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# SAVING LAW REVIEWS FROM POLITICAL SCIENTISTS: A DEFENSE OF LAWYERS, LAW PROFESSORS, AND LAW REVIEWS

*Benjamin H. Barton*<sup>1</sup>

SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS  
DISTORT CONSTITUTIONAL MEANING. By *Robert J. Spitzer*. New York: Cambridge  
University Press. 2008. Pp. ix, 195. \$85.00.

Robert J. Spitzer is one of America's best known Political Scientists. He's written over three hundred articles and multiple highly influential books. He's been repeatedly honored for his work and has been a leader in the American Political Science Association, the premier American political science organization.<sup>2</sup> When Robert Spitzer writes a book published by the Cambridge University Press that argues that legal training and law reviews gravely "distort" the Constitution itself and concludes that the Constitution thus needs "saving" from lawyers, the claim is serious enough to require a response.

Spitzer's argument relies upon three central criticisms of American lawyers and law professors. First, Spitzer suggests that lawyers are congenitally disposed to ignore the truth in favor of their clients' selfish interests. Second, Spitzer argues that law professors are ill suited to analyze the Constitution (and maybe law as a whole) because they are trained as lawyers in the art of advocacy, rather than in the more neutral scientific method (like political scientists). Last, Spitzer asserts that student-edited law

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<sup>2</sup> ROBERT J. SPITZER, SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS DISTORT CONSTITUTIONAL MEANING 187-88 (2008).

reviews compound the above errors by publishing law professors' facially erroneous constitutional interpretations. Policy makers and judges then use these inaccurate interpretations to distort and subvert constitutional meaning.

Any law professor who has stood still in front of a political scientist or an economist will recognize these three criticisms, and Spitzer himself makes no claim that they are particularly original.<sup>3</sup> Spitzer's most original claim is that the combination of law professors disinclined to seek (or incapable of seeking) the truth in their scholarship with poorly edited student law reviews results in "dangerous" scholarship that does affirmative harm to the constitution. The heart of the book is Spitzer's three examples of "wayward constitutional theorizing." On the surface I quite like this argument: it is simple and bold and attempts to connect three common criticisms into a much larger indictment of American constitutional theorizing.<sup>4</sup>

Nevertheless, after reading the book several times I conclude that both the underlying criticisms and Spitzer's examples do not add up to much. This review seeks to debunk Spitzer's contention on two fronts. First, I offer a defense of lawyers, law professors, and law reviews. Second, I show that Spitzer's own book proves that peer-reviewed political science scholarship suffers from at least as many faults and foibles as law review scholarship.

For example, in each of his three examples of wayward theorizing Spitzer insists that his reading of the Constitution and its history is so clearly correct that his opponents'

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<sup>3</sup> For example, Spitzer himself notes multiple earlier commentaries on the difference between a lawyer's approach to a problem and a scientist's, *see* SPITZER, *supra* note \_\_, at 22-25, and the vast volume of criticism of student-run law reviews. *See* ID. at 46-58.

<sup>4</sup> Over the years I have been known to use narrower criticisms of the legal profession as an explanation for broader systematic failures, *see, e.g.*, Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 1-55 (2007); Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation – Who Should Control Lawyer Regulation, Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167-1250 (2003), so I am a naturally sympathetic audience.

scholarship is not only wrong on the merits, but is so bad that it is affirmatively dangerous and never should have been published. The efficacy of these arguments is crippled, however, by Spitzer's use of the Second Amendment as one of his prime examples. Spitzer claims that the individual rights theory of the second amendment is fatally, obviously, and laughably wrong as a matter of constitutional theory, case law, and history.<sup>5</sup> Unfortunately for Spitzer the Supreme Court held the exact opposite by a vote of 9-0 in *District of Columbia v. Heller*<sup>6</sup> months after the publication of the book.

Further, Spitzer presents a remarkably weak case of causation between this alleged faulty scholarship and any resulting governmental actions. Even if Spitzer is correct that the scholarship he highlights is fatally wrong, it is quite a leap to say that this scholarship *caused* executive branch actions like George W. Bush's claim of expansive executive powers after 9/11 or George H.W. Bush's claim of an inherent line item veto.

Part I describes Spitzer's argument more fully. Part II argues that Spitzer's criticisms of lawyers, law professors and law reviews are wrong in important ways that undermine his thesis. Part III then demonstrates how Spitzer's own examples demonstrate the failings of his arguments with particular clarity.

## I. The Argument in Brief

Spitzer's argument consists of three parts. The first two chapters lay out the theoretical underpinnings of the book: Chapter One argues that by training and nature lawyers and law professors do not care about the truth, only advocating a position, and Chapter Two notes that student-edited law reviews compound this problem. The last part of the argument stretches across chapters 3-5, where Spitzer lays out three examples of

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<sup>5</sup> SPITZER, *supra* note \_\_\_, at 129-76.

<sup>6</sup> 128 S.Ct. 2783 (2008).

poor law review scholarship harming the Constitution itself. This Part describes each of these elements of the book in turn.

A. Lawyers and Law Professors are Trained Liars?

I add the question mark to the heading above as an homage to the first subpart of Spitzer's book, which is titled "Lawyers as Liars?"<sup>7</sup> Spitzer does include a question mark after this phrase and even concludes the Chapter by proclaiming law an "honorable, noble and – above all – necessary profession."<sup>8</sup> Yet, the great bulk of Chapter One's treatment of lawyers and the advocacy system leaves little doubt as to how Spitzer would answer the questions presented above. Spitzer focuses on law as gladiatorial combat between zealous advocates with limited incentives or willingness to present or speak the truth. He quotes others to the effect that the "tenets of the legal profession often 'encourages or even requires outright lying'"<sup>9</sup> and the "gladiator using the weapons in the courtroom is not primarily crusading after truth, but seeking to win."<sup>10</sup>

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<sup>7</sup> SPITZER, *supra* note \_\_ at 11.

<sup>8</sup> SPITZER, *supra* note \_\_ at 31. In another spot Spitzer likewise expresses his support for the American adversary system. SPITZER, *supra* note \_\_ at 22.

<sup>9</sup> SPITZER, *supra* note \_\_ at 12 (quoting Michael Kinsley, "Why Lawyers are Liars," SLATE MAGAZINE, January 20, available at <http://www.slate.com/id/2134510/>).

<sup>10</sup> SPITZER, *supra* note \_\_ at 20 (quoting Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 Penn. L. Rev. 1035, 1039 (1975)). There are multiple other examples throughout Chapter One. On p.11 Spitzer notes that while a lawyer is not supposed to knowingly lie, lawyers are rarely eye witnesses so "lawyers are essentially free to make whatever argument best suits the client" and "the values and norms of the profession may have the effect of placing truth farther down the list of lawyer priorities." On p. 12 Spitzer calls both Justices Alito and Roberts liars based on their confirmation testimony, because as lawyers "it was allowable for them to lie to their client regarding what they really thought about *Roe* because they knew that their client, Ronald Reagan, opposed *Roe*." On p. 18 he states the traditional defense of the advocacy system as a truth seeking process, but then argues that "[t]ruth to tell, the advocacy system in operation tends to serve the objective of resolving disputes rather than searching for material truth." On p. 19 he states that lawyers "may encourage a fact-finder to reach a wrong conclusion by . . . knowingly presenting perjured testimony or cross-examining truthful witnesses in a manner that undercuts their credibility." On pp. 21-22 Spitzer describes Oliver Wendell Holmes' distinction between law and morals, points out the "moral ruthlessness" of lawyers and concludes that "[t]o some readers, this account of the advocacy process and other aspects of legal education might seem draconian or even immoral." On p. 23 he notes that lawyers are "skeptical about, if not indifferent to, the notion of objective truth."

According to Spitzer this indifference to truth starts in law school, and is drilled home in practice. Lawyers, law students, and law professors are taught to doubt objective material truth and to separate morals from law. The natural result of law school, legal practice, and the adversary system is advocates who serve only the narrow interests of their clients, not truth or broader morality.

The irony of this account is that while Spitzer admits that his version of the legal system may shock readers who find it “draconian or even immoral,”<sup>11</sup> he eventually concludes with a defense of lawyers, law schools, and the advocacy system.<sup>12</sup> This is because Spitzer’s actual target is not lawyers or the legal profession, but law professors. The entire point of the description of the immoral advocacy system and the congenital liars who inhabit it is to tar the majority of law professors whose only training is in law school and whose only experience is as lawyers, rather than a proper scholarly training in a PhD program.<sup>13</sup>

Scholarly inquiry is always devoted to the search for truth, with no preconceived notions or specific answers in mind. Spitzer notes that legal training and the practice of law are thus particularly ill-suited as precursors to a life as a scholar. In contrast to all other PhD trained faculty, they have no training in the “rules of inquiry” that govern research in the hard and social sciences. This adds up to the bugaboo of “advocacy scholarship” in law schools, where law professors come to a conclusion first, and then gather supporting arguments second.<sup>14</sup>

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<sup>11</sup> SPITZER, *supra* note \_\_ at 22.

<sup>12</sup> SPITZER, *supra* note \_\_ at 14, 22, 31, 32.

<sup>13</sup> This becomes particularly clear in pp. 17-31 where Spitzer compares law schools and the adversary system at length with the “social sciences and the rules of inquiry,” noting that the latter focuses upon the objective and unbiased search for truth, while the other seeks to persuade through a mix of untruths and advocacy scholarship.

<sup>14</sup> SPITZER, *supra* note \_\_ at 29-30.

It is worth noting, however, that from the title of the book to the bulk of the material in Chapter One Spitzer himself is attempting a sleight of hand. Spitzer promises us an argument for “Saving the Constitution from Lawyers” and that he will explain “How Legal Training and Law Reviews Distort Constitutional Meaning.” The book is frankly silent on the first of these points. At the absolute maximum Spitzer provides an argument against the constitutional theorizing of law professors that appears in law reviews. The book spends little time on the actual arguments that lawyers put forth in court in constitutional cases. Spitzer never argues that it’s wrong for a lawyer to advocate zealously on behalf of her client. Nor does he argue that any particular constitutional analysis by lawyers is bad or wrong. To the contrary, Spitzer is worried about academic legal writing in law reviews and its propensity towards “the cultivation of wayward constitutional theorizing.”<sup>15</sup> When he discusses the theorizing that lawyers do to win cases he seems positively sanguine.<sup>16</sup> I suppose that “Saving the Constitution from Law Professors and Law Reviews” would have been a much less catchy title, but it would have been vastly more accurate.

#### B. Law Reviews Make It Worse

In Chapter Two Spitzer argues that the flaws in the student-run law review system magnify the problems with the law professoriate exponentially. It begins with a short history of the law review system and a description of how it currently operates.

Spitzer’s basic attitude towards student-edited law reviews can be easily summed up: “To the contemporary academic world, the decision to allow students to create and run an academic publication, especially at a flagship university, might seem puzzling,

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<sup>15</sup> SPITZER, *supra* note \_\_ at 11.

<sup>16</sup> “In fact, I side with defenders of the American system of justice. But I also believe that its traits have other, adverse consequences *when removed from the practice of law*.” (p. 22) (emphasis added).

even inexplicable.”<sup>17</sup> By comparison, most other academic disciplines use the “gold standard” of peer review, rather than student-editing.<sup>18</sup> This inexplicable situation has multiple problematic results, and anyone who’s familiar with the anti-law review literature will recognize them. There are too many law reviews.<sup>19</sup> Law review writing suffers from excess “length, redundancy, and footnoting.”<sup>20</sup> More worrisome is that law students are not experts in what they publish, and therefore choose to publish poor, biased, or incorrect scholarship.<sup>21</sup>

Spitzer does recognize that as a historical matter law reviews used to publish articles that were more practice-oriented, and that students are better situated to review and edit that type of scholarship.<sup>22</sup> Like Spitzer’s late defense of the advantages of the advocacy system and law school training for lawyers, Spitzer also offers a limp description of the advantages of the law review system noting that “law reviews publish many excellent articles,”<sup>23</sup> that they are a good educational experience for the students,<sup>24</sup> and that Spitzer himself has published in law reviews.<sup>25</sup> Spitzer likewise recognizes that peer-review can result in demonstrably incorrect scholarship, citing the plagiarism charges against Stephen Ambrose and Doris Kearns Goodwin and the fabricated/misrepresented evidence used by Michael Bellesiles and John Lott.<sup>26</sup>

Nevertheless, Spitzer concludes quite firmly that peer review is demonstrably superior to

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<sup>17</sup> SPITZER, *supra* note \_\_ at 38. One of the more humorous repeated ticks in the book is the use of conditional phrases like “might seem” and the possible opinions of third parties, like the “contemporary academic world,” to soften harsh critiques and to suggest that while Spitzer raises them, he would not want to come right out and state them.

<sup>18</sup> SPITZER, *supra* note \_\_ at 49.

<sup>19</sup> SPITZER, *supra* note \_\_ at 41-42.

<sup>20</sup> SPITZER, *supra* note \_\_ at 56-57.

<sup>21</sup> SPITZER, *supra* note \_\_ at 53-55.

<sup>22</sup> SPITZER, *supra* note \_\_ at 41-43.

<sup>23</sup> SPITZER, *supra* note \_\_ at 59.

<sup>24</sup> SPITZER, *supra* note \_\_ at 48.

<sup>25</sup> SPITZER, *supra* note \_\_ at 4 & n. 10.

<sup>26</sup> SPITZER, *supra* note \_\_ at 51-52.



student-editing, and that the problems with student-editing provide “a uniquely wide and fertile opportunity for the cultivation and propagation of wayward constitutional theories.”<sup>27</sup>

### C. Three Case Studies of “Wayward Constitutional Theories”

Chapters Three, Four and Five are the heart of Spitzer’s book and its most original contribution. Spitzer argues that the combination of ill-trained law professors/advocates writing in student-run law reviews has resulted in dangerously wrong scholarship that has later created bad public policy or even erroneous judicial decisions. If Spitzer is right that law training and law reviews “distort” constitutional meaning Spitzer has greatly raised the stakes on the somewhat well-worn complaints in Chapters One and Two of the book.

Spitzer notes three different problematic constitutional interpretations that he claims arose as a result of poor scholarship: the idea of a constitutionally inherent line-item veto, as suggested during the presidency of George H.W. Bush (Chapter 3), the strong unified executive theory claimed by George W. Bush following 9/11 (Chapter 4), and the “individual right” theory of the Second Amendment (Chapter 5).

Each chapter follows the same basic pattern. Spitzer begins each by laying out what he considers a deeply erroneous constitutional argument that nevertheless received support in law review articles. He notes that the governmental actors involved relied upon faulty scholarship as support for their poor decisions. He then lays out, in great

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<sup>27</sup> SPITZER, *supra* note \_\_ at 59. It’s worth noting here that Spitzer’s criticisms of lawyers, law professors, and law reviews are all pretty standard stuff. He cites appropriately to the main prior sources of these critiques, but the really original analysis is the claim that these criticisms add up to actual harm to the Constitution. Nevertheless, it’s ironic that one of Spitzer’s complaints against law reviews is that they publish “mind-numbing” and repetitive prose “that serves no other purpose than to duplicate what has already been published.” SPITZER, *supra* note \_\_ at 56-57.

detail, why he disagrees with the argument, usually relying on the historical record at the time of the Founders and/or case law. Spitzer then uses each of these examples to prove that poor law review scholarship has thus wrought serious harm upon the Constitution itself.

The book closes in Chapter 6 with some possible solutions to the problem that Spitzer identifies. These solutions include making law school look more like graduate school in political science, making law reviews look more like traditional peer-reviewed publications, and limiting the scope of legal academic scholarship to more traditional legal analysis.

## II. Lawyers, Law Professors, and Law Students

Spitzer's argument relies on three key critiques of lawyers, law professors, and law reviews, each of which is quite problematic.

### A. Lawyers as Liars

Spitzer provides the first leg of the defense himself: he admits to being a supporter of the adversary system, the role of lawyers in that system, and the training lawyers receive as a precursor to operating in that system. Thus, Spitzer himself concedes that the Constitution needs no saving from lawyers operating as lawyers.<sup>28</sup> To the contrary, constitutional interpretation by lawyers in legal cases is obviously advocacy on the part of their client, and to be viewed as such.

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<sup>28</sup> "In fact, I side with defenders of the American system of justice. But I also believe that its traits have other, adverse consequences *when removed from the practice of law*." SPITZER, *supra* note \_\_ at 22 (emphasis added). See also SPITZER, *supra* note \_\_ at 31 ("Yet, my argument is that lawyers are well equipped by the principles and training of their discipline to function within the professional world for which they are prepared but are poorly equipped to engage in the scholarly world as it pertains to constitutional scholarship.").

Moreover, Spitzer's basic point – that lawyers are congenitally pre-disposed to bend the truth or outright lie – is overblown and hardly reflects the reality of law practice or law school. First, Spitzer is a political scientist, so he should certainly understand that lawyers, like politicians, are often called upon to put the best face on unfortunate circumstances. As any marginally decent lawyer (or politician) will report, outright lying or evasion is rarely, if ever, the most effective strategy.<sup>29</sup> To the contrary, lawyers who are interested in serving their clients and winning do their very best to massage the facts and present the best possible case they can, consistent with both the good and bad facts.<sup>30</sup>

One of the oddities about Spitzer's book is his naïve insistence on a single, absolute truth, both in matters of constitutional interpretation and in lawsuits. In Spitzer's world, one side to a lawsuit must be "lying," because there is an objective truth to be discovered and only one side's story can be true.<sup>31</sup> In lawsuits, as in life, there are two or more sides to every story. Witnesses naturally remember and shade events differently, often to their own benefit. The adversarial system is not capable of, or aimed to, discover the absolute truth of past events. No human system can accomplish that. To the contrary, the adversary system lets each side tell their story and then allows fallible decision-makers (either judges or juries) to choose whom to believe.

Moreover, it is flatly incorrect to say that law schools train lawyers to disregard the truth. To the contrary, since the 1970s law schools have added layer upon layer of

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<sup>29</sup> Just ask Presidents Nixon and Clinton about how lying/evading worked out for them.

<sup>30</sup> Cf. L. TIMOTHY PERRIN ET AL., THE ART & SCIENCE OF TRIAL ADVOCACY 1-6 (2003) ("Trial lawyers' successes come from hard work and attention to the details; from the advocate's sincerity and authenticity; from facts marshaled and presented in such a way that they appeal to both logic and emotion; and from a cause or a principle that the jurors will claim as their own."); DOUGLAS S. LAVINE, CARDINAL RULES OF ADVOCACY 31-45 (2002) (noting that all good advocacy is "honest and respectful").

<sup>31</sup> See SPITZER, *supra* note \_\_ at 23 (noting that lawyers are skeptical or indifferent to "objective truth"). Further, Spitzer's repeated descriptions of perjured or knowingly misleading arguments makes it seem like these events occur in every legal transaction, and are a critical, daily part of a lawyer's job.

legal ethics training.<sup>32</sup> Law schools do train students that law is often indeterminate (i.e. there is not necessarily a single clear answer to every legal question),<sup>33</sup> but law schools rarely tell students anything about the truth or falsity of the facts in the cases they study.

#### B. Law Professors as Incompetents

Spitzer's critique of law professors, however, cuts closer to the bone. It is certainly true that the bulk of American law professors (this author included) have no additional graduate degrees beyond a JD or other law related degree. It is also true that the pursuit of a JD in law school is quite different from the pursuit of a PhD in the social sciences.

Spitzer's critique does a nice job of highlighting the hybrid nature of the law professoriate. On the one hand, unlike political scientists, law professors serve a critical pre-professional function of training lawyers for the practice of law. Given that student tuition supplies the great bulk of the revenue supporting law schools, and the important role that lawyers play in the functioning of our government and democracy, the need for satisfactory teaching of law students is absolutely critical. In short, most, if not all, law professors should be able to teach the practice of law, which likely requires that they have attended law school and had some experience as lawyers.

On the other hand law professors are also required to publish scholarship,<sup>34</sup> and as Spitzer points out, contemporary law professors often publish articles directly utilizing

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<sup>32</sup> See Stephen Gillers, *Eat Your Spinach?*, 51 ST. LOUIS U. L.J. 1215, 1218 (2007).

<sup>33</sup> I have called this aspect of law school "the siren song of indeterminacy." Benjamin H. Barton, *The Emperor of Ocean Park: The Quintessence of Legal Academia*, 92 CAL. L. REV. 585, 593-95 (2004).

<sup>34</sup> The ABA accreditation standards require, among many other things, a faculty engaged in scholarly research and writing. See AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS §§ 401-402, at <http://www.abanet.org/legaled/standards/20082009StandardsWebContent/Chapter%204.pdf> (last visited Dec. 1, 2008).

the tools and approaches of other academic disciplines.<sup>35</sup> Often these law professors do not hold advanced degrees in these disciplines, and may not have been trained at all in those disciplines.<sup>36</sup> It may, in fact, be true that law professors should think twice before writing in these areas, and it may also be true that law reviews should be cautious about publishing “law and” scholarship from scholars without the requisite backgrounds or bona fides.

That said, Spitzer misses a key fact about lawyers and law professors. The job of a lawyer invariably involves “law and,” as a lawyer’s practice always involves some outside activity, from medical practice, to construction, to banking, plus the governing law. If one speaks to a medical malpractice lawyer, she will tell you that she often feels like she understands the procedures at issue in her cases better than the doctors she deposes. Similarly, legal standards and cases are not ever solely about the law, so the study of an area of the law necessarily requires outside expertise. Antitrust scholars must understand economics. Securities regulations scholars must understand stock offerings. The study of law, like the job of the law professor, naturally involves a breadth of knowledge and expertise in areas outside of law. Law professors, like lawyers, are often forced to pick up this expertise on the fly. In many cases this has worked out quite nicely.<sup>37</sup> It’s also worth noting that Spitzer’s biggest beef is with the historical research

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<sup>35</sup> SPITZER, *supra* note \_\_ at 42.

<sup>36</sup> SPITZER, *supra* note \_\_ at 15.

<sup>37</sup> Richard Posner, the progenitor of law and economics, is not a formally trained economist. *Richard Posner Bio*, <http://www.law.uchicago.edu/faculty/posner-r/>. Lawrence Friedman, author of the seminal American legal history text, is not a trained historian. *James M. Friedman Bio*, <http://www.law.stanford.edu/directory/profile/23/>. Lawrence Lessig does not have a degree in computer science. *Lawrence Lessig Bio*, <http://www.lessig.org/info/bio/>.

of various law professors on constitutional issues, and Spitzer himself is not a trained historian.<sup>38</sup>

Moreover, it would be impossible for law professors to teach or write about Constitutional law without delving into the underlying history of the Constitution. This is so because the Supreme Court has regularly relied upon historical antecedents (particularly from the time of the founders) in analyzing the Constitution. As such, both practicing lawyers and law professors are continually required to comb the historical record. Whether or not courts and lawyers are good at exploring the historical record, and whether the Supreme Court should try to avoid basing decisions upon difficult and spotty historical records, are different questions. The fact remains that in these circumstances lawyers and judges must explore the historical record to decide what the “right” answer is based upon history. In this regard, law professors are doing no more or less than courts have required of them.

Lastly, Spitzer is actually too circumspect in only suggesting that poorly trained law professors should decline to write about constitutional interpretation. Given that it’s true that most law professors were trained in law school rather than another PhD program and assuming that renders them poorly trained for true scholarly inquiry and inevitably prone to flawed “advocacy” scholarship published by unwitting student-run law reviews, shouldn’t we be dubious of all legal scholarship? If there are examples of “wacky” or “bizarre” scholarship outside of constitutional law that have had deleterious effects, they would greatly strengthen Spitzer’s thesis. If there are no such examples that would naturally undercut the thesis.

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<sup>38</sup> Robert Spitzer Bio, [http://www.cortland.edu/polsci/default.asp?page\\_id=19](http://www.cortland.edu/polsci/default.asp?page_id=19). Nor does he have a law degree. See *id.*

### C. Law Reviews

Spitzer himself recognizes that much law review scholarship is good,<sup>39</sup> and there is a certain irony that so many of the sources he uses to buttress his critique of the legal profession, law professors and law reviews come from law reviews and/or law professors themselves. For example, Chapter One's critique of the adversary system rightly cites and quotes many of the foundational works,<sup>40</sup> including influential commentaries by law professors Stephen Gillers,<sup>41</sup> Monroe Freedman,<sup>42</sup> Deborah Rhode,<sup>43</sup> Geoffrey Hazard,<sup>44</sup> Marvin Frankel,<sup>45</sup> and David Luban.<sup>46</sup> Likewise, both Spitzer's argument about the insufficiency and inappropriateness of legal training for scholarly work and the evils of student run law reviews rely heavily on influential works, often in law reviews, by law professors.<sup>47</sup>

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<sup>39</sup> SPITZER, *supra* note \_\_\_ at 59.

<sup>40</sup> SPITZER, *supra* note \_\_\_ at 18-22.

<sup>41</sup> Spitzer quotes and cites Stephen Gillers, *The American Legal Profession*, in FUNDAMENTALS OF AMERICAN LAW (Alan B. Morrison, ed. 1996) on pp. 18-19 & nn. 30 & 32.

<sup>42</sup> Spitzer quotes and cites MONROE FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975) on pp. 19-22 & nn. 31, 39, 43, 53.

<sup>43</sup> Spitzer paraphrases and cites Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 STANFORD L. REV. 604 (1985) on p. 20 & n. 37.

<sup>44</sup> Spitzer quotes and cites GEOFFREY HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978) on p. 20 & n. 36.

<sup>45</sup> Marvin Frankel was a law professor at Columbia and a federal judge. See Steven Greenhouse, *Marvin Frankel, Federal Judge and Pioneer of Sentencing Guidelines, Dies at 81*, N.Y. TIMES March 5, 2002, at A17. Spitzer quotes and cites Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 Penn. L. Rev. 1035 (1975) on pp. 18 & 20-21 nn. 29, 41, 44, as well as MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980) on pp. 18, 22-23 & nn. 35, 53, 55.

<sup>46</sup> Spitzer quotes and cites David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban, ed. 1983) on pp. 20, 22 & n. 42, 51 and DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) on pp. 22, 24 & nn. 53, 61.

Chapter One's discussion would have been enriched by including WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1998) and MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994), two of the absolute best books in this area. Glendon is cited later in the discussion of "advocacy scholarship." SPITZER, *supra* note \_\_\_ at 30 & nn. 85-86.

<sup>47</sup> On the inability of law professors to write true scholarship Spitzer quotes and cites law professors (among others) Anthony Kronman, Arthur Miller, and Lee Epstein (with co-author and political scientist Gary King). See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) cited and quoted on p. 23 & n. 56; Arthur S. Miller, *The Myth of Objectivity in Legal Research and Writing*, 18 CATH. U. LAW REV. 291 (1969) cited and quoted on p. 24 & nn. 58-59; Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 9 (2002) cited and quoted on pp. 25, 29 & nn. 64, 80-82;

Again, Spitzer presents many fair critiques of the law review system. There are probably too many law reviews, and it is true that some bad scholarship is published every year. It's also true that law review articles tend to be too long, and are in some cases poorly written.<sup>48</sup>

Nevertheless, Spitzer's argument does not rest upon stylistic concerns. Spitzer needs to prove that student-edited law reviews are more likely to publish biased or flatly incorrect scholarship than peer-reviewed journals. On this front, I do not think he carries the day.

Most importantly, I do not think law reviews are more likely to publish false information. To the contrary, I think they are less likely to. Anyone who has published with an American law review knows that there is one thing that students excel at, often to the great consternation of authors: cite checking. Students ask that almost every proposition have a cite, and then they check each and every cite within an article to make sure it matches the proposition. By contrast peer-reviewed journals generally rely upon their authors to verify the accuracy of their footnotes and propositions.<sup>49</sup> This means that at a minimum whatever an author says in the text that is followed by a footnote is

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Lee Epstein & Gary King, *A Reply*, 69 U. CHI. L. REV. 194 (2002) cited and quoted on p. 30 & n. 84. On the various problems with student-edited law reviews Spitzer cites (among others) law professors James Lindgren, Bernard Hibbitts, Lawrence Friedman, Richard Posner, Fred Rodell, and Robert Stevens on pp. 33-49 & nn. 2-74.

<sup>48</sup> I have not read as many peer reviewed poli sci journals as I have law reviews, but I have read enough to know that stilted or repetitive writing and articles that add incrementally, if at all, to the existing literature are not a unique problem to law reviews.

<sup>49</sup> I have published in a peer-reviewed journal, Benjamin H. Barton, *Is There a Correlation Between Law Professor Publication Counts, Law Review Citation Counts, and Teaching Evaluations? An Empirical Study*, 5 J. EMPIRICAL L. STUD. 618 (2008), and am on the Board of Editors of The Clinical Law Review, a peer-reviewed journal, and it is certainly not true that peer reviewed publications sweat the footnotes the way that student-edited law reviews do. Cf. Max Schanzenbach, *Peer-Reviewed versus Student-Edited Journals*, EMPIRICAL LEGAL STUDIES BLOG, [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2006/02/peerreviewed\\_ve.html](http://www.elsblog.org/the_empirical_legal_studi/2006/02/peerreviewed_ve.html) (noting the cite checking advantage for student run law reviews). So, some of the most famous examples of fabricated research in peer-reviewed journals would have been impossible in a student-edited journal, because the students check each and every source carefully.



extremely likely to be true, and that the reliance upon fabricated evidence that occurred in some famous peer-reviewed work would have been impossible in a law review.

Spitzer also claims that student-edited law reviews are more likely to publish slanted or biased scholarship (advocacy scholarship). As an initial matter I'll note that Spitzer's own book is hardly a paragon of neutrality. He calls Justices Alito and Roberts liars,<sup>50</sup> accuses John Ashcroft of "shocking incompetence"<sup>51</sup> and chooses as its examples of "wayward" or "bizarre" constitutional thinking only actions during the presidencies of George H.W. Bush and George W. Bush, when Bill Clinton certainly pushed the legal envelope during his last years in office.<sup>52</sup> This selection of issues, and the description of the Second Amendment issue as an open and shut case, certainly raises the question of whether Spitzer's own book suffers from bias. I will also note that Spitzer is not alone; truly unbiased scholarship in the social sciences is relatively hard to come by.<sup>53</sup>

Spitzer also notes that student editors often allow undeserved authorial hyperbole about the importance of their work.<sup>54</sup> Given that Spitzer's own book title claims to save the Constitution from lawyers, while actually addressing only law review articles, I will let this claim speak for itself. Hyperbole may be distasteful, but hardly a danger to the Constitution.

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<sup>50</sup> SPITZER, *supra* note \_\_ at 12-13.

<sup>51</sup> SPITZER, *supra* note \_\_ at 170.

<sup>52</sup> *Cf.* Clinton v. Jones, 520 U.S. 681, 705-06 (1997) (holding unanimously that sitting presidents generally are not entitled to immunity from civil lawsuits based on their unofficial misconduct); Jonathan L. Entin, *Executive Privilege and Interbranch Comity After Clinton*, 8 WM. & MARY BILL RTS. J. 657 (2000) (describing various Clinton strategies to expand executive privilege).

<sup>53</sup> Like our disagreement over the "truth" and "lies" at trial, this is an area where Spitzer and I simply disagree. Writing is by its nature persuasive, and in one form or another bias is natural. This is one of the reasons why much law scholarship has drifted towards empirical work, although empirical work can certainly suffer from bias as well.

<sup>54</sup> SPITZER, *supra* note \_\_ at 1-3.

Lastly, Spitzer notes that student editors may not force an author to include outside materials that disprove the author's thesis. This is a legitimate worry. Student editors do a masterful job of making sure everything the author cites is true, but they may be underequipped to know when some other source or author's work should be included. This is where the overabundance of law reviews is actually a benefit. With the sheer volume of published information it is extremely unlikely that a controversial and wrong idea that draws any attention will stay un rebutted for long.

The three examples Spitzer offers are instructive on this point. In each case there were multiple law review articles (as well as books and peer-reviewed articles) on both sides of the issue,<sup>55</sup> and whether or not Spitzer thought some were clearly wrong and others were clearly right, system-wide the information was there for readers, policy-makers and judges to make their own call on the issues.<sup>56</sup>

### III. Spitzer's Three Examples

As noted above the first two parts of Spitzer's book present relatively well worn criticisms of law professors and law reviews. It's Spitzer's three examples and his theory that law professors and law reviews combine to endanger the Constitution that is his unique contribution. Nevertheless, Spitzer's three examples have two main flaws. The first is Spitzer's insistence that the history underlying parts of the Constitution is so clear that the arguments he debunks are not only wrong, but wrong enough that they never should have been published and are, in fact, dangerous to the Constitution. The second is

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<sup>55</sup> Spitzer cites to these articles throughout the footnotes of Chapters 3-5, and the sheer volume of cited material makes clear that whatever else can be said about these debates there certainly was a full and open debate where everyone (including Spitzer) had a chance to state their case.

<sup>56</sup> For Spitzer's thesis to hold it is not enough that some law review articles he disagreed with were published, it's necessary that these articles were so invidious that they harmed the Constitution itself. If the ideas were given a full airing though, it's hard to see how the harm (if indeed there is harm) can be imputed to the law review system or the law professoriate.

Spitzer's weak case for causation. While the proposed government actions that Spitzer derides were partially supported by law review articles, it's very dubious the law reviews actually caused anything. To the contrary, the government actions at issue would have occurred with or without academic support. The scholarly support was, at best, a gloss on decisions already made.

A. The Fallacy of Constitutional Correctness

As I've noted above Spitzer seems surprisingly earnest for a Political Scientist. In each of his three areas of constitutional inquiry Spitzer seems utterly convinced that there is a single right and wrong answer to the issue at hand, and that those who disagree with him should simply be shamed into silence by the sheer force of his arguments.

Nevertheless, any historian of constitutional theory will note that changes (both large and small) within constitutional law were attributable as much (or more) to changes in Supreme Court personnel and national preferences than to any claim to the "correctness" of the underlying constitutional theory or history. Spitzer forgets that the history of constitutional law is written by the winners, not by law professors or political scientists. Constitutional "correctness" is never set in stone, it's played out over years of decisions across differently assembled Courts.

Spitzer's last example, the individualist view of the Second Amendment, makes this weakness particularly clear.<sup>57</sup> Spitzer calls the individualist view "stunningly and

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<sup>57</sup> The "individualist view" of the Second Amendment argues that "the ownership of firearms is a constitutionally based protection that applies to all individuals, without any attachment to militias or the government, just as free speech and the right to counsel apply to all individuals." SPITZER, *supra* note \_\_ at 145. For a succinct and prescient discussion of the individualist view, see Glenn Harlan Reynolds, *Gun by Gun*, LEGAL AFFAIRS, May/June 2002, [http://www.legalaffairs.org/issues/May-June-2002/scene\\_reynolds\\_mayjun2002.msp](http://www.legalaffairs.org/issues/May-June-2002/scene_reynolds_mayjun2002.msp). Spitzer proscribes (quite vociferously) to the "collective rights" theory, which posits that the Second Amendment only guarantees state militia rights and "the Second Amendment provides no protection for personal weapons use, including hunting, sporting, collecting, or even personal self-protection." SPITZER, *supra* note \_\_ at 133.

fatally defective,”<sup>58</sup> “erroneous” and “nonsensical,”<sup>59</sup> “startling,”<sup>60</sup> rife with “obvious problems,”<sup>61</sup> “wayward,”<sup>62</sup> and based upon an “imaginary past.”<sup>63</sup> He makes repeated sweeping and unequivocal statements like “[n]othing in the history, construction, or interpretation of the amendment applies or infers [an individual right].”<sup>64</sup>

He ravages the historical arguments for the individualist view. He then reviews the Supreme Court’s pre-2008 Second Amendment case law and concludes that the cases are crystal clear in meaning, and all unquestionably support a collective rights interpretation. Spitzer doesn’t stop there though. He argues that the Supreme Court’s various denials of certiori over the last years also signal the “inescapable conclusion . . . that the Supreme Court simply has no inclination to revisit the issue.”<sup>65</sup> In other words, Spitzer argues that the current Supreme Court is against the individualist view of the Second Amendment.<sup>66</sup>

The timing of the book is, in this regard, quite unfortunate for Spitzer. The Supreme Court essentially fully adopted the individual rights argument in *District of Columbia v. Heller*<sup>67</sup> this summer, just months after publication of Spitzer’s book. In fact, while *Heller* was a 5-4 decision, it was unanimous on the underlying constitutional theory: all nine Justices recognized some form of the individual rights theory of the

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<sup>58</sup> SPITZER, *supra* note \_\_ at 133.

<sup>59</sup> SPITZER, *supra* note \_\_ at 134.

<sup>60</sup> SPITZER, *supra* note \_\_ at 150.

<sup>61</sup> SPITZER, *supra* note \_\_ at 162.

<sup>62</sup> SPITZER, *supra* note \_\_ at 175.

<sup>63</sup> SPITZER, *supra* note \_\_ at 176.

<sup>64</sup> SPITZER, *supra* note \_\_ at 148.

<sup>65</sup> SPITZER, *supra* note \_\_ at 159. *See also* SPITZER, *supra* note \_\_ at 143.

<sup>66</sup> SPITZER, *supra* note \_\_ at 143 (“The inescapable conclusion is that the Supreme Court has considered the matter settled and has no interest in crowding its docket with cases that merely repeat what has already been decided.”).

<sup>67</sup> 128 S.Ct. 2783 (2008).

Second Amendment.<sup>68</sup> Spitzer's book spends forty-seven pages rejecting this same constitutional theory as clearly, laughably, foolishly incorrect.

Given my general disregard for expansive claims of obvious constitutional correctness I am hesitant to criticize Spitzer too much for his Second Amendment chapter. If a different group of Justices decided *Heller* in a different time they might well agree with Spitzer. Nevertheless, Spitzer has written a book that argues that the supporters of the individualist right theory are not only wrong, they are so wrong that their scholarship never should have been published and their work is dangerous. In this circumstance it seems perfectly appropriate to point out that *Heller*'s unanimous repudiation of Spitzer's theory cripples his overall thesis, and well establishes the maxim that one should think carefully before committing hyperbole in the written word.<sup>69</sup>

#### B. Causation, Causation, Causation

Beyond the rather unfortunate example of the Second Amendment, Spitzer has little evidence of allegedly "harmful" scholarship infecting court decisions.<sup>70</sup> Instead Chapters three, four and five are all largely critical of executive branch reliance on faulty

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<sup>68</sup> See *Heller*, 128 S.Ct. at 2790-2805 (majority opinion of Scalia, J., joined by Roberts, Alito, Thomas, and Kennedy); *Heller*, 128 S.Ct. at 2822 (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer) ("The question presented by this case is not whether the Second Amendment protects a 'collective right' or an 'individual right.' Surely it protects a right that can be enforced by individuals."). See also Glenn H. Reynolds & Brannon P. Denning, *Heller's Future in the Lower Courts*, 102 NW. U. L. REV. 2035, 2035 ("What *Heller* is most notable for is its complete and unanimous rejection of the "collective rights" interpretation that for nearly seventy years held sway with pundits, academics, and -- most significantly -- lower courts.")

<sup>69</sup> Moreover, while Spitzer is quite critical of law school and legal practice's insistence that there are two sides to most issues, some of that equivocation would have served him well in writing this book. It's hard to imagine a lawyer of any ability ever making the sweeping claims of correctness Spitzer makes here.

<sup>70</sup> Note that this fact alone greatly limits the amount of "harm" that any of these theories caused, as courts have the final say on the constitution, not members of the justice department or the president's staff. Moreover, as Spitzer himself notes, courts have explicitly or implicitly rejected the theories in Chapters three and four, see SPITZER, *supra* note \_\_ at 60-61 and 119-21.

scholarship.<sup>71</sup> The problem with these chapters is that while the executive branch partially relied upon the scholarship Spitzer derides as faulty, it's again quite naïve to think that this scholarship actually caused any of these actions.

It's worth wondering about the influence of law reviews altogether. Spitzer himself notes that law reviews are cited less frequently by courts and are utilized less frequently by practicing lawyers than ever before.<sup>72</sup>

Moreover, even if law reviews were influential, a political scientist like Spitzer should certainly understand that the actual effect of a law review article on the behavior or decisions of judges, let alone other governmental actors, is quite limited. Political scientists have spent years building the literature of the attitudinal model, which argues that judges decide cases on the basis of their political preferences, not any deep understanding or analysis of the law, and then add the legal discussion as a justification for their pre-determined decision.<sup>73</sup> Under the attitudinal theory judges make up their minds first based on political preference, and then fill in the blanks later on. Under this model of judicial decision-making the most you could say about law review articles in a judicial opinion is that they are used as support for decisions that were already made.

If this is the case for judges (as the attitudinal model suggests), it has to be doubly true for political actors like White House or Justice Department officials. It is a historical fact that lawyers in the first Bush White House argued for an inherent constitutional line item veto and in the second Bush White House for uniquely powerful unitary executive

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<sup>71</sup> Chapter Three addresses George H.W. Bush's constitutional claim to an inherent line item veto. Chapter Four covers George W. Bush's claims to expansive executive privilege. Chapter Five includes a critique of John Ashcroft's position on the Second Amendment.

<sup>72</sup> SPITZER, *supra* note \_\_ at 47, 180-81.

<sup>73</sup> The attitudinal model was first laid out in JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993). See also JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

and commander-in-chief powers. It is also true that in justifying these claims the White House used law review articles, among other areas of support. I'll even grant that it may be true that both Bush White Houses were wrong on the merits (although that's a much harder question).

It is untrue and quite naïve, however, to assert that a law review article “caused” either Bush White House to make these claims. In fact, Spitzer himself recognizes that the George W. Bush brief in support of expanded presidential powers “reveals an administration that had already decided on the direction in which it wished to proceed and had gone in search of a post hac legal justification to legitimize conclusions already drawn.”<sup>74</sup>

These decisions were made politically, and the law review support was added as a *post hac* defense. If the law review articles cited by Spitzer had been rejected by peer review, would these White House efforts been stymied? Hardly. The lawyers at issue would have gone forward with what they had as support, regardless. The law reviews were at best icing on the cake. More likely they were a cynical gloss added to support decisions made politically, not on the basis of the actual “truth” or “correctness” of the constitutional theories presented.

#### IV. CONCLUSION

“Saving the Constitution from Lawyers” does raise some challenging issues about the nature of the law professoriate, and its interaction with student-edited law reviews. Spitzer taps into the variety of issues that come with the hybrid nature of law schools: we are professional schools that also produce serious scholarly research, and sometimes the training and qualifications for each are not coextensive.

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<sup>74</sup> SPITZER, *supra* note \_\_ at 122.

That said, Spitzer fails at his main goal of proving a danger to the U.S. Constitution from faulty scholarship. Spitzer may have a legitimate disagreement over the scholarship he pillories, but it is too much for him to prove that the scholarship is so wrong as to be dangerous.<sup>75</sup>

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<sup>75</sup> So, rest easy America, the Constitution will be fine.