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# Constitutional Scholarship: What Next?

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Lincoln argued in his debates with Douglas, a constitution based on interest is not a constitution of a free people.

Constitutional scholarship, if it is to be serious scholarship, must be the scholarship of freedom. It must seek, above all, to elaborate the fundamental and permanent principles of the organic will of the people. The permanent principles of the Constitution must, of course, be adapted and applied in different ways in order to meet changing exigencies. But this adaptation and application does not alter or change the principles themselves. There must, therefore, be an element of statesmanship in constitutional studies if those studies are to serve constitutional government. But a scholarship that cannot unashamedly serve the ends of constitutional government—human freedom—does not deserve to be taken seriously. There is a real question as to whether the regnant scholarship of today deserves to be taken seriously.

RODNEY A. SMOLLA<sup>27</sup>

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

—To Be Played Blues Style, Sung in a  
Bob Dylan Nasal Twang

A distinguished professor of constitutional law, from one of the nation's best law schools, recently shared with me, in a candid moment over drinks at a conference, his thoughts on the current state of constitutional law scholarship. He was depressed about it, and he depressed me. I'm now in a constitutional crisis of my own. I suspect I was depressed primarily for two reasons: his diagnosis of the disease rang true, and I saw my own scholarship as dominated by its symptoms.

*So, I turn to my colleagues  
for what it's all about  
Please tell me, John Nowak,  
please lay it all out  
What were they really thinking,  
and why should we care?  
What should we be thinking, and  
where should we go from here?  
  
I got the Ollie No-orth  
Bob Bo-ork  
Bye, Bye, Bye Centennial Blues!*

The discipline of constitutional law scholarship, it seems, has

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largely lost its discipline. And a discipline without discipline isn't one. The field is increasingly dominated by instrumentalists. When constitutional scholarship is unabashedly result-oriented, when reading a law review piece becomes indistinguishable from reading an amicus curiae brief (the citations are simply in footnotes instead of the text), the field loses its sense of inquiry. All feeling of struggle is missing; from the first sentence the writer betrays no hint of doubt in his premises, and confidence builds inexorably with each conclusion. Does no one remember the admonitions of Holmes that "certitude is not the test of certainty," and that men have been "cock-sure of many things that were not so?"

*Raoul Berger says he knows  
what they basically had in mind,  
And because a deal's a deal, this  
thing is binding over time  
But if I eat Raoul's theory, I'll  
grow up to be Bruce Fein.*

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

How, if at all, is the professional role of the constitutional scholar different from that of the litigator or judge? The magnetic forces attracting the scholar toward becoming a lean, mean advocacy machine increase exponentially with expertise, threatening to suck one's professional persona into a black hole of endless good causes. Bright, personable, and altruistic scholars, who believe passionately in using their craft to improve American life, become pseudo-scholars, sophisticated intellectual lobbyists in tweed coats and Volvos.

*Mark Tushnet don't like nothin'  
that ain't tinged with Mr. Marx  
Karl, that is, not Groucho —  
we're talkin' sit-ins in the parks  
Dick Howard's with Roger Mudd, Eleanor  
Holmes Norton he's a chiden';  
She's chiden' him right back  
with lines she ripped off from  
Joe Biden.*

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

If this description were merely accurate, it could inflict pain, but not depression. Depression is the product of futility, of not being able to perceive a way out. For to renounce advocacy is not easy, if it is possible at all. A litigator's life is stressful in its de-

mands for performance, and in its persistent challenge to resist unethical conduct, but it is at least free of intellectual guilt for preoccupation with result. Advocacy cannot be a sin when it is the whole point.

*Ollie is a macho nerd,  
He'll wrestle terrorists with calm  
While his lawyer screams at Inouye  
I'm not a potted palm!  
I got the Ollie No-orth  
Bob Bo-ork  
Bye, Bye, Bye Centennial Blues*

The judge is spared much of the stress of daily abrasive battles, but is saddled with an endemic crisis of conscience: how is a trained advocate suddenly to become a trained neutral, and what does being neutral mean? It certainly should not mean staying “in the mainstream,” for as Learned Hand instructed in the *T.J. Hooper*, “a whole calling may have unduly lagged.” It must instead mean deciding cases through some mode of thought different, at least in degree, from pure advocacy. It must refer to some sort of disinterested intellectual honesty—some veil of ignorance, disregard for consequences, some dispassionate obsession with principle. The president and members of Congress are supposed to have visions of America. The judge is not. The judge is to have a vision of law.

*Chief Justice Burger he resigned  
to take the Bicentennial job  
I'm surprised they gave it to him, I think  
Ted Koppel he got robbed.  
The marching band at half-time will  
now form Independence Hall  
While Ollie's shredding documents  
with Fawn Hall on the Washington Mall.  
I got the Ollie No-orth  
Bob Bo-ork  
Bye, Bye, Bye Centennial Blues*

But this vision of the judge's role is pure myth, and the world is better for it. So what if they wear robes for the State of the Union address, while everyone else is in business suits. Judges are mostly men and women of affairs. They decide cases as practical people, mediating between the ideal and the mundane. How can results be totally ignored when the judge is paid to determine them?

*Georgie Washington ran the Convention  
With a hands-off management style  
So now we got the Iranian connection  
And a big Ronnie Reagan smile*

*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!*

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

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