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Introduction

Larry Alexander

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Larry Alexander is one of the most profound and influential legal scholars in the last century. His voluminous portfolio of work spans numerous areas of law and both grapples with, and creatively invents, illuminating puzzles of extraordinary interest, difficulty, and importance for those who work at the intersections of law and philosophy. Larry's typically ingenious solutions to these puzzles have served as invitations to other scholars to explore whole new areas of legal inquiry and previously undiscovered philosophical terrain. Anyone who now sets out to write in the areas of criminal law, constitutional law, jurisprudence and legal reasoning, or moral philosophy cannot help but engage with the tantalizing difficulties that Larry has identified and the beguiling and contrarian positions that he has staked out. It is the distinctive signature of great scholars that one cannot enter their fields without being forced to engage with their work while doing one's own, and by that measure Larry enjoys formidable scholarly prowess, for scholars within numerous disciplines and over numerous decades have had to shape their work to fit the contours of topics molded by Larry's path-breaking contributions.

Larry's legacy within the legal and philosophical academies, however, is not confined to the ways in which he has seismically altered intellectual landscapes through his scholarship. It is also defined by the impacts he has had as a colleague and mentor on those within his fields of inquiry. Simply put, Larry is widely beloved. He has invested extraordinary energy in the work of his academic colleagues, writing warm but philosophically rigorous critiques of their work and hosting them to intellectual gatherings that have united them with others in common pursuit of solutions to problems that haunt branches of scholarly inquiry. It is hard to find anyone who works on topics within criminal law, constitutional law, legal theory, or moral philosophy who does not feel beholden to Larry and who does not bear tremendous respect for the energy that he brings not just to academic inquiry, but to the cultivation of others' work and to the collaborative pursuit of knowledge.

This collection of essays reflects the shared desire on the part of prominent figures within the legal academy to honor Larry's intellectual legacy by engaging with some of his most important scholarly contributions. Yet this volume is far more than a tribute to Larry's towering reputation within the academy. More importantly, it is a very helpful "reader's guide" for anyone who seeks to master the positions that Larry has defended across the array of disciplines to which he has contributed, as well as the systematic philosophical connections between those positions that might be lost on one who only reads disparate essays. Because Larry's work is sure to have a very long half-life, scholars for years to come will be forced to grapple with the puzzles, paradoxes, and perplexities that he has teased out of core legal doctrines. They shall thus find the essays in this volume fertile sources of insight and innovation as they seek their own means of surmounting the philosophical obstacles that Larry has famously devised to thwart complacency about the defensibility of the law's most central tenets.

1.1 THE MAKING OF THE MAN

Larry Alexander grew up in Corpus Christi, Texas, the city in which his father's family had settled when it was a small frontier town a fraction of the size it is today. As he describes it, his family was "bookish."[1] That rather understates it, for academic ambition and accomplishment characterized generations reaching back on both sides of his family. His paternal grandmother was one of eleven children born to "a sort of patrician Jewish family,"[2] who went on to college and thereafter became one of the original members of the American Association of University Women. Larry's paternal grandfather was a University of Texas graduate whose brother became an editor of *Collier's* magazine.

Before World War II broke out, Larry's father, Simon Ray Alexander, had been pursuing a PhD in chemistry at the University of Texas, but by the time the war was over he faced the challenge of supporting a wife and two children – Larry and his sister Candy – and so he never returned to the academy. Instead, he became the owner of a record and phonograph store, which guaranteed Larry the enviable status of owning the best record collection of anyone in his school.

Larry's mother, Helen Rosenwasser Alexander, hailed from the small West Texas town of Stamford, where she was the salutatorian of her high school class and the 1938 Queen of the Texas Cowboy Reunion, the largest amateur rodeo in the world. The Rosenwasser family was one of only two Jewish families in Stamford at that time, and they owned a small department store. Its competition was a similar store owned

[1] Larry Alexander, letter to author, July 7, 2017 (on file with author).
[2] Ibid.

by the other Jewish family in town – Helen's aunt and uncle. One of their sons, Helen's first cousin, was Robert Strauss, who went on to marry Helen's roommate at the University of Texas and to become, inter alia, the head of the Democratic National Committee and a Washington power broker.

As Larry describes it, while Corpus Christi was a ranching community, it was surprisingly "democratic" for its time and location.[3] Upon settling in the town, his grandparents became "very Texan,"[4] and as merchants they acquired considerable ranch land in payment for goods. Jews were well accepted in the area; indeed, as Larry recalls, the mayor was Jewish and his great uncles and grandfather founded the Corpus Christi Country Club together with their non-Jewish friends.

Larry and his sister, Candy, attended public schools in Corpus Christi where both acquired obvious analytic talents. Candy went on to major in mathematics at the University of Texas and became a high school math teacher, teaching everything from calculus to remedial algebra. Larry went on to study philosophy at Williams College where he had the highest GPA among the eighteen philosophy majors in his class. He was elected to Phi Beta Kappa in his junior year and graduated *magna cum laude* with Highest Honors in Philosophy. Having also captained the varsity golf team at Williams, he aspired to apply for a Rhodes Scholarship[5] with which to complete a DPhil at Oxford University. But several of his teachers who knew of his interest in public policy persuaded him to change course and to apply to the Yale Law School. Knowing of its reputation for adopting a philosophical approach to legal education, they assured him that it would afford him the American equivalent of the DPhil. Larry was disappointed to discover that, in his words, "the school's philosophical credentials were largely hype."[6] Most of the instruction was, in fact, like that of most other law schools, "its focus far more doctrinal than philosophical."[7]

Yet, as Larry has always insisted, he never regretted his choice to attend Yale Law School. He had some of the most celebrated teachers of the day – Alexander Bickel, Boris Bittker, Guido Calabresi, and Ronald Dworkin. Far more importantly, it was at Yale that he met his wife, Elaine, who was also in the Class of 1968. They were married after their first year of law school, having never revealed their 1L grades to one another (a point of pride to this day, though it makes one wonder what other secrets they will take to their graves). They were happily relieved when they both graduated within the top 10 percent (during years when Yale had real grades and real GPAs) and shared the honor of being named to the Order of the Coif.

3 Ibid.
4 Ibid.
5 At the time, those who applied for Rhodes scholarships were required to have played a varsity sport in college in addition to accumulating a superb academic record.
6 Larry Alexander, letter to author, July 7, 2017 (on file with author).
7 Ibid.

Larry and Elaine both developed a lifelong interest in criminal law while at Yale because their respective criminal law teachers both used the casebook then edited by Sanford Kadish and Monrad Paulsen[8] – a text that Larry describes as "much more interesting than our classes."[9] Indeed, to Sandy Kadish's delight, Elaine credited him with her career choice. In their final year, Larry and Elaine wrote a joint senior thesis under the supervision of Steven Duke in which they (rather immodestly!) presented a full-blown theory of the criminal law. Upon his retirement from Yale a few years ago, Professor Duke found their thesis among his papers and sent it to Larry. Larry was amazed at how similar their views in 1968 were to his views today (prompting his closest colleagues to conclude that he either peaked or calcified at a very young age).

1.2 ELAINE ALEXANDER: LARRY'S PARTNER IN LIFE, LOVE, AND INTELLECTUAL INQUIRY

In 1970, after law school and clerkships, Larry was appointed to the faculty at the University of San Diego School of Law, while Elaine went into the practice of criminal law, founding Appellate Defenders, Inc., in 1973 and becoming its Executive Director in 1979. ADI is a non-profit law firm that administers the appointed counsel system for the California Court of Appeal, Fourth Appellate District. Elaine pioneered ADI to improve the quality of indigent appellate representation in criminal and juvenile delinquency cases, and today ADI has a large staff of attorneys who operate under contract with the California Administrative Office of the Courts. Elaine has been showered with local, state, and national awards for the work she has done on behalf of indigent people unjustly convicted or unjustly treated by our imperfect system of criminal justice. These moments of recognition for Elaine have evoked rare expressions of exuberant pride from Larry, who is characteristically modest about his own achievements. But it has been words like those of Harvey Davis, for whom ADI finally won parole after 27 years and numerous procedural setbacks, that best capture Larry's sense that Elaine and the organization to which she has devoted her life's blood practices what he preaches, and by so doing completes his life's work. Harvey Davis wrote to Elaine: "There really aren't enough words to properly voice the good that you have done in the hearts of many men!!!"[10]

[8] That casebook has metamorphosized over the years a good deal, but it remains the most philosophically rich book in the field. See the most recent edition by Sanford H. Kadish, Stephen J. Schulhofer, and Rachel E. Barkow, *Criminal Law and Its Processes: Cases and Materials*, 10th ed. (New York: Wolters Kluwer, 2017).

[9] Larry Alexander, letter to author, July 7, 2017 (on file with author).

[10] Cheryl Geyerman, "Richard Pfeiffer's Chain Victories in Parole Cases," Appellate Defenders, Inc., www.adi-sandiego.com/news_alerts/pdfs/2009/029-Pfeiffer-parole-article-for-newsletter.pdf.

Larry's first two law review articles were coauthored with Elaine and he credits her, to this day, with being his most valued discussant. In the first of their coauthored articles, they criticized the turn away from color blindness and the legal entrenchment of various forms of "color consciousness." Here is Larry's description of the metamorphosis of his thinking about this issue:

> During college, I had been a campaigner in both the North and the South for passage of the 1964 Civil Rights Act, which made color blindness the law of employment and public accommodations. It embodied Martin Luther King, Jr.'s ideal of focusing on the content of character, not the color of skin. Elaine and I decried, on grounds of principle, the turn away from that ideal in affirmative action programs. I later came to the view that we were wrong to claim that color consciousness was a violation of moral principle, but I still think that we were nonetheless right to oppose it. The correct basis for opposition was (and is) pragmatic. Color consciousness, and identity politics more generally, has proved to be highly divisive, and on campuses it has led to balkanization, the creation of departments of grievance polemics, and a rhetoric of postmodern gibberish. I have written several articles since that first one making such points – though obviously, if my voice has been heard at all, it has thus far failed in its mission.[11]

The other article that Larry and Elaine coauthored represented Larry's only foray into the field of evidence law. In it, they attacked what came to be known several years later as "conditional relevance." As far as I can glean, theirs was the first article to attack the notion. And it explains why, when I interviewed at the University of San Diego Law School as an entry-level candidate, Larry proved to be a formidable debate opponent when I illustrated my thesis that evidence law is a rich source of philosophical conundrums by outlining a puzzle that turned on the concept of conditional relevance. That was not the first – nor will it be the last – time that I stuck my foot in my mouth during an intensive grilling, but I remember it vividly because Larry figuratively grabbed my foot and gleefully shoved it down my throat.

1.3 MAPPING LARRY'S SCHOLARLY PORTFOLIO AND THE MAJOR POINTS OF CONTENTION WITH CRITICS

Larry matured into one of the legal academy's most creative contributors by developing an approach to identifying fruitful topics of inquiry that aspiring scholars would be well advised to emulate. First, Larry reads the legal and philosophical literatures voraciously to locate the specific issues about which leading scholars are persistently disagreeing. He then considers whether there is a deep reason for their

[11] Larry Alexander, letter to author, July 7, 2017 (on file with author).

persistent disagreement. He asks: Are the premises from which the arguments begin ill-formed, or is there a basic incoherence or paradox at the heart of the controversy? As he has chortled, "Occasionally, I even find incoherence embedded within matters of broad agreement – such as when the Supreme Court unanimously affirms what I take to be an illusory distinction between the President's acting illegally under federal law and his acting unconstitutionally." Larry's general strategy of first uncovering and then proffering solutions to conceptual puzzles at the core of persistent disputes (and sometimes at the core of smug agreements) is emblematic of most of Larry's scholarship.

Although he has written on an extraordinary number of other topics, Larry's scholarship is largely concentrated in four somewhat overlapping areas: the philosophical underpinnings of criminal law; the theoretical foundations of constitutional law; the core disputes in general jurisprudence, including the authority of law and the rationality of rule following; and the central debates in moral philosophy, including the structure and content of deontological ethics. This volume of essays tracks this organization.

Within the arena of criminal law, to which Part I of this volume is dedicated, one of Larry's earliest and most-cited pieces has as its centerpiece an imagined doomsday machine and deals with the question of why punishment should be proportional to the offender's desert when the defendant has noticed that disproportionate punishment will be levied for violations.[12] Larry concludes in this early work that penalties imposed to deter have more in common with safes, moats, and electric fences than with desert-based punishment of the sort recommended by a principled retributive theory. After this early foray into punishment theory, Larry went on to write further ground-breaking articles on the justification of inflicting suffering on wrongdoers, reprising the doomsday machine thesis,[13] exploring the implications of inadvertently punishing the innocent,[14] analyzing how underserved suffering affects retributive desert,[15] and tracing the ways in which retributive desert interacts with distributive justice.[16]

In their contributions to this volume, both Doug Husak and David Brink explore aspects of Larry's retributivism, arguing that its defense remains incomplete. In Doug Husak's view, while Larry has morally motivated a retributive theory of punishment, he has glossed over the central question of how to match kinds or modes of

[12] Larry Alexander, "The Doomsday Machine: Proportionality, Prevention and Punishment," *The Monist* 69, no. 2 (1980): 199.
[13] Larry Alexander, "Consent, Punishment, and Proportionality," *Philosophy and Public Affairs* 15, no. 2 (1986): 178.
[14] Larry Alexander, "Retributivism and the Inadvertent Killing of the Innocent," *Law and Philosophy* 2, no. 2 (1983): 233.
[15] Larry Alexander, "You Got What You Deserved," *Criminal Law and Philosophy* 7, no. 2(2013): 309.
[16] Larry Alexander, "Retributive Justice," in *Oxford Handbook of Distributive Justice*, ed. Serena Olsaretti (Oxford: Oxford University Press, 2018), 177–94.

punishment with claims of desert.[17] Husak worries that, absent a principled basis for matching a given offense with a given penalty, Larry's retributivism cannot vindicate our use of imprisonment as a legitimate form of punishment (nor could it vindicate any other form of punishment, such as corporal punishment or the death penalty). David Brink, in turn, fears that because moral responsibility is scalar, any system that calls upon juries to find defendants either guilty or innocent (as ours largely does) is destined to offend against a retributive theory of punishment.[18] As he argues, retributivists like Larry ought to urge the abandonment of a bivalent system that fails to conceive of guilt as a scalar property, and that thus falls well shy of imposing punishments that approximate defendants' just deserts.

Larry's decades of work on legal responsibility ultimately reached beyond the justification for punishing wrongdoers to examine every doctrinal nook and theoretical cranny in the edifice of Anglo-American criminal law. For example, he has defended the counterintuitive claim that incomplete attempts – namely, attempts that fall shy of constituting the last acts defendants intend to do – are not culpable.[19] But he has simultaneously elevated *mens rea* elements above *actus reus* elements in the analysis of prima facie liability by arguing that genuine but failed attempts are every bit as blameworthy as successfully completed crimes. In short, results don't matter.[20] This thesis is the target of Antony Duff's contribution to this volume.[21] As Duff suggests, the best explanation of why we have different psychological reactions to those who fail at their attempts and to those who succeed – such as the relief felt by someone who fails to perpetrate a harm ("Thank God I failed!") – is that these possess very different moral pedigrees.

Larry has further explored in depth the structure of omission liability.[22] He has mapped the relations between both inculpatory and exculpatory mistakes of fact and

[17] Douglas Husak, "Kinds of Punishment," this volume.

[18] David O. Brink, "Partial Responsibility and Excuse," this volume.

[19] Larry Alexander and Kimberly Kessler Ferzan, "Risk and Inchoate Crimes: Retribution or Prevention?" in *Seeking Security: Pre-Empting the Commission of Criminal Harms*, ed. G.R. Sullivan and Ian Davis (Oxford: Hart, 2012), 103–20; Larry Alexander and Kimberly Kessler Ferzan, "Danger: The Ethics of Preemptive Action," *Ohio State Journal of Criminal Law* 9, no. 2 (2012): 637.

[20] Larry Alexander, "Crime and Culpability," *Journal of Contemporary Legal Issues* 5, no. 1 (1994): 1; Larry Alexander and Kimberly Kessler Ferzan, "Results Don't Matter," in *Criminal Law Conversations*, ed. Paul H. Robinson, Kimberly Kessler Ferzan, and Stephen P. Garvey (Oxford: Oxford University Press, 2009), 147–53; Larry Alexander, "Michael Moore and the Mysteries of Causation in the Law," *Rutgers Law Journal* 42, no. 2 (2011): 301; Larry Alexander and Kimberly Kessler Ferzan, "'Moore or Less' Causation and Responsibility," *Criminal Law and Philosophy* 6, no. 1 (2012): 81; Larry Alexander and Kimberly Kessler Ferzan, "Ferzander's Surrebuttal," *Criminal Law and Philosophy* 6, no. 3 (2012): 463.

[21] Antony Duff, "'Thank God I Failed,'" this volume.

[22] Larry Alexander, "Criminal Liability for Omissions: An Inventory of Issues," in *Criminal Law Theory: Doctrines of the General Part*, ed. Stephen Shute and Andrew Simester (Oxford: Oxford University Press, 2002), 121–42.

mistakes of law.[23] And he has examined the conditions that justify the commission of prima facie criminal offenses and compared these to conditions that function to excuse such offenses. In his contribution to this volume, Peter Westen vindicates Larry's ongoing ambivalence concerning the conventional categorization of the defense of duress as an excuse.[24] Westen argues that duress lacks any family resemblance to the cognitive and volitional deficits that are paradigmatically exonerating (e.g., infancy, insanity), and demonstrates that, in its important moral respects, duress most resembles the conditions that Larry and others take to be manifestly justifying.

Larry's explorations of the classic justifications recognized by the criminal law have been profoundly influential. He has advanced a nuanced theory of self-defense that seeks to answer concerns about pre-emptive proportionality[25] and he has identified previously unexplored moral conundrums raised by the lesser evils defense.[26] It is to one of these latter conundrums that Gideon Yaffe dedicates his contribution to this volume.[27] In his view, Larry cannot explain without the aid of consequentialism (which he takes to be an illegitimate crutch) why the law should give the lesser evils defense to an offender whose prima facie criminal deed prevented a great evil but failed to constitute the least evil means available. Yaffe argues that, contrary to Larry's assumption, the lesser evils defense is not a means of entrenching in law a substantive safety valve made available in morality, but rather constitutes a procedural mechanism essential to preserving not just the state's power, but its legitimate political authority. Were the criminal justice system to punish a defendant who chose a lesser evil, but not the least evil, it would be inconsistently committed to both preventing the greater evil and preventing the greater evil's prevention.

[23] Larry Alexander, "Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Bayles," *Law and Philosophy* 12, no. 1 (1993): 33; Larry Alexander, "Facts, Law, Exculpation, and Inculpation: Comments on Simons," *Criminal Law and Philosophy* 3, no. 3 (2009): 241; Larry Alexander, "What's Inside and Outside the Law," *Law and Philosophy* 31, no. 2 (2012): sec. 2.

[24] Peter Westen, "Does Duress Justify or Excuse? The Significance of Larry Alexander's Ambivalence," this volume.

[25] Larry Alexander, "Justification and Innocent Aggressors," *Wayne Law Review* 33, no. 4 (1987): 1177; Larry Alexander, "Self-Defense, Justification, and Excuse," *Philosophy and Public Affairs* 22, no. 1 (1993): 53; Larry Alexander, "A Unified Defense of Preemptive Self-Protection," *Notre Dame Law Review* 74, no. 5 (1999): 1475; Larry Alexander, "Self-Defense," in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (Abingdon: Routledge, 2012), sec. 3.1.6; Larry Alexander, "Recipe for a Theory of Self-Defense: The Ingredients and Some Cooking Suggestions," in *The Ethics of Self-Defense*, ed. Christian Coons and Michael Weber (Oxford: Oxford University Press, 2016), 20–50.

[26] Larry Alexander, "Lesser Evils: A Closer Look at the Paradigmatic Justification," *Law and Philosophy* 24, no. 6 (2005): 611.

[27] Gideon Yaffe, "Alternative Lesser Evils," this volume.

Perhaps the most fertile source of Larry's signature challenges to common assumptions and conventional theses about criminal responsibility is his 2009 book, *Crime and Culpability: A Theory of Criminal Law*, coauthored with Kim Ferzan (with contributions by Stephen Morse),[28] the publication of which constituted an intellectual watershed within the criminal law academy. Consider just three of the profound, and profoundly surprising, claims that Larry and his coauthors defend in this detailed analysis of the conditions of criminal responsibility. First, in keeping with their conviction, explored by Antony Duff, that results don't matter, they reject the claim that culpably causing harm is more blameworthy than culpably risking it – making the driver who recklessly speeds home without incident as deserving of a manslaughter conviction as one whose recklessness causes a deadly accident. Second, they take an actor to be culpable if, and only if, she subjectively believes that she is imposing a risk on another's protected interests that is, by the law's measure (not hers), an unjustifiable one. This position prompts them to reject the criminal law's assumption that there is special moral and legal significance to be attached to acts that are done with the purpose or with knowledge that they will harm, and to thus collapse purposeful harms and harms knowingly caused into the singular category of recklessness.[29] Third, their theory of culpability implies their rejection of the deeply held intuition that negligence is culpable, and they thus argue that those who risk or cause harm through inadvertence should be exempted from any blame or punishment.[30] The mother who forgets that her child is in the car on a sweltering summer day, the driver who dozes off at the wheel while traveling along the interstate, the mechanic who forgets to check the brakes on a customer's car – all of these are free from moral blame, and when the predictable harms ensue, all of these are to be exonerated from legal liability for the losses of life they cause.

Larry has explored and defended conclusions as surprising, and as surprisingly hard to circumvent, in the arena of constitutional law, to which Part II of this volume is dedicated. In early articles Larry waded into the doctrinal morass of the "state action" issue, arguing, first, that what people thought was the state action issue was, in fact, easily resolvable, but then pointing to a different, very real, and very difficult

[28] Larry Alexander and Kimberly Kessler Ferzan, with Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009).

[29] Larry first articulated and defended this unitary conception of culpability in Larry Alexander, "Insufficient Concern: A Unified Conception of Criminal Culpability," *California Law Review* 88, no. 3 (2000): 931.

[30] This thesis emerged in a number of earlier pieces. See, for example, Larry Alexander and Kimberly Kessler Ferzan, "Against Negligence Liability," in *Criminal Law Conversations*, ed. Paul Robinson, Kimberly Kessler Ferzan, and Stephen Garvey (Oxford: Oxford University Press, 2009), 273–81; Larry Alexander, "Insufficient Concern," 931; Larry Alexander, "Negligence, Crime and Tort: Comments on Hurd and Simons," *Boston University Law Review* 76, no. 1/2 (1996): 301.

state action issue that had been lurking in the shadows ever since the Supreme Court had glimpsed it over a century before.[31] He then dove into unconstitutional conditions theory, developing the important notions of constitutionally optional benefits and burdens and tracing their theoretical presuppositions and implications for equal protection, the equal protection modes of free speech and free exercise, and the relation between substantive rights and procedural due process.[32]

Among Larry's many fruitful intellectual partnerships over the years is one with former San Diego colleague, Sai Prakash. After writing two solo articles in which Larry employed Arrow's impossibility theorem to demonstrate the incoherence of the claim that gerrymanders dilute votes,[33] he and Sai teamed up to launch a final concerted attack on the academic orthodoxy regarding the unconstitutionality of gerrymanders.[34] They then crossed the aisle in a pair of articles to defend the majority position regarding the constitutionality of legislative delegations of power against the contrarian view advanced by Eric Posner and Adrian Vermeule, arguing that the Posner-Vermeule position logically generates a set of outlandish conclusions. And they then tacked back in characteristically heterodox form to argue that Congress's statutes defining terms in future statutes violated the principle that Congress cannot entrench its laws.[35]

Larry also deservedly enjoys a very considerable reputation within the field of constitutional law for his work on free speech theory. Early in his years of teaching constitutional law he concluded that the judicial invalidation of regulations that affect, but are not aimed at, the content of speech – Laurence Tribe's so-called Track Two regulations – cannot be based on any principle that is content free.

[31] Larry Alexander, "The Public/Private Distinction(s)," *Constitutional Commentary* 10, no. 2 (1993): 361; Larry Alexander, "State Action," in *The Philosophy of Law: An Encyclopedia*, ed. Christopher Berry Grey (New York: Garland, 1999); Larry Alexander, "What's Inside and Outside the Law," *Law and Philosophy* 31, no. 2 (2012): 213.

[32] Larry Alexander, *Is There a Right of Freedom of Expression?* (Cambridge: Cambridge University Press, 2005), chap. 3; Larry Alexander, "Rules, Rights, Options and Time," *Legal Theory* 6, no. 4 (2000): 391; Larry Alexander, "Constitutional Theory and Constitutionally Optional Benefits and Burdens," *Constitutional Commentary* 11, no. 2 (1994): 287; Larry Alexander, "Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique," *Ohio State Law Journal* 42, no. 1 (1981): 3. See also Larry Alexander "Understanding Constitutional Rights in a World of Optional Baselines," *San Diego Law Review* 26, no. 2 (1989): 175.

[33] Larry Alexander, "Lost in the Political Thicket," *Florida Law Review* 41, no. 3 (1989): 563; Larry Alexander, "Still Lost in the Political Thicket (or Why I Don't Understand the Concept of Vote Dilution)," *Vanderbilt Law Review* 50, no. 2 (1997): 327. See also Larry Alexander, "Constitutional Rules, Constitutional Standards, and Constitutional Settlement: *Marbury v. Madison* and the Case for Judicial Supremacy," *Constitutional Commentary* 20, no. 2 (2003): 369.

[34] Larry Alexander and Saikrishna Prakash, "Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering," *William and Marry Law Review* 50, no. 1 (2008): 1.

[35] Larry Alexander and Saikrishna Prakash, "Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation," *Constitutional Commentary* 20, no. 1 (2003): 97.