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Editorial to "Law and Politics", a special issue of E-Pública

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EDITORIAL A "DIREITO E POLÍTICA", UM NÚMERO ESPECIAL DA E-PÚBLICA

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The papers published in this issue of E-Pública constitute different approaches to the relationship between Law and Politics, developed at different theoretical levels. They were presented at the conference "The Return of Politics to Constitutional Law" held at the University of Lisbon's School of Law in May 2018.

At the level of general jurisprudence, Larry Alexander distinguishes politics (a realm of first order practical reasoning) from law (a realm of norms, already determined through the first order practical reasoning of politics). A "gap" between the two realms allows for dispute settlement in a context of disagreement, for certainty and coordination. Therefore, to close it is not desirable, even if it means that those who act or decide according to law must comply with rules against their own first order practical reasoning. Whether law – as a realm insulated from politics – is possible is a question left open by Alexander, even if his general argument leads to skepticism. It is that skepticism that is discussed by Gonçalo de Almeida Ribeiro, for whom the "gap" – which he describes as the idea that "rules are every bit as necessary as they are impossible" – is not an intractable problem.

At the level of the theory of legal interpretation, Robert F. Nagel's paper illustrates the way in which different views of reason and sources of moral judgement usually taken to be "political" – "conservative", on the one side, and "progressive", on the other – lead to different results. Nagel develops a view that

immerses reasoning and understanding in "activity and experience" – therefore not taking it as "a rationale or an order imposed upon experience" –, which he frames in the conservative tradition, considering it to be more congenial to constitutionalism and judicial restraint. Whether Nagel has thus found a "viable candidate for a conservative jurisprudence" is what is discussed by Steven D. Smith, who is generally skeptical regarding the proposal.

At the level of constitutional theory, James Allan presents an adversarial defense of "informal constitutionalism" vis a vis "formal constitutionalism", focusing on the role of politics in each. Interestingly, for Allan, each of the alternatives – also "formal constitutionalism" in the variety assisted by judicial review – is linked to a specific sort of politics. Consequently, the argument for the "informal" type mainly is that the sort of politics that accompanies it (which is unconcealed and democratic) is better than the alternative (unpredictable and unelected "judicial politics", which usually takes over "formal constitutionalism", despite its promises of predictability, certainty and locked-in outcomes). Jaime Valle questions whether Allan's defense of informal constitutionalism can be replied with success outside Britain and her scions and also whether it is adequate to reduce democracy to majoritarianism.

At the level of the theory of judicial review, Maimon Schwarzschild addresses the political questions doctrine by analysing several American courts' cases, trying to show how the doctrine coexists with growing judicial activism. According to him, there are a handful of topics, and at least one Constitutional provision, that are said to raise political questions which the courts will not adjudicate. Whilst the courts sometimes invoke the political question doctrine to avoid adjudication, or to adjudicate in favour of whatever the elected government has done, he considers the doctrine to impose little real restraint on the courts' power, even on the limited range of questions to which the doctrine is said to apply. In addition, in his view the questions included by the doctrine are not necessarily the most important to the social and political character of American life. Due to this, American courts have taken on an increasingly political role, deciding social controversies that would otherwise be up to democratically accountable legislatures. In turn, starting from Henkin and Seidman's analysis on the topic, Jorge Silva Sampaio asks if there is an autonomous political question doctrine or if judges and scholars are just talking about already known legal phenomena.

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