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# Constitutional Scholarship: What Next?

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*I got the Ollie No-orth  
 Bob Bo-ork  
 Bye, Bye, Bye Centennial Blues*

But if the advocate and the judge know their jobs, what is the constitutional scholar's role to be? In ideal terms, at least in the ideal terms of my distinguished colleague, I suspect that the scholar is seen as the only actor in the drama with the luxury of true neutrality. His or her role is thus that of the nagging conscience, to be everything the judge is supposed to be in myth but can never be in practice. If the legal system is to be kept honest the scholar must be honest, and to be honest the scholar must be ruthlessly disciplined.

But if constitutional scholarship is not to be advocacy, what is it to be? If one cares deeply about the central issues of American life, and if one recognizes that judicial rulings in constitutional cases profoundly affect that life, what is the constitutional scholar to do?

The advocate at least has a provisional anchor in the end he or she seeks to accomplish, and the judge an anchor in the end that is accomplished. The neutral scholar, however, must search for safe moorings in some more transcendent fixture. But where? In logic? In the constitutional text? In history? In the collective aspirations of the people? Where am I supposed to find my discipline? What discipline tells me what discipline means? To give up instrumentalism seems to threaten the one sure compass I have, what I feel in my gut. Without it will scholarship be drained of force and meaning? Will I be yet another yuppie without a cause?

*I got the Ed Meese, Warren Burger, Roscoe Pound,  
 Alexander Bickel, Gerald Gunther,  
 Larry Tribe, Fred Rodell, John Nowak, Ron Rotunda,  
 Mark Tushnet, Richard Posner, Vincent Blasi,  
 Henry Monaghan, Michael Perry, William Van Alstyne,  
 Dan Farber, David Bryden, Jesse Choper, John Hart Ely,  
 Bruce Ackerman, Richard Epstein, Ronald Dworkin,  
 John Rawls, Abe Lincoln, Herbert Wechsler,  
 Orval Faubus, Teddy Kennedy, Orrin Hatch,  
 James Madison, Alexander Hamilton, William Rehnquist,  
 William Brennan, George Washington, Ronald Reagan*

*Ollie No-orth  
 Bob Bo-ork  
 Bye, Bye, Bye Centennial Blues!*

DAVID M. O'BRIEN<sup>28</sup>

Two points about contemporary constitutional scholarship strike me as worth making. First, it has become heavily normative

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as well as marked by the proliferation of specialized theories of judicial review. As a result, we now face a kind of intellectual crisis. Second, I find surprisingly lacking a certain kind of empirical scholarship, namely, that focusing on collegial courts and how the interaction—the political interaction—of Justices and judges determines the course of adjudication and the direction of constitutional law.

As to the first point: obviously, American Legal Realism's triumph over Legal Formalism prepared the way for the development of contemporary instrumentalist or result-oriented jurisprudence. It did so by underscoring the significance of Justice Felix Frankfurter's observation that constitutional law "is not at all a science, but applied politics." Karl Llewellyn, in particular, brought the insights claimed by legal realism to bear on constitutional interpretation when in 1934 he called for a jurisprudence of a "living Constitution"—one, as he put it, "that can face fact, including that fact, is what we need."

Since World War II, we have gotten more than Llewellyn, and others, perhaps, bargained for. As the Supreme Court expanded and espoused new constitutional doctrines and rights, liberal legal academics churned out more and more specialized theories of constitutional interpretation. That appeared necessary not merely to justify novel rulings, but to explain prior holdings and to offer guidelines for later decisions, other courts, and legal development.

There were (and are) scholars wedded to one or another version of "interpretivism." This is particularly so for those trained at the time when progressives attacked the conservative judicial activism that marched under the banner of Legal Formalism and who favored the New Deal but found subsequent liberal judicial activism deeply troubling. They still insist on "the reasoned elaboration of judicial decisions" and decisions based on "neutral principles." But some in that and the next generation, following Justice Stone's suggestion in footnote four of *Carolene Products*, also worked and reworked "process-oriented" theories of judicial review.

It was with the generations that came of age in the late 1950s, 1960s and early 1970s that liberal legal scholars emerged with even more explicitly "noninterpretivist" theories. Accordingly, constitutional interpretation turned toward "abstract beliefs about morality and justice," the teachings of natural law and human dignity, the "voice of reason," "a moral patrimony" implicitly in "our common heritage," "the circumstances and values of the present generation," "conventional morality," "public morality," "constitutional morality," "fundamental values," the "essential principles of justice," and even the idea of progress.

Alongside this dominant current of legal scholarship came not only the Law and Economics School, but two other major intellectual forces. They have now so taken hold that they are likely to prove major contenders in charting the course for scholarly debate during the rest of this century.

Those identified with the Critical Legal Studies movement, on the one hand, sharply debunk the increasingly idiosyncratic theories of liberal legal scholarship. But beyond further broadening the scope of legal scholarship (much as did the "Law and Society" movement in the late 1960s and 1970s), this brand of scholarship threatens to go deeper into theories of literary criticism and social forces.

Liberal legalism confronts another, even greater challenge from conservative legal scholars pushing a New Formalism. This movement grew out of opposition to the "liberal jurisprudence" of the Warren Court and the idea of a "living Constitution." And it has moved far beyond Richard Nixon's clarion call for "strict constructionists." Already widely popularized and identified with Attorney General Edwin Meese's 1985 call for a "return to a jurisprudence of original intentions," it undeniably has a stronghold in law schools, with groups like the Federalist Society. And it has an even stronger hold in the federal judiciary. While the likes of Judge Robert H. Bork see themselves in the vanguard of this "great intellectual struggle," the changing character of the entire federal judiciary—due to President Ronald Reagan's naming of forty-five to fifty percent of the bench before leaving the Oval Office—will certainly affect the course of legal scholarship.

Law reviews already bear the weight of the growing debate over a "jurisprudence of original intentions" and the New Legal Formalism. Yet, just as agreement on increasingly abstract principles of liberal legalism proved elusive, the New Legal Formalism and work-product of "originalist" judges, while providing much grist for legal scholars, is likely to prove no less divisive. Nor is the New Formalism any less normative than that of post-New Deal liberal legalism or the Old Legal Formalism that preceded it.

As for contemporary empirical research on collegial courts—which was at the heart of public law scholarship (at least among political scientists since the pioneering work of C. Herman Pritchett)—I am struck by the fact that it has gone in two directions.

There are notable quantitative studies of voting alignments, the influence of and strategies for building voting blocs, and related levels of agreement or disagreement in deciding cases and opinion writing. Much of this research—incorporated now in law schools

and reviews—has been directed at the Supreme Court, though there have been some studies of lower federal appellate courts and state supreme courts.

Unfortunately, most of this work is big on showing associational patterns and comparisons, but weak on detailed descriptions and analysis of collegial interaction. In short, much more than quantitative study of published opinions and docket books is needed.

The kind of rich detail that we need on collegial interaction is the promise of the second line of literature geared toward more ethnographic, even journalistic, description. It is exemplified by the works of Alpheus T. Mason and Carl Swisher. One also thinks of the many recent biographies of Justices Louis Brandeis, Felix Frankfurter, and Frank Murphy, for example, or those of Judge Frank Johnson and Learned Hand. The shortcoming of these works is that the focus on individual judges—and their styles, approaches, and working relationships—often neglects collegial interaction. They nevertheless point toward a richer understanding of courts, judges, and politics.

One exception in the domain of judicial biographies is Bernard Schwartz's major work on the Warren Court, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography*. But alas even this vividly descriptive book offers little in terms of advancing conceptual understanding of collegial judicial decisionmaking. And it invariably fails to incorporate the concerns and discoveries of those engaged in quantitative social science research.

All of this is by way of indicating that I think there is a surprising dearth of what I call—in expropriating John Schmidhauser's words—"collective judicial biographies." That is to say, biographical studies whose chief concern is to explain the interpersonal relationships and interactions within collegial courts and which do so by combining both quantitative description and detailed discussion of intimate interactions, forces, and negotiations.

In other words, the two lines of empirical judicial studies need to be brought together so that we begin to develop a comparative literature of collective judicial biographies. That literature would go beyond studies of the Supreme Court at different periods—marked by different kinds of collegial interaction—to those of lower federal appellate courts and state supreme courts, as well as perhaps collegial courts abroad.

Such studies of "court-ways" would not only advance our understanding of collegial decisionmaking. They could also offer some important findings for how we should think about courts and about

possible, perhaps inexorable, changes in the structure of courts. Specifically, studies of court-ways need to pay more attention to the following:

1. The effects of the size of an appellate bench and how the number and rotation of judges affect law and decisionmaking.
2. The housing and geographical location of appellate courts as related to collegial interaction. One thinks, for example, of the differences between the Ninth Circuit Court of Appeals and that for the District of Columbia Circuit and how important those differences are for collegial decisionmaking.
3. The rise of what some judges lament as "bureaucratic justice"—how the increase in the number of law clerks and staff attorneys affects collegial decisionmaking, the traditional role of negotiation and compromise, and opinion writing.
4. Finally, a related issue, the consequences of introducing modern office managerial practices and equipment during the last ten to fifteen years. How are "court ways" changing due to the greater reliance on modern office technology?

From my perspective as a political scientist, such empirical research deserves as much (if not more) attention as that presently given to normative debates over theories of judicial review.

#### JOHN H. GARVEY<sup>29</sup>

1. It used to be that big shot legal academics wrote casebooks and treatises when they tired of writing for the law reviews. They now do books for university presses. There are many reasons for this. Treatises are out of fashion because there is too much law and it has lost its structure. Scholars are interested in either "deconstructing" or "rethinking" the law. Neither of these enterprises appeals to law firms, which buy a large fraction of the law reviews. Such writers are also often big thinkers (like treatise writers in their own way) and their oeuvre is too big for periodicals. Too, footnotes are less important for deconstructors and rethinkers, and the law reviews' addiction to them is annoying. (For shorter pieces such people flee to *Constitutional Commentary*, *Ethics*, *Nomos*, *Philosophy and Public Affairs*, *Social Philosophy & Policy*, etc., where citation obligations are more relaxed.)

I have several reflections about this change in the form of scholarship. One is that these books are hard for law library patrons to find. If I'm doing research on judicial review or equal protection I can't find books on the subject through the Index to Legal

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