by Tushnet's divided government/chastened constitutional ambition regime. The earlier period was marked by the failed nominations of four conservative candidates for Supreme Court seats,<sup>22</sup> and by only a modest retrenchment from Warren Court reforms. There was a similar pattern on the broader political stage. It turned out that the most important fact about Watergate was not Nixon's attempted coup d'état, but the gloriously successful counter-coup mobilized by a powerful opposition in Congress and the media. Similarly, although conservatives made obvious advances during the Reagan era, the effort to achieve truly broad-based and lasting change—on the Supreme Court and elsewhere—were defeated by a still powerful Congressional opposition and entrenched liberal interest groups.

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20. For a good contemporary characterization, see J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 Harv. L. Rev. 769 (1971).

21. See Hicks, *supra* note 18.

22. Clement Haynesworth and G. Harold Carswell (both nominated by President Richard Nixon in 1969), as well as Robert Bork (nominated by President Ronald Reagan in 1987), were defeated on the Senate floor. Douglas Ginsburg (nominated by President Reagan after the Bork nomination was defeated) withdrew after it was revealed that he had used marijuana. See L.A. Powe, Jr., *From Bork to Souter*, 27 Willamette L. Rev. 781, 784 n.12, 796 (1991).



Given an environment marked by liberal collapse and conservative hibernation, it is hardly surprising that critical constitutional scholars directed much of their attention to their liberal opponents. On the one hand, critical constitutionalism needed to clear away the detritus produced by the liberal crack-up. Before a fresh start was possible, the self-justificatory illusions of legal liberalism had to be dispelled.<sup>23</sup> In the place of the misplaced hope for top-down reform driven by legal principles, critics held out the promise of local organization and struggle.

On the other hand, the threat of conservative ascendancy seemed relatively remote. Importantly, the absence of a conservative threat left space for critics to attack rule-of-law values. Much of the liberal anger at critical constitutionalism stemmed from a deep fear that these attacks would leave the left exposed to conservative power.<sup>24</sup> The contemporary response of critical constitutionalists was to claim that civil liberties protections were illusory and, indeed, harmful.<sup>25</sup> No doubt critics were honest when they asserted that they experienced rights claims in this way. Still, from a historical perspective, it seems likely that the experience was at least partially grounded in the perception that the conservative threat was puny and remote.<sup>26</sup> In this sense, CLS constitutionalism was parasitic on the great liberal victory in Watergate, and the more muted triumph fifteen years later in Iran-Contra. Ironically, these rule-of-law victories provided space within which critics could safely argue for dismantling the rule of law. So long as a serious rethinking of constitutional norms from a conservative perspective was stymied, critical constitutionalists could safely insist on such a rethinking from a radical perspective.

### III. HOW WE ARE NOW

The status of modern critical constitutionalism poses a fascinating paradox.<sup>27</sup> Events of the last six years provide a stunning confirmation of

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23. There was, no doubt, an Oedipal strain to this impulse. When critics arrived on the scene, the major law schools were dominated by an entrenched older generation of moderate liberals. See Robert Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561, 675 (1983) ("When we came, they were like a priesthood that had lost their faith and kept their jobs.").

24. See, e.g., Fiss, *supra* note 5.

25. See *supra* notes 11, 12.

26. As critical race opponents of critical constitutionalism contemporaneously pointed out, the threat was less remote for more vulnerable groups. See Patricia J. Williams, *The Alchemy of Race and Rights* 146-65 (1991). Unsurprisingly, therefore, academic representatives of these groups found the critique of rights less persuasive. See, e.g., Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 Harv. C.R.-C.L. L. Rev. 301 (1987). See generally *Critical Race Theory: The Key Writings that Formed the Movement* (Kimberlé Crenshaw et al. eds., 1995). For a contemporary restatement, see Daria Roithmayr, *Left Over Rights*, 22 Cardozo L. Rev. 1113 (2001).

27. For an alternative account of the current status of critical legal studies, see Tushnet, *supra* note 9, at 99, 108.

the claims critical constitutionalists made during the last century, yet critical constitutionalism now has less influence than at any time since its emergence.

Why have crits lost credibility at the very moment when their prophecies have been vindicated? There are important reasons for the decline that have nothing to do with the vindication of crit claims. Perhaps the most dramatic proximate cause was a bitter split between some of the white males who founded critical legal studies and scholars representing women and people of color, who felt that the movement was not serving their needs.<sup>28</sup> Even before this schism occurred, CLS, like many left-leaning movements, was weakened by internecine ideological struggle, sometimes about very esoteric points of doctrine, and by the failure to produce results on the ground. Meanwhile, its proponents have grown older and lost energy, and a new generation has different interests and priorities.<sup>29</sup>

In this section, I argue that there is another reason for the decline of critical constitutionalism that is tied to the accuracy of crit analysis. Put succinctly, it is just because the crits were right about the disutility of rights and the indeterminacy of law that critical constitutionalism has become increasingly irrelevant.

To see why this is so, we must first understand the characteristics of our new constitutional order and the ways in which those characteristics vindicate crit claims. The new order is characterized most prominently by extremely aggressive use of legal argument and rhetoric to cement a system of one-party government.

Any description of how things are now must give the so-called War on Terror a prominent place, but it is important to realize that these features appeared before the planes destroyed the World Trade Center. The first event of importance occurred almost a year before that attack when the Supreme Court handed the presidency to George W. Bush.<sup>30</sup>

Two facts stand out about the Court's decision in *Bush v. Gore*. First, although the decision may have been motivated by raw politics, the Court's opinion was written in the language of legality and rights. Cases were cited and distinguished, language interpreted, and legal principles applied. Second, the Republicans got away with it. Defenders of *Bush v. Gore* are probably correct when they claim that the Court was able to settle the election more peaceably and expeditiously than any overtly political

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28. For identity-based attacks on "mainstream" CLS work, see *supra* notes 11-12. For a sense of the tension produced by the attacks, compare Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 Geo. L.J. 251 (1992) (criticizing some identity-based scholarship), with Gary Peller, *The Discourse of Constitutional Degradation*, 81 Geo. L.J. 313 (1992) (defending the work), with Mark Tushnet, *Reply*, 81 Geo. L.J. 343 (1992) (criticizing the defense).

29. See Tushnet, *supra* note 9, at 103.

30. See *Bush v. Gore*, 531 U.S. 98 (2000).

process could have.<sup>31</sup> Moreover, the Justices appear to have paid little price for doing so.<sup>32</sup> The façade of legality served to legitimate an outcome that might otherwise have been unacceptable.

It is an open question whether this victory would have been lasting had the September 11 attack never occurred. Once it did occur, though, the pattern of *Bush v. Gore* was replicated again and again. In a wide variety of contexts—from the legal defense of an aggressive war, to the assertion of constitutional power to hold American citizens indefinitely without legal process, to the claim that the President has inherent constitutional power to utilize torture and warrantless wiretapping, to assertions that the filibuster is unconstitutional and that mid-decade gerrymandering of congressional districts is constitutionally permissible, to the unprecedented search of the office of an incumbent congressman—the Bush Administration and its allies have used legal rhetoric to hold and consolidate power.

Of course, it is a mistake to suppose that this success is entirely internal to law and legal consciousness. Just as the critics argued, these legal developments must be understood against the backdrop of the prevailing political regime. Despite the President's deep unpopularity<sup>33</sup> and voting and polling data showing majority or near-majority support for Democratic candidates,<sup>34</sup> as of early fall 2006, that regime was entirely dominated by the Republican party. Not only did Republicans control the presidency; they had managed to extend that control into the bowels of executive agencies more effectively than any administration in memory. Similarly, Republican control over both Houses of Congress extended beyond the working majority necessary to organize both bodies. For at least the first four years of the Bush Administration, Republicans voted as a bloc in a fashion unprecedented since the early New Deal. And, of course, Republicans controlled a majority of state legislatures and governorships and, increasingly, the courts.

The importance of this Republican dominance cannot be overstated. Whereas previous Republican administrations faced push-back in the form

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31. See, e.g., Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (2001).

32. Although the data are ambiguous, there appears to have been a modest decline in public support for the Court during the Rehnquist years. See Herbert M. Kritzer, *The American Public's Assessment of the Rehnquist Court*, 89 *Judicature* 168 (2005). However, it is difficult to separate out this decline from the general decline in support for all institutions of the federal government. *Id.*

33. As of October 2006, Gallup reported that thirty-seven percent of Americans approved of President George W. Bush, and fifty-nine percent disapproved. These figures are similar to those generated by other polling organizations. See *PollingReport.com*, *President Bush—Overall Job Rating*, <http://www.pollingreport.com/BushJob.htm> (last visited Oct. 14, 2006).

34. For example, as of October 8, 2006, Gallup showed fifty-nine percent of its respondents favoring Democratic candidates for the House of Representatives and thirty-six percent favoring Republican candidates. See *PolingReport.com*, *Election 2006*, <http://www.pollingreport.com/2006a.htm> (last visited Oct. 14, 2006).

of refusal to enact administration-sponsored legislation, congressional investigations, adverse court decisions, or revolt within the executive branch itself, until quite recently, the Bush Administration has been almost entirely unconstrained.

What explains this power imbalance? It is certainly not explainable by anything resembling a broad-based popular mandate. Bush has never had such a mandate.<sup>35</sup> Some of it is attributable to the winner-take-all features of the American political system and to a combination of Republican discipline and Democratic fecklessness. A large contributing factor is the War on Terror itself. The Bush administration has masterfully deployed and prolonged the “rally effect” produced by the Afghan and Iraqi wars.<sup>36</sup> Finally, there is a feedback loop, whereby the Bush legal strategy reinforces its political dominance, which, in turn, protects the legal strategy from attack. Thus, *Bush v. Gore*, the confident assertion of executive constitutional authority to stymie a congressional check, the virtual elimination of competitive congressional districts, and the threat to declare the filibuster unconstitutional have all served to create and entrench Republican political control, which, in turn, has protected Republican legal strategy.

Although they can take small comfort from the fact, this complex interaction of legal consciousness with politics vindicates the key claims of critical constitutionalists.<sup>37</sup> It turns out that constitutional principle is sufficiently elastic to accommodate easily the Bush revolution, at least when it interacts with one party political control. To be sure, liberals will complain that, for example, the *Bush v. Gore* decision or the Office of Legal Counsel’s torture rulings<sup>38</sup> amount to a perversion of, rather than respect for, the rule of law. Without question, the legal reasoning in these documents is something of a stretch. In fairness, though, it is hard to say that they involve more of a stretch than celebrated liberal legal victories like

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35. George W. Bush lost the popular vote to Al Gore in 2000 and won the popular vote against John Kerry by a scant three million votes out of some 121 million cast. See Infoplease, Presidential Elections 1789-2004, <http://www.infoplease.com/ipa/A0781450.htm> (last visited Oct. 14, 2006).

36. See Marc J. Hetherington & Michael Nelson, *Anatomy of a Rally Effect: George W. Bush and the War on Terrorism*, PS: Political Science & Politics, April 2003, at 37 (reporting the September 11th rally effect as the largest and longest sustained of all recorded rally effects).

37. For an elaboration of this point in the context of *Bush v. Gore*, see Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 Geo. L.J. 173 (2001).

38. See Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

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*Roe v. Wade*<sup>39</sup> or *Brown v. Board of Education*.<sup>40</sup> Just as liberals did under the old regime, Republican lawyers have managed to dress up political outcomes in rhetoric that is within the domain (albeit perhaps barely) of recognizable, competent legal argument. Indeed, they have demonstrated that the domain itself is not fixed, but can be moved by the very fact that powerful legal actors are willing to advance arguments previously thought out-of-bounds. They have, in short, used legal reasoning to do exactly what critics claim legal reasoning always does—put the lipstick of disinterested constitutionalism on the pig of raw politics.

Ironically, it is just this vindication of critical constitutionalism that disables it from responding to the current crisis. Recall that in the previous century, critical constitutionalism filled a vacuum left when conservative legal thought failed to take advantage of the disintegration of reformist liberalism. Rights skepticism made sense in this environment because the risk of serious oppression from a still immature rightist movement was very small.

The world today has been radically transformed. There is no longer a need to discredit liberal reformism to make room for a fresh start. For the present, at least, there is no liberal reformism to discredit, and the prospect of a fresh start is vanishingly small. On the other hand, there is a very real threat of rightist repression. To put the point baldly, we are one more terror attack away from a complete remaking of our political culture.<sup>41</sup>

In this environment, the crucial question for left constitutionalists is how to stop the slide into authoritarianism. Very recently, there have been some encouraging signs, but, importantly, some of them stem from increasing apprehension among liberals and some traditional conservatives concerning rule-of-law values. After four years during which Republican unity across branches of government mocked James Madison's hope that "ambition would counter ambition," the judicial and legislative branches have tentatively begun to assert their constitutional authority. Thus, even some conservative Justices on the Supreme Court rejected Bush Administration claims that it could indefinitely hold American citizens as enemy

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39. 410 U.S. 113 (1973); *see, e.g.*, Tushnet, *supra* note 2, at 820 ("It seems to be generally agreed that, as a matter of simple craft, Justice Blackmun's opinion for the Court was dreadful.").

40. 347 U.S. 483 (1954). Consider, for example, the statement of Justice Robert Jackson (who ultimately joined the unanimous *Brown v. Board of Education* opinion) to his colleagues after the first *Brown* argument: "[There is] [n]othing in the text that says this is unconstitutional. [There is] nothing in the opinions of the courts that says it's unconstitutional. Nothing in the history of the 14th amendment [says it's unconstitutional]. On [the] basis of precedent [I] would have to say segregation is ok." Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 296 (2004) (quoting an early draft of Justice Jackson's concurrence in *Brown*).

41. For a convincing explication of this point, together with a less-than-convincing (to this reader at least) proposal for what to do about it, see Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (2006).

combatants without meaningful procedures or access to courts.<sup>42</sup> In Congress, growing coalitions of liberals and conservatives have attacked the Bush Administration's assertion of unilateral authority to disregard wiretapping laws<sup>43</sup> and torture prisoners.<sup>44</sup>

These cracks in the Bush legal strategy magnify, and are magnified by, changes in the political climate. Bush's lame duck status, his reaction to the Hurricane Katrina disaster, the failure of Social Security reform, the endless chaos in Iraq, and abysmal poll numbers are all contributing to the unraveling. Of course, the danger has not passed. The Bush Administration has demonstrated remarkable resilience, and, as noted above, another terror attack could yet change everything.

The short of it, then, is that we are at a critical and delicate moment, a moment at which, it would seem, nothing could be more ill-advised than launching a frontal attack on the rule of law. At first, this may seem paradoxical. If constitutionalism has provided the cover for creeping authoritarianism, as I have claimed above, how can it be that it is also part of the solution? The paradox is resolved as soon as one rejects the Liberal faith that the content of constitutionalism is internal to law. Precisely because it is not, constitutionalism can be put to a variety of contradictory uses in different environments. Thus, critics will say, Liberal constitutionalists are deluded in thinking that legal consciousness itself provides a bulwark against all that is evil in the world. Sometimes, though, it is wise to indulge the delusions of others, especially when one is trying to keep together a fragile coalition and when those delusions motivate coalition partners to stay on the right side of a vital struggle.

#### IV. WHAT DOES CRITICAL CONSTITUTIONALISM MEAN NOW?

What meaning are we to give critical constitutionalism in this new and very dangerous environment? In answering this question, I want to return to the internal debate between critical structuralists and existentialists that

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42. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

43. See Sheryl Gay Stolberg, *Senate Chairman Splits with Bush on Spy Program*, N.Y. Times, Feb. 18, 2006, at A1 ("The chairman of the Senate Intelligence Committee [Republican Pat Roberts] said Friday that he wanted the Bush administration's domestic eavesdropping program brought under the authority of a special intelligence court, a move President Bush has argued is not necessary.").

44. See Eric Schmitt, *House Defies Bush and Backs McCain on Detainee Torture*, N.Y. Times, Dec. 15, 2005, at A14 ("In an unusual bipartisan rebuke to the Bush administration, the House . . . overwhelmingly endorsed Senator John McCain's measure to bar cruel and inhumane treatment of prisoners in American custody anywhere in the world."); see also Carl Hulse, *House Leaders Demand Return of Seized Files*, N.Y. Times, May 25, 2006, at A1 ("The constitutional clash pitting Congress against the executive branch escalated Wednesday as the Republican and Democratic leaders of the House demanded the immediate return of materials seized by federal agents when they searched the office of a House member who is under investigation in a corruption case.").

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emerged during the last century. Thinking about that debate, in turn, allows us to break out of the structural frame of this essay itself.

From a structural perspective, the modern meaning of critical constitutionalism is relatively clear. Structuralists always believed that the meaning and utility of rights depended upon background structure. Thus, the fact that rights discourse was harmful in the last century does not mean that is harmful in this century. If law is, indeed, politics, then the value of legal rhetoric will change as the underlying political situation shifts. It follows that even though critical constitutionalism meant rights skepticism and rule indeterminacy in the last century, it means rights consciousness and legal formalism now. There is no contradiction because legal meaning as well as the meaning of critical constitutionalism itself are determined by structure.

From the existential perspective, there are two important problems with assigning this meaning to modern critical constitutionalism. First, structuralism threatens norms of publicity and authenticity in ways that bring back uncomfortable memories of the “popular front” movement in the 1930s. Recall that the coalition with liberals and legal-minded conservatives is built on the illusion that law transcends politics—that it is autonomous and politically neutral. Of course, their crit allies believe nothing of the kind. They favor law because, and to the extent that, it serves contestable political purposes. But law can serve these political purposes only so long as it masquerades as apolitical. Thus, a critical constitutionalist who joins liberals and conservatives on this basis must systematically misrepresent her true beliefs. For her political program to be successful, she must persuade others to believe in a contextless and permanent meaning to, and value of, law that she herself rejects.

For a thoroughgoing structuralist, perhaps this is not a problem. Authenticity, itself, always exists within a structure. Structuralists will claim that in some environments it is a virtue, while in others it is not. But surely there is a difficulty here. Even if the virtue of law is not structure-independent, the virtue of authenticity, if indeed it is a virtue, must be. What it means to be authentic is to represent one’s true self to oneself and to the outside world. Are structuralists to have us believe that there is no true self to be represented—that it is structures all the way down? Perhaps, and perhaps they are even right on this score. But if there is no true self, then there can be no commitments that the self is capable of making and, so, no fights worth fighting.<sup>45</sup> What, after all, is the point of a political coalition to combat Bush authoritarianism if there is no self capable of forming a commitment to combat it?

There is also a second way in which structuralism eats its own tail. If structuralism is right, then the analysis of the existing structure must, itself,

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45. For some nervous ruminations along these lines, see William Ian Miller, *Faking It* 233-34 (2003).

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be located within a structure. And if this is true, then the analysis has no independent truth value. The example of Tushnet's 1999 description of the new constitutional order reminds us that our vision is always and inevitably located, and this should serve as a useful caution. Tushnet's analysis of the forces in play was, itself, a product of those forces and, with different forces in play now, the analysis is very different. Of course, if this was true for Tushnet in 1999, then it must also be true of the analysis in this essay. The description of our current order is the best I can do, right now, to make sense of our situation, but the situation is fluid and any meaning assigned to current events must be transient and contextual. Things will no doubt seem very different seven years from now just as they seemed different seven years ago. If it is indeed structures all the way down, then how are we to make sense of our current situation and how are we to formulate strategies to deal with it?

The existential strand of critical constitutionalism has answers to these questions, although it also generates some new questions of its own. For an existentialist crit, structures are like law itself in the sense that they produce a false sense of constraint and serve to alienate people from the possibility of their own freedom. Whatever structuralists tell us, it is just a fact that we do have authentic selves and that we retain the possibility of choice. Structures do not produce determinate, predictable, and inevitable outcomes any more than law does. Everything is contingent and depends on how human beings choose to respond to the environment in which they find themselves.

An existential approach is attractive because it liberates us from the iron grip of structuralism and emphasizes the possibilities of freedom and choice. Unfortunately, though, it does so at the cost of eliminating the very question we are attempting to address. Should crit constitutionalists join their liberal and conservative allies in making rule-of-law arguments or not? Existentialist thought cannot answer this question because existentialists deny the possibility that any argument or set of reasons can dictate any outcome. Worse yet, an existential approach removes the motivation for asking the question in the first place. On the existential view of things, critical constitutionalism itself cannot dictate any outcome. Asking what stance critical constitutionalists should take supposes that by affiliating with this movement or body of thought, one has thereby committed oneself to a certain course of action that, given the commitment, is necessary and inevitable. But this is just what existentialists want to deny.<sup>46</sup> For them, choice is always possible, and the belief that critical constitutionalism

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46. See Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 *Stan. L. Rev.* 199, 236 (1984) (arguing that critical legal scholars risk becoming frozen in their own critical methods).



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forces us to behave in a certain way is just as delusional as the belief that the rule of law requires certain action.

But although an existentialist cannot exactly defend an argument dictated by an approach that emphasizes the inability of argument to dictate anything, perhaps she can explain a certain sensibility. It might be, as well, that this sensibility will play out differently in our environment than it did in the last century. In the remainder of this essay, I attempt to describe this sensibility, to explain why I find it attractive, and to offer some suggestions for how it intersects with our current situation.

I begin by expressing my own unease in affiliating myself with a view that the rule of law dictates or requires resistance to the Bush revolution. Arguments along these lines amount to a claim that people are somehow obligated to adopt certain political positions whether they want to or not. Put concretely, these arguments claim that even if someone reaches an all-things-considered judgment that, say, the Guantanamo detentions are the right thing to do, one is nonetheless required to oppose them because they violate the law.

Properly understood, this position is both authoritarian and obfuscatory. Instead of treating people as free and autonomous grown-ups, it treats them as children who must be bullied or tricked into compliance. I believe the Bush revolution should be resisted precisely because it is authoritarian and obfuscatory, and I therefore feel uncomfortable using these means to dislodge it. Of course, a thoroughgoing existentialist cannot claim that some transcendent principle prevents this sort of duplicity. All I can (and do) claim is that I am uncomfortable with it.

Does this mean that it is impossible for modern critics with similar sensibilities to form alliances with rule-of-law liberals and conservatives? I do not think so. It is at this point that our changed situation might cause us to understand critical constitutionalism somewhat differently. Critical constitutionalism in the twentieth century was often marked by a kind of brash in-your-faceism. In fairness to critics, at least some of this rhetoric was defensive after others had struck the first blow, and some was perhaps necessary to shake up a sleepy constitutional establishment. In any event, whether because we are all older and wiser, or whether because the situation has changed, this rhetoric does not seem necessary now.

Indeed, viewed from our current environment, it is possible to see how the "real" meaning of critical constitutionalism leads to a kind of tolerant acceptance of rival points of view. The indeterminacy of rules and the unconstrained possibility of choice mean that no views are permanently and necessarily out-of-bounds. I may see the world one way today, but how am I to know that I will not see it differently tomorrow? And if I, myself, might change my views tomorrow, how can I despise you for holding the views that I might tomorrow embrace?

This kind of skeptical tolerance, I think, provides a basis for coalition. For me, the Bush revolution is bad not because it violates the rule of law,

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but because it is creating a country that I do not want to live in. I cannot prove it, but my hunch is that this is really what motivates many rule-of-law liberals and conservatives as well. It is just that they attach the rule-of-law label to their preferences. If I am right about this, then I wish they would stop using these words, but a problem with labels should not get in the way of joining together in a crucial struggle. Even if I am wrong, an existential crit cannot claim that there is some permanent, fixed, and inevitable force that prevents one from choosing to value the rule of law. This is not my choice, but, in my new, tolerant mood, I can see no reason why I should shun you just because it is yours.

Of course, the move toward toleration itself produces well-known problems. If there is precisely nothing preventing me from choosing to become a rule-of-law liberal or conservative, then there is also precisely nothing preventing me from becoming a Bush revolutionary. In this way, eventually, when we become old enough and wise enough, the meaning of critical constitutionalism may morph yet again into a kind of placid, passive, and deeply disempowering, acceptance of any status quo.

I must say that, from my present perspective, I find this possibility deeply unsettling. Fortunately (or at least so it seems to me at present) I am not yet that old and that wise. It follows that, for me at least, this is not the meaning of critical constitutionalism now. It is fortunate as well that possible meanings that might be assigned to critical constitutionalism in the future are beyond the scope of this essay.