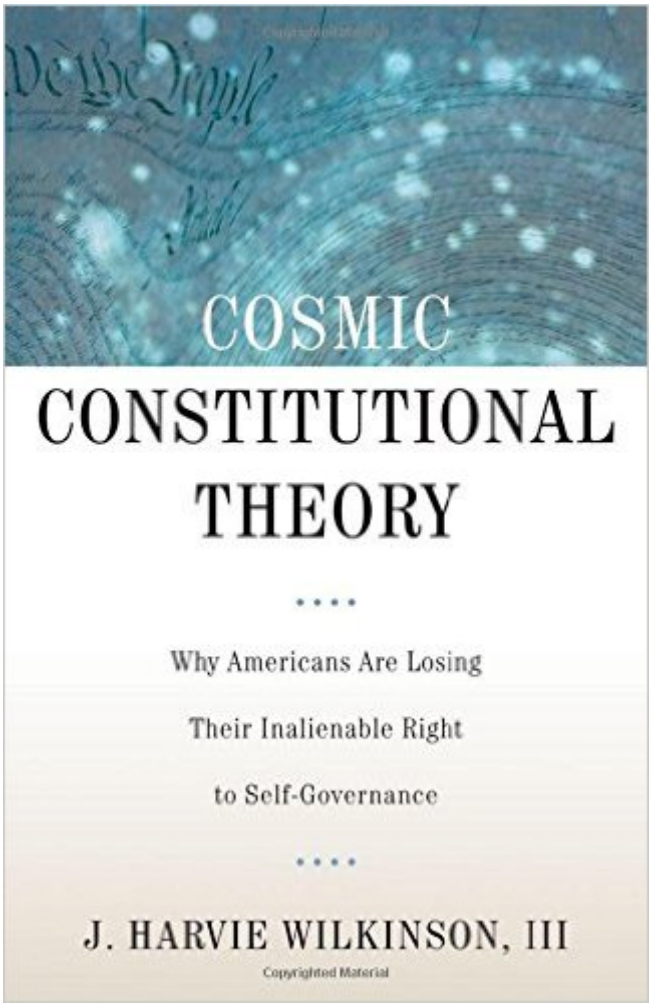
Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right To Self-Governance (Inalienable Rights)



Synopsis

American constitutional law has undergone a transformation. Issues once left to the people have increasingly become the province of the courts. Subjects as diverse as abortion rights and firearms regulations, health care reform and counterterrorism efforts, not to mention a millennial presidential election, are more and more the domain of judges. What sparked this development? In this engaging volume, Judge J. Harvie Wilkinson argues that America's most brilliant legal minds have launched a set of cosmic constitutional theories that, for all their value, are undermining self-governance. Thinkers as diverse as Justices William Brennan and Antonin Scalia, Professor John Hart Ely, Judges Robert Bork and Richard Posner, have all produced seminal interpretations of our Founding document, but ones that promise to imbue courts with unprecedented powers. While crediting the theorists for the sparkling quality of their thoughts, Judge Wilkinson argues they will slowly erode the role of representative institutions in America and leave our children bereft of democratic liberty. The loser in all the theoretical fireworks is the old and honorable tradition of judicial restraint. The judicial modesty once practiced by Learned Hand, John Harlan, and Oliver Wendell Holmes has given way to competing schools of liberal and conservative activism seeking sanctuary in Living Constitutionalism, Originalism, Process Theory, or the supposedly anti-theoretical creed of Pragmatism. Each of these seemingly disparate theories promises their followers an intellectually respectable route to congenial political outcomes from the bench. Judge Wilkinson calls for a plainer, simpler, self-disciplined commitment to judicial restraint and democratic governance, a course that alas may be impossible so long as the cosmic constitutionalists so dominate contemporary legal thought.

Book Information

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Customer Reviews

The author, a Judge on the U.S. Court of Appeals for the Fourth Circuit, discusses the nature, limitations, and drawbacks of four modern theories of constitutional law: (1) living constitutionalism; (2) originalism; (3) political process theory; and (4) pragmatism. The Judge concludes that: (a) each theory has positive and negative aspects; (b) each theory has more net negatives than positives; and (c) each theory poses risks and threats to the fundamental principle of self-governance by the American people. The Judge also concludes that another theory of constitutional law is not needed, and a new theory of constitutional law is not likely to resolve the kinds of dilemmas and contradictions associated with the four modern theories of constitutional law that he critiques. Unfortunately, the author offers no clear solution or specific recommendation for addressing the problems and dilemmas he identifies with modern theories of constitutional law, but merely offers the hope that judges will cease pursuing grand theories of constitutional law and respect the limits of their authority under the U.S. constitution.The book addresses the timely and important issue of the proper role of courts under a constitutional system in which the American people -- not judges, lawyers, or government officials -- are the sovereign. Although the book is brief, it succeeds in succinctly identifying the major pros and cons of the four modern theories of constitutional law discussed. The author’s failure to offer a clear solution or specific recommendation to addresses the problems of judicial theorizing and judicial overreaching is disappointing, but it does not detract from the value of his insights and cogent critiques of modern theories of constitutional law.

In recent months we have witnessed a most unusual phenomenon. Conservative commentators who for decades railed against "unelected activist judges undermining our democracy" have suddenly started praising the courts as the lynchpins of democracy. Liberals, who for decades viewed the courts as their favorite venues for voiding laws that annoyed them have suddenly mounted a propaganda campaign against the "irresponsible courts overstepping their bounds."What brought about this sea-change in opinion? Of course a lot of it has to do with the Supreme Court voiding much of the campaign finance laws in "Citizen vs. United" and now perhaps preparing to void the Healthcare Reform Act. The people who criticized the courts before these two decisions now adore them, and vice versa.It has been apparent from our earliest days that the courts have a Dr. Jekyll and Mr. Hyde character. They are trusted to be the final arbiter of the law, to have the final

say not only in common cases of business, but in controversies between congresses and presidents or between the various levels of federal, state, and local governments. To properly adjudicate the fundamental laws of the land, judges are expected to be above politics and the vicissitudes of volatile popular opinion.But of course judges ARE fallible human beings affected by the same politics as anybody else. If court decisions WERE made on the basis of defined objective principles, all Supreme Court decisions would be rendered unanimously, not split 5 to 4 as most of the important decisions are. So in the end, the federal, state, and local laws are no more and no less than what the federal judges say they are.

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