



School of Law

# **THREE INVITATIONS TO *LAW & COMMENTARY***

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# LAW & COMMENTARY

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“Chinn offers a helpful trichotomy: the Court’s first task will be *to delimit* the scope of the new principles, and thereby define what is living and what is dead in the constitutional legacy left by the past. Later on, it will elaborate *order-creating* opinions that give more affirmative meaning to the new constitutional principles; these principles will, of course, sometimes conflict with others derived from earlier constitutional moments, requiring the Court to confront a third, and more standard, task: writing opinions that seek to *resolve the tensions* between constitutional principles inherited from different eras of our constitutional development.”

Bruce Ackerman, page 186

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# THREE INVITATIONS TO *LAW & COMMENTARY*

Ross E. Davies<sup>†</sup>

If *Law & Commentary* survives, it will be due to some combination of its approaches to: (a) peer review and article selection; and (b) commentary on the featured works it publishes. Please stay with me for a quick survey of our plans. You might be inspired to pitch in.

## PUBLIC PEER REVIEW

We begin with an unusual approach to peer review: Each article we publish is and will be accompanied by at least two signed review essays by senior, leading scholars in relevant fields. Imagine a symposium issue in which a panel of top scholars selects (in collaboration with an editor) one of the best not-yet-published works in the panelists' area of expertise, and then they write substantial comments to be published side-by-side with that work. That is, roughly speaking, what every issue of *Law & Commentary* will be.

The contributions made by those leading scholars are at the core of this project: (1) they lend their knowledge of the relevant field and their connections within it to the identification and solicitation of excellent new work; (2) they lend their good names – their reputations – to the selection and publication of that work by publicly endorsing it; and (3) they add to the substantive quality of the work by providing their own explanations and extensions of it in signed companion essays.

There are two interrelated concerns motivating this version of peer review. First, there is the difficulty junior scholars – and also

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senior scholars working in areas outside their established specialties – sometimes have placing first-class articles in appropriate journals and generally drawing attention to their best work. Second, there is the difficulty consumers of legal scholarship can have identifying which articles – out of the many thousands published every year in the many hundreds of law reviews – most merit their attention. Articles placed in a few leading law journals (the flagship law reviews at prominent law schools and premier faculty-edited journals) will enjoy wide notice. But there are not many slots in those journals, and few of those few go to the work of relatively junior or unknown scholars.

So, for the underappreciated scholar and the people who ought to be reading that scholar's best work, an additional, accessible, credible signal of quality might well be a big help. But such signals are hard to come by. Currently, probably the best approach is to work with a highly regarded senior co-author in the relevant field. But even in this modern era of growing appreciation for collaboration in the legal academy, scholars tend to work with peers, not juniors or non-specialists.<sup>1</sup> So far, it has been the rare senior scholar who has had the ability, the inclination, and the opportunity to pursue his or her scholarly agenda – and fully share authorial credit for the resulting work product – with such people.<sup>2</sup>

*Law & Commentary's* peer review process is designed to provide signals comparable to, perhaps even better than, co-authorship, and at lower cost to the participants. All it requires is cooperation by two or three well-known, top-drawer legal scholars in (1) the selection of an underappreciated work and (2) the preparation of signed reviews – each something of a cross between a positive peer review letter and a critical symposium comment.

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<sup>1</sup> See Paul H. Edelman & Tracey E. George, *Six Degrees of Cass Sunstein: Collaboration Networks in Legal Scholarship*, 11 GREEN BAG 2D 19 (2007); Paul H. Edelman & Tracey E. George, *Sunstein 1s and 2s*, in 2008 GREEN BAG ALM. 473 Paul H. Edelman & Tracey E. George, *Mr. Sunstein's Neighborhood*, in 2009 GREEN BAG ALM. 344.

<sup>2</sup> See, e.g., Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. (2009); Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 90 VA. L. REV. 551 (2004); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995).

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This approach is based on two kinds of optimism about the intellectual and collegial capacities of legal scholars. Optimism that there are more good articles out there than the average reader currently gets to see, and optimism that there are prominent senior legal scholars who can and will invest in bringing that scholarship the attention it merits.

Here is an outline of how the process works:

1. *The Writing.* A junior scholar, or an established scholar entering a new field, writes an excellent article.

2. *The Proposing.* A mentor to or colleague of that scholar – believing that the article is or is likely to be under-placed in the law reviews – suggests to *Law & Commentary* that the article should be published here. This is, really, the first stage of article selection: Self-selection. No one is going to turn down placement in a top student- or faculty-edited law journal in favor of *Law & Commentary*, and so pieces that do land in such publications will never appear on this journal's radar. In addition, no self-respecting mentor or colleague is going to invest time or reputation in pitching an article to *Law & Commentary* unless he or she (a) believes that the article is good enough to appear here, and (b) is willing to go to the trouble of spelling out grounds for that belief. *Law & Commentary* is, one might say, the journal of error-correction in article selection – a home for articles that should be appearing in top journals but for some reason unrelated to the quality of the work are not.

3. *The Reviewing.* If the article measures up to our internal standards, we invite at least two senior scholars in relevant fields to comment on the article. The gist of the invitation is this: Please read this article. If you think it is an excellent piece of legal scholarship and are willing to write for publication a short essay explaining exactly (a) what makes the article worth reading, and (b) what would make it better, as well as (c) elaborating your own views on the subject, please let us know and we will get to work. If not, you need not explain why, unless you want to, in which case we will keep your comments confidential. This is, as a practical matter, the second stage of article selection: If two senior scholars with sterling qualifications invest in evaluating an article, and then do the serious

though relatively small-scale work they are invited to perform, then neither the author of the article nor *Law & Commentary* is likely to have a good excuse for backing out. On the other hand, if we cannot come up with two suitable scholars who are willing to make the investment, that is a pretty good sign that the article, although possibly quite good, is not quite right for *Law & Commentary*.

4. *The Editing*. When all pieces are complete, an editor edits. Given the intense early screening for work of the highest quality, and the caliber of the reviewers, the editorial work is unlikely to be an overwhelming burden. (It wasn't for this issue.)

5. *The Posting and Publication*. The package of article-plus-reviews is posted in citable form on *Law & Commentary's* website (accessible via [www.journaloflaw.us](http://www.journaloflaw.us)), sent to a printer for ink-on-paper publication and distribution, and generally released to the wide world.<sup>3</sup>

Obviously, this is different from traditional double-blind peer review – a secret process in which author and reviewer do not know each other's identities during the review process, and the reviewer's identity and comments remain confidential – but not as different as might appear at first blush. Practically speaking, the extent of actual as opposed to conceptual blindness and secrecy in traditional peer review varies widely, from near-total opacity to near-total transparency.<sup>4</sup> This variation should come as no surprise given the great di-

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<sup>3</sup> See generally Ross E. Davies, *Like Water for Law Reviews*, 1 J.L. 1 (2011).

<sup>4</sup> Something similar might be said about variation in the scope and rigor of peers' reviews. And then there is the fact that a central authority shrouded in secrecy – an authority exercising power over process design and implementation, decisionmaker appointment, and information dissemination – does not always inspire confidence among people observing or subject to such an authority, even though its members may sincerely believe in their own wisdom and capacity to do right. See Brief of Legal Scholars and Historians as Amici Curiae in Support of Petitioner, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Such concerns might be especially salient in cultures where some in positions of authority are known (or perceived) to be engaged in (or blind to) sneaky mistreatment of relatively weak peers in contexts other than peer review. Cf. Scott Jaschik, *A Call to Shun*, INSIDE HIGHER ED, [www.insidehighered.com/news/2011/03/30/philosophers\\_consider\\_what\\_to\\_do\\_about\\_sexual\\_harassment](http://www.insidehighered.com/news/2011/03/30/philosophers_consider_what_to_do_about_sexual_harassment) (Mar. 30, 2011; vis. Apr. 2, 2011). Surely, though, defects in design and failures in execution are grounds for fixing, not abandoning, peer review processes. See, e.g., DAVID SHATZ, PEER REVIEW: A CRITICAL INQUIRY (2004); DARYL E. CHUBIN & EDWARD J. HACKETT, PEERLESS SCIENCE: PEER REVIEW & U.S. SCIENCE POLICY ch. 4 (1990); *Information for Authors*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, [www.pnas.org/site/misc/iforc.shtml](http://www.pnas.org/site/misc/iforc.shtml) (vis. Mar. 11, 2011); Joanne Meyerowitz, *History's Ethical Crisis*:

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versity of academic disciplines, institutions, publications, editors, and scholars. *Law & Commentary*'s mostly public peer review certainly falls near the transparent end of the spectrum when it comes to positive and mixed reviews (after all, we will be printing a couple of them, signed, with every featured article), but it tends toward the opaque end on negative reviews (which, recall, need not consist of anything more than an ambiguous refusal to comment at all, and will never consist of more than comments confidentially shared by the reviewer).

We are, by the way, not at all alone in our efforts to shape and diversify peer review to meet the needs of our discipline – especially by increasing transparency, flexibility, and accountability in peer participation. In the humanities, for example, the influential *Shakespeare Quarterly* experimented with “a public phase of external vetting” via “online open reviewing” at MediaCommons Press for some submissions to its Fall 2010 issue,<sup>5</sup> and it has since used the same process for some other reviews.<sup>6</sup> In her forthcoming book, *Planned Obsolescence: Publishing, Technology, and the Future of the Academy*, Kathleen Fitzpatrick of Pomona College describes similar projects (with mixed results) in the sciences.<sup>7</sup>

Like the *Shakespeare Quarterly* and other innovators, *Law & Commentary* has adopted unorthodox methods in pursuit of goals we

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*An Introduction*, 90 J. AM. HIST. 1325 (2004). As the Shatz and Chubin & Hackett books show, peer review in faculty-edited journals (like editorial processes in student-edited law reviews) has been the subject of considerable commentary, thoughtful scholars naturally being interested in the institutions and processes through which their own work is publicized and immortalized. Studies of peer review have had little to say about legal scholarship, however, probably because its history of peer review is mostly short and meager.

<sup>5</sup> See Katherine Rowe, *From the Editor: Gentle Numbers*, 61 SHAKESPEARE Q. iii, v (Fall 2010); see also [mediacommons.futureofthebook.org/mcpress/ShakespeareQuarterly\\_NewMedia/](http://mediacommons.futureofthebook.org/mcpress/ShakespeareQuarterly_NewMedia/) (vis. Mar. 18, 2011) (archived open peer review for Fall 2010 *Shakespeare Quarterly*).

<sup>6</sup> See, e.g., Sarah Werner, *Shakespeare and Performance Open Review*, SHAKESPEARE Q. FORUM, [shakespearequarterly.wordpress.com/2011/02/15/shakespeare-and-performance-open-review/](http://shakespearequarterly.wordpress.com/2011/02/15/shakespeare-and-performance-open-review/) (vis. Mar. 18, 2011).

<sup>7</sup> See KATHLEEN FITZPATRICK, *PLANNED OBSOLESCENCE: PUBLISHING, TECHNOLOGY, AND THE FUTURE OF THE ACADEMY* ch. 1, [mediacommons.futureofthebook.org/mcpress/planned-obsolence/](http://mediacommons.futureofthebook.org/mcpress/planned-obsolence/) (vis. Mar. 18, 2011) (MediaCommons Press edition; print edition forthcoming from NYU Press, autumn 2011); see also *Nature's peer review debate*, [www.nature.com/nature/peerreview/debate/](http://www.nature.com/nature/peerreview/debate/) (vis. Mar. 7, 2011); Christen Brownlee, *Peer Review Under the Microscope*, SCIENCE NEWS, Dec. 16, 2006 at 392-93.

share, we are sure, with all journals that use some kind of peer review: (1) honest, impartial evaluation of scholarship; (2) investment by scholars in improving and promoting each other's good work without regard to status or identity; (3) publication of the best work possible in the best form and forum possible; and (4) preservation of human dignity and collegial relations. We hope and expect that the processes described above and below (and refined as experience instructs) will achieve those ends in ways that fit well within the culture of the legal academy. Put yourself in the shoes of a participant in *Law & Commentary's* process and consider how you would behave. We like to think that it would be a challenging and constructive experience.<sup>8</sup>

In this issue, Stuart Chinn's article and the accompanying reviews by Bruce Ackerman and Sanford Levinson provide fine examples of the kinds of work we hope to publish. The article is good, and the reviews are by scholars whose expertise in relevant fields and standing in the profession are sufficient to justify your attention to the article they are commenting on. In addition, the reviews are worthy little essays in their own right, not saccharine raves about the brilliance or intellectual promise of the author or book-blurbish superficial endorsements of the general thrust of the article.

## COMMENTS & RESPONSES

Finally, there is the aftermath of publication. We encourage scholars of all sorts to comment on articles appearing in *Law & Commentary*. We will print comments that are of publishable quality,

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<sup>8</sup> Although meddling in retention, promotion, and tenure is not on *Law & Commentary's* agenda, we suspect that our processes could have some benefits in that area. Put yourself in the shoes of a law school's tenure committee. A junior member of your faculty who is up for tenure has published an article in *Law & Commentary*. The committee thus at the outset already has at least two detailed statements by competent commentators on the record regarding the strengths and weaknesses of one of the candidate's major works. In addition, the committee can reach out to those reviewers for additional comments, and the reviewers can simply add to their published remarks, rather than doing an entire write-up from scratch. This might well reduce the overall cost of the tenure process, without reducing the quality or quantity of available data. Or put yourself in the shoes of the candidate, who will have the benefit of at least some constructive, substantive attention to his or her work in the public eye, rather than merely in a permanently confidential, single-use tenure file.

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and we will give authors the opportunity to respond, also in print. Comments and authors' responses will be subject to the standards that apply to the reviews accompanying the original article.

The idea here almost goes without saying: Good scholarship benefits from criticism, praise, and extension.<sup>9</sup> We hope this comment-and-response approach will help the good ideas published here attract useful commentary and present commentators and authors with opportunities to refine and expand their ideas in print.<sup>10</sup>

### THE THREE INVITATIONS

By now it should be clear that *Law & Commentary* is not a revolutionary organ. We are not seeking to overturn or restructure the order of things in the legal academy. Faculty-edited law journals (in which commitments to some version of peer review are not uncommon) are a rising force that should continue to gain influence and readership. Student-edited law reviews – love 'em or hate 'em – are here to stay, and the best of them will continue to compete with and often prevail over faculty-edited journals in the pursuit of the best work to publish. *Law & Commentary* is simply another vehicle for optimizing the production and distribution of legal scholarship.

All of which brings us to you, the scholar-reader. First, we invite you to consider *Law & Commentary* for publication of your own underappreciated, excellent work. Second, we encourage senior scholars (in the academy, in private practice, in government, and on the bench) to help their juniors and colleagues both by bringing their work to our attention and by reviewing it in our pages. And

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<sup>9</sup> Much good material of this sort is showing up at a fine faculty-edited web-only journal – *Jotwell: The Journal of Things We Like (Lots)*, [jotwell.com](http://jotwell.com) – and in many manifestations of an interesting development in student-edited law reviews – the web-based adjunct to the established print journal. To name just a few: the *Yale Law Journal's* "YLJ Online" (formerly the "Pocket Part"), the *Virginia Law Review's* "In Brief," the *Texas Law Review's* "See Also," the *University of Pennsylvania Law Review's* "PENumbra," the *Northwestern University Law Review's* "Colloquy," the *Harvard Law Review's* "Forum," and the *Columbia Law Review's* "Sidebar." See *Ereviews*, 9 GREEN BAG 2D 103 (2006).

<sup>10</sup> See Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4, 5-9 (2006), [www.thepocketpart.org/2006/09/06/volokh.html](http://www.thepocketpart.org/2006/09/06/volokh.html); Brian Leiter, *Why Blogs Are Bad for Legal Scholarship*, 116 YALE L.J. POCKET PART 53, 56-58 (2006), [www.thepocketpart.org/2006/09/20/leiter.html](http://www.thepocketpart.org/2006/09/20/leiter.html).

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third, we encourage all scholars to submit short, constructive comments on works published here.

Thank you for your attention. ☐