

Constitutional scholarship in the United States

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The status and character of constitutional scholarship depends upon the nature of constitutional law. In the United States, the content of constitutional law is typically negotiated within a dialogue between the Supreme Court and the American people. Constitutional scholarship accordingly seeks to mediate this dialogue by clarifying the systematic and jurisprudential implications of potential constitutional developments. In Europe, constitutional law is more independent of political dialogue; hence constitutional scholarship is relatively more autonomous. Whereas European constitutional scholars imagine their project as the development of an apolitical and internally coherent structure of constitutional norms, American constitutional scholars tend to develop theory in the context of its practical implications for case-by-case adjudication.

I have been asked to comment on Armin von Bogdandy's excellent and comprehensive essay on the profession of constitutional scholarship in Europe. Von Bogdandy stresses "the fundamental role of legal scholarship"¹ in the development of constitutional law, asserting that "[a] thorough understanding of a legal order hardly is conceivable without a familiarity with its legal scholarship."² In Europe, von Bogdandy observes, "one can even recognize the identity of a public law system as grounded in scholarship's conceptual creations..."³ These are marvelous and strange thoughts to someone reared in the United States.

Yesterday, for example, in Philadelphia, I visited the National Constitution Center (NCC), a museum of the American Constitution created by the Constitution Heritage Act of 1988.⁴ By statute the functions of the NCC include:

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¹ Armin von Bogdandy, *The past and promise of doctrinal constructivism: A strategy for responding to the challenges facing constitutional scholarship in Europe*, 7 INT'L J. CONST. L. (I•CON) 1, 3 (2009).

² *Id.*

³ *Id.* at 2.

⁴ 102 Stat. 1640, Pub. L. 100-433 (September 16, 1988).

- (1) serving as a center of exhibits and related materials on the history and contemporary significance of the Constitution;
- (2) directing a national program of public education on the Constitution; issuing traveling exhibits, commissioning radio and television programs, furnishing materials for the schools, and providing other education services; [and]
- (3) functioning as an intellectual center, drawing both academics and practitioners to debate and refine constitutional issues and, at the same time, providing intellectual support for the Center's exhibits and public education program.

Americans take their Constitution very seriously, as the NCC attests. The museum contains 160,000 square feet of public space and attracted one million visitors in its first fifteen months of operation. It is a lively and entertaining institution, full of exhibits that use text, objects, video, and interactive dialogue to explain the meaning, origins, and development of the United States Constitution. Yet throughout the vast space of these exhibits there is barely a whisper regarding constitutional law scholarship.

Instead, the focus is on the institution that imagines itself the voice of the Constitution—the United States Supreme Court. Visiting the “Interactive Constitution” web site maintained by the NCC, for example, the viewer is presented with three search functions: the first two facilitate topic and keyword searches of the book *The Words We Live By: Your Annotated Guide to the Constitution* by the journalist Linda R. Monk, of whose writing I had been blithely unaware before visiting the site, and the last allows the viewer to “Search the text of the Constitution by Supreme Court decisions.”⁵ Each year American legal scholars produce a vast corpus of work commenting on the United States Constitution. But for purposes of the NCC and its web site, this work is apparently irrelevant. The NCC instead constructs its image of the American constitutional order through popular journalism and the case law of the Supreme Court. The focus and emphasis of the NCC is not idiosyncratic; it accurately reflects ordinary understandings.

From an American perspective, there is considerable tension between affirming that constitutional scholarship is foundational for constitutional law and affirming, as von Bogdandy also seems to do, that “national constitutional law enshrines the core of national identity.”⁶ If constitutional law indeed expresses national identity, how can constitutional law simultaneously be controlled and defined by legal scholars? Would any nation willingly yield the contents of its identity to a small group of academic experts?

⁵ Available at <http://72.32.50.200/constitution/>.

⁶ Von Bogdandy writes: “If the premise of article 4 (2) of the Treaty on European Union, as amended by the Treaty of Lisbon, is correct, then national constitutional law enshrines the core of national identity.” Von Bogdandy, *supra* note 1, at 3.

Is not national identity, instead, given to a nation by its history and sociology, by its citizens, judges, and officials? Certainly that is the message of the NCC. Every exhibit in the museum eloquently seeks to portray the construction of American national identity, and in every instance this portrait focuses on the dialogue between federal courts and American political actors. The portrait is that of a polity forging its identity through the law of the Constitution.

This is by no means an eccentric portrait. The United States is a nation of immigrants, so that it is frequently said that our very nationhood is uniquely bound up in the law of our Constitution. We do not have the equivalent of a relatively homogeneous French people who make up the nation of France; we do not have the equivalent of the monarchy that embodies sovereignty in the United Kingdom. We have always had only a kaleidoscopically changing people and their fundamental law, the law of their Constitution. We believe that it is the Constitution, not ethnicity, that binds us together.

Seen through this lens, the United States Constitution may be law, but it is a peculiar kind of law. In the words of Woodrow Wilson: “[T]he Constitution of the United States is not a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of the age.”⁷ It is an important and fundamental question how a “vehicle of life” can exist as law. Ordinary law is given over to the control of legal experts and courts. Judicial review, as established in the United States in 1803,⁸ has since become the chief structural mainstay of our constitutional law. But judicial review has always lived under the onus of the “counter-majoritarian difficulty,” the haunting, unanswerable question of how unelected judges can purport to speak for the political life and national identity of the American people.⁹

The upshot is that our constitutional law has developed within the push and pull of political struggles between the Supreme Court and the American people.¹⁰ As Alexander Bickel put it, “Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives.”¹¹ Although the Supreme Court may announce a constitutional decision, although it may propose a meaning for the Constitution, the ultimate substance of the Constitution’s content will be significantly shaped by the political forces that the Court’s pronouncement

⁷ WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 69 (Columbia Univ. Press 1908).

⁸ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁹ For a discussion, see Robert C. Post, *Theories of Constitutional Interpretation*, 30 *REPRESENTATIONS* 13 (1990).

¹⁰ For a discussion, see Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *HARV. C.R. C.L. L. REV.* 373 (2007).

¹¹ ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91 (Yale Univ. Press 1970).

unleashes. This dynamic is evident in cases ranging from *Brown v. Board of Education*¹² to *Roe v. Wade*.¹³ In this regard the enormous deference paid by the NCC to the Supreme Court as the living and immanent voice of the Constitution is more wish than fact. Americans want their Constitution to have the solidity of law, but, in a pinch, they prefer their Constitution to express their fundamental political identity.¹⁴

If this dynamic underlies the creation of American constitutional law, how should we conceive the role of constitutional law scholarship in the United States? Von Bogdandy writes that in Europe constitutional scholarship produces “an autonomous area of discourse and argumentation, a sort of middle level between natural law, which is primarily within the competence of philosophy and theology, and the concrete provisions of positive law, which fall within the direct purview of politics and the courts.”¹⁵ The goal is a “quest for systematicity through the development of general concepts and structures and the perception of these as internal to and operative within the legal system.” Constitutional scholarship is responsible for “the creation and safeguarding of legal transparency”¹⁶ and for ensuring that “the development of law” is kept “in line with changing social relationships, interests, and beliefs.”¹⁷

These formulations display some internal tension. On the one hand, constitutional scholarship is conceived as standing outside the judicial development of constitutional law and as disciplining that development through the use of systematic jurisprudential concepts and structures. Constitutional scholarship “systematizes constitutional jurisprudence and, thereby, upholds the original doctrinal agenda in times of balancing-happy constitutional courts.”¹⁸ On the other hand, constitutional scholarship participates in the adaptation of constitutional law to modern social conditions by articulating “legal principles” that “can fulfill the function of gateways through which the legal order connects to the broader public discourse.”¹⁹

¹² 347 U.S. 483 (1954). See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

¹³ 410 U.S. 113 (1973). See Post & Siegel, *supra* note 10; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006).

¹⁴ For a discussion, see Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L. J. 1 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L. J. 1943 (2003).

¹⁵ Von Bogdandy, *supra* note 1, at 10.

¹⁶ *Id.* at 14.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

On the first conception, legal scholarship seeks to maintain the internal integrity of the constitution understood as “a lawyers’ document,” as an expression of the systemic concepts and practices of an autonomous constitutional law. On the second conception, legal scholarship seeks to mediate between this autonomous professional enterprise and popular political understandings. This mediation swerves constitutional law from the path it would take were it to consist solely of autonomous professional expertise.

This dual conception of constitutional scholarship nicely captures the tension under which American constitutional law actually functions. Constitutional law must not only maintain its legitimacy as an autonomous professional practice that fulfills rule-of-law virtues, it must also maintain its external legitimacy by remaining responsive to the social needs and demands that are placed on the legal system.²⁰ If constitutional law is torn between these twin imperatives, so, too, is constitutional law scholarship. Von Bogdandy explains how these potentially inconsistent tasks devolve upon legal scholars in Europe. American constitutional scholars are also torn between these two tasks. American constitutional law scholars attempt to maintain the internal integrity of the law, yet they also seek to reformulate constitutional law so as to make it responsive to pressing popular concerns.²¹

Von Bogdandy remarks that European constitutional scholars stress “the systematic working mode”²² and that “[a]lthough casuistry, or so-called case law, has become more important in Europe, nowhere does legal scholarship operate as though a case law–orientation could ever replace a conceptual-doctrinal orientation. One may also formulate this as an ethical argument: fostering and maintaining systematic coherence undergirds the ideas of legal certainty, equality, and, thereby, justice.”²³ I interpret these passages to mean that in Europe constitutional scholars negotiate the tension between systemic coherence and social responsiveness by stressing the former. Their primary orientation is toward fostering and maintaining systematic coherence. This certainly would be consonant with my own observations of European scholarship.

In the United States, by contrast, the ongoing, intense, and dynamic exchange between judicial decision making and popular mobilization has all but foreclosed this option to American academics. When the giants of the legal-process school sought to bring the Warren Court to heel by criticizing its

²⁰ For a discussion, see Robert C. Post & Neil Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473 (2007); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

²¹ For an example of the latter, see Robert C. Post & Reva B. Siegel, *Originalism as a Political Practice: The Right’s Living Constitutionalism*, 75 FORDHAM L. REV. 545 (2006).

²² Von Bogdandy, *supra* note 1, at 15.

²³ *Id.* at 16.

abstract professional technique and competence,²⁴ they all but consigned themselves to oblivion.²⁵ Although American scholars may invoke the authority of disinterested expertise, this authority is so thin that the connection between constitutional scholarship and mobilizing segments of the American public is almost always instantly recognizable. Conservative scholars criticize the Court's failure to follow an "originalist" methodology while progressive scholars criticize the Court's failure adequately to apply the Equal Protection Clause to issues of race or gender.

Because American constitutional scholars typically seek to translate political needs into a systematic and coherent jurisprudential framework, their efforts are ordinarily directed toward what von Bogdandy calls the gatekeeping function. American scholars seek to ensure that "the development of the law" is kept "in line with changing social relationships, interests, and beliefs."²⁶ There is little space for American scholars to address the content of constitutional law in ways that transcend the constitutive dialogues that flow between the Court and its publics. It is quite rare to find an American academic who can invoke the authority to speak in a disinterested, disciplining voice about the abstract conceptual structure of American constitutional law.

The apparent capacity of European scholars to speak with this apolitical authority is what underlies von Bogdandy's discussion of constitutional scholarship as having "seized the crown," meaning that it has become "the supreme discipline among the ranks of various forms of legal scholarship."²⁷ The assumption that there is a coherent hierarchy of disciplinary scholarship is manifestly underwritten by the conviction that law is itself arranged in a coherent hierarchy. The crown of constitutional scholarship depends upon "constitutional law's placement at the pinnacle of the normative hierarchy."²⁸

No such ordered and hierarchical account of law presently exists in the United States, and, consequently, we have no analogously structured hierarchy of legal scholarship. The American legal scholars who come closest to the European ideal of professional autonomy are those who pursue the discipline of law and economics. They have produced a body of work that is highly systematic, that deploys reproducible methods, and that pursues a scholarly agenda that is largely self-determined, although it has a distinctly conservative

²⁴ See, e.g., Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

²⁵ Even the American Bar Association, when it sought to rate judicial candidates based upon professional competence, came to grief.

²⁶ Von Bogdandy, *supra* note 1, at 14.

²⁷ *Id.* at 18.

²⁸ *Id.* at 21.

slant.²⁹ Law and economics has advanced to the point where its practitioners can engage in what they regard as “normal science.”

Public law scholarship, by contrast, is not characterized by normal science. American constitutional scholarship reflects an indefinite number of methodologies, approaches, and frameworks. There is far more agreement about what characterizes excellent work in law and economics than there is about what characterizes excellent work in constitutional law. It is for that reason that the number of professors practicing law and economics continues to increase dramatically.

As yet, however, law and economics exerts only minimal influence on constitutional scholarship. At bottom, this is because constitutional scholarship is primarily driven by the need to ensure that constitutional law remains responsive to changing political conditions. Because law and economics is instead driven by its own internally generated telos of efficiency, it is relatively unresponsive to the evolution of political commitments. The very systematic autonomy that makes law and economics a normal form of “expertise” also disqualifies it from an influential role in constitutional scholarship.

The fundamental contrast between European and American constitutional scholarship is reflected in differences in the institutional location of professors of constitutional law. Von Bogdandy writes that “[l]egal scholars are members of institutions within the system of sciences, dedicating thought, lectures, and publications to the systematic exposition of public law, within a professionalized scheme and ‘unburdened’ by the need to decide cases. So it comes as no surprise that legal scholarship is institutionalized at universities, as faculties and not as professional schools.”³⁰ American constitutional scholars, by contrast, are almost all housed within professional schools. Although “most Continental constitutional scholars conceive of constitutional scholarship as a science,”³¹ few if any American legal scholars, with the possible exception of those specializing in law and economics, would conceive of their work as “science.” Since the advent of legal realism, American legal scholars have understood the study of law to be the study of the social practice of law. They have sought to clarify the goals of that practice and to explore how those goals can be most effectively achieved.

In the United States, the scholars who fit most closely the model described by von Bogdandy are the political scientists who study constitutional law and courts. Political scientists are housed in faculties of arts and sciences. They imagine that their work is a science, and they seek to explain how the system

²⁹ As a discipline, the growth of law and economics was facilitated by conservative groups to counter what they believed was a progressive hegemony within legal scholarship. See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (Princeton Univ. Press 2008).

³⁰ Von Bogdandy, *supra* note 1, at 4.

³¹ *Id.* at 5.

of constitutional law actually functions. Most political scientists do not credit the law as an autonomous practice; most view it as the continuation of politics by other means.³²

American legal scholars, by contrast, identify with the practice of law—most especially, with the practice of judging—which they seek to clarify and improve. Because judging is normative, so is the work of American legal scholars. The profusion of analytic methods and frameworks that beset American constitutional scholarship reflects the normative heterogeneity that pervades a vast and plural country. Law is an arena within which this pluralism is negotiated. Were law to ignore this pluralism and to insist upon disciplining it by invoking the authority of a disinterested and apolitical legal “science,” law could not perform its assigned task of mediating among competing ethical and political commitments.

The relative autonomy of constitutional law, and hence of constitutional law scholarship, is not a natural fact. It is historically and socially constructed out of the forms of trust that a society is willing to repose in the claims of independent legal expertise. In the United States, tolerance for law as a moderately autonomous system is far less than in Europe. This is evident in the process of Europeanization, which von Bogdandy discusses. The so-called democratic deficit that attends this fundamental European constitutional transformation would be all but inconceivable in the United States. Citizens of Europe are evidently far more willing to entrust their fate to legal experts than are citizens of the United States. The contrast between the forms of constitutional scholarship that von Bogdandy describes and those that predominate in the United States ultimately flow from this difference. Because in the United States constitutionalism is institutionally and normatively entangled with processes of political legitimation, so also is the enterprise of constitutional scholarship.

³² HENRY R. GLICK, *COURTS, POLITICS, AND JUSTICE* ix (McGraw-Hill 1983) (“There is a great deal of evidence that formal law cannot adequately account for judicial behavior and that social science research provides more complete and realistic explanations”); BARBARA M. YARNOLD, *POLITICS AND THE COURTS* (1992) (criticizing the “law school” model of judicial decision-making); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 32–64 (1993) (reviewing and rejecting variants of the “legal model” of judicial decision making in terms ranging from merely unhelpful to “fatuous” and “meaningless”).