

## SELECTION BIASES

Mark A. Graber\* and Sanford Levinson\*\*

Two polemics inspired this issue of the *Tulsa Law Review*. Writing in the May 2009 *Texas Law Review*, Levinson bemoaned the decline of book reviews in law student edited journals. Noting that a majority of the so-called “top” law reviews published no book reviews at all, he complained of the “willful refusal . . . of America’s leading law reviews to serve as a venue for serious discussion of important books relevant . . . to thinking about law.”<sup>1</sup> In his view, “both serious scholars and general readers alike” regard “book reviews as invaluable filtering mechanisms”<sup>2</sup> for determining what of the many works published merit reading and which are best left on library shelves. Graber, in the spring 2002 issue of *Law and Social Inquiry*, had earlier condemned the failure of prominent law professors to engage relevant political-science literature. “The grand constitutional theory that emerged in response to the Warren Court,” he detailed, “self-consciously ignores the external influences on judicial review extensively studied by political scientists.”<sup>3</sup> Graber concluded, “Unless the Wechslerian and Bickelian tendencies that structure much contemporary constitutional theorizing are arrested, constitutional scholars will not explore the normative possibilities suggested by . . . the best contemporary political science work.”<sup>4</sup>

Levinson was immensely pleased when the editors of the *Tulsa Law Review* invited him to indulge his passion for book reviews. He was even more pleased when Graber agreed to be the “co-producer” and indulge his passion for engaging social scientists and law professors in reciprocal conversation. Both are delighted that the reviews that follow not only think critically about major books recently published on constitutionalism, jurisprudence, and legal history, but also provide opportunities either for law professors to discuss works by political scientists/historians or for political scientists/historians to engage law professors on subjects of mutual interest and concern.<sup>5</sup>

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\* Mark A. Graber is the Associate Dean for Research and Faculty Development at the University of Maryland School of Law and a Professor of Government at the University of Maryland, College Park.

\*\* Sanford Levinson is the W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law at the University of Texas School of Law and a Professor of Government at the University of Texas, Austin.

1. Sanford Levinson, *The Vanishing Book Review in Student-Edited Law Reviews and Potential Responses*, 87 *Tex. L. Rev.* 1205, 1207 (2009).

2. *Id.* at 1212.

3. Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 *L. & Soc. Inquiry* 309, 312 (2002).

4. *Id.*

5. Of the twenty-eight reviews, nineteen reviews either have a law professor reviewing at least one work written by a non-law professor or a non-law professor reviewing at least one work written by a law professor.

The reviewers and books reviewed have a pronounced American bias, although three reviewers (Ran Hirschl, Hugh Corder, and Theunis Roux) are out-of-towners (if primarily English speaking). Many works reviewed highlight what Hirschl declares is the “Continued Renaissance of Comparative Constitutional Law” (especially if one includes within the domain of “comparative” study the increasing focus on American state constitutions).<sup>6</sup>

Both the alleged crimes of law review editors and our remedy one ought not speak of “punishment” - involve undoubted selection bias. Levinson charged law review editors with exhibiting an increasingly overwhelming selection bias towards articles including traditional student notes on doctrinal topics as opposed to book reviews (or notes that might take the form of book reviews instead of doctrinal analysis). Graber charged law professors with a bias towards exclusively engaging other law professors, as distinguished from scholars who study law from other disciplinary perspectives. Clearly, however, the reviews that follow also exhibit a selection bias that challenges several purposes underlying this issue. Begin with our decision to select books we thought were good and, for the most part, reviewers we thought would concur with our overall judgment. Life like law review space - is short. There was no point in asking anyone to review what we (and others) viewed as bad (or even mediocre) books. Unsurprisingly, almost all the reviewers recommend the works they critiqued. Such passages as “exemplifies everything that a scholarly, rigorous, and empirically rich study of a complex society like South Africa can achieve,”<sup>7</sup> “the most important piece of scholarship in English on constitutional courts,”<sup>8</sup> “needs to be read carefully by anyone that thinks seriously about the issues of war and counterterrorism confronting the United States,”<sup>9</sup> and “a superb piece of history and political science”<sup>10</sup> run throughout the solicited reviews. With the possible exception of “constitutional,” “important” and “significant” are the words with more than two syllables that appear most frequently on the pages that follow. The reviewers we sought were those most likely to be interested in engaging in interdisciplinary conversations. Many are JD/PhDs or have joint appointments. Most regularly participate in interdisciplinary panels at national conferences, including those held annually by the American Political Science Association, the Association of American Law Schools, the Law and Society Association, or the American Society for Legal History. In short, rather than find reviewers who would evaluate whether books were good, we obtained reviewers who explained why books were good. Rather than find reviewers who might see rival disciplinary perspectives as novel, intriguing, or threatening, we obtained reviewers already deeply enmeshed in interdisciplinary conversations.

Nevertheless, we are confident that readers will learn a good deal from the works

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Several of the nine remaining reviews are by or about lawyers with PhDs, lawyers with joint appointments in another discipline, or lawyers who are not teaching law at the present time.

6. Ran Hirschl, *The Continued Renaissance of Comparative Constitutional Law*, 45 *Tulsa L. Rev.* 771 (2011).

7. Theunis Roux, *Book Review*, 45 *Tulsa L. Rev.* 781, 787 (2011).

8. Miguel Schor, *New Thinking about National High Courts*, 45 *Tulsa L. Rev.* 789, 796 (2011).

9. Michael W. Lewis, *A Different Case for Restraint*, 45 *Tulsa L. Rev.* 751, 761 (2011).

10. Stephen A. Siegel, *How Many Critiques Must Historians Write?* 45 *Tulsa L. Rev.* 823, 830 (2011).

that follow, even if they were selected in light of our biases. The reviewers identify and point to important trends in legal scholarship, from more sophisticated studies of comparative constitutionalism, including American state constitutionalism, to more nuanced studies of equality to an increased fascination with the legal complexities of the “Civil War.” These “scare quotes” illustrate how any particular label, whether “Civil War” or “War between the States,” smuggles in a distinct legal theory of the nature of the American Union and the legitimacy of state secession from such a Union. The essays also point to an ongoing convergence between a significant group of law professors and scholars of law in other disciplines. The tone of the essays suggests the existence of a growing number of scholars of law in a variety of disciplines and institutional locations who increasingly see each other as a relevant, perhaps even a dominant, “reference group” and audience for their scholarly writings, and do not write solely, or even primarily, for their particular disciplinary colleagues or institutions.

#### SELECTION BIAS AND THE REVIEWS

Selection bias may explain the tendency for our reviewers to use such phrases as “fascinating and provocative,”<sup>11</sup> “must-read,”<sup>12</sup> “persuasive,”<sup>13</sup> and “a masterpiece of historical scholarship.”<sup>14</sup> Seldom, though not never, is heard “alarmingly misinformed” or similar phrases.<sup>15</sup> After all, we selected for review what we believed were good books and as reviewers scholars we believed likely to respect the books in question and, by temperament, unlikely to savage authors with whom they disagreed. On several occasions, reviewers suggested adding other works, always because they wished to call a particularly good piece of writing to public attention. For obvious reasons, we honored those requests.

Nevertheless, although with rare exception, all the works reviewed received an A- or better, the reviewers did not pull crucial punches. Virtually all reviews, after giving the author or authors due praise, point to omissions or alternative perspectives that they believe would have improved the works reviewed. Robert Chesney begins his review by asserting, “Professor Harold Bruff has made an exceeding valuable contribution with *Bad Advice: Bush’s Lawyers in the War on Terror*.”<sup>16</sup> Chesney nevertheless casts doubt on Bruff’s central thesis that President Bush was betrayed by White House attorneys who acted as advocates for executive power rather than as detached professionals. Chesney concludes, “By drawing our attention to the possible inadequacy of the lawyers, it distracts us from the possible inadequacy of the laws themselves.”<sup>17</sup> Mark Tushnet raises methodological questions about *Law’s Allure* and *The Hollow Hope*, both of which he believes are “important . . . because they bring into view serious questions about the

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11. Stephen M. Feldman, *Modernity, Religion, and the Public Sphere*, 45 *Tulsa L. Rev.* 845, 846 (2011).

12. Hirschl, *supra* n. 6, at 777.

13. Jamal Greene, *The Alchemy of Dissent*, 45 *Tulsa L. Rev.* 703, 707 (2011).

14. Scott D. Gerber, *The Beautiful American Abroad*, 45 *Tulsa L. Rev.* 807, 807 (2011).

15. Scott Horton, *Torture and Its Malcontents*, 45 *Tulsa L. Rev.* 745, 748 (2011).

16. Robert M. Chesney, *Bad Advice or Bad Laws? Allocating Responsibility between Lawyers and Laws in the Context of National Security Policymaking*, 45 *Tulsa L. Rev.* 591, 592 (2011).

17. *Id.* at 603.

ways in which law matters to the judicial implementation of social policy.”<sup>18</sup> Nonetheless, he indicates some skepticism about the authors’ emphasis on “case studies” and registers his belief that “the methods of interpretive political science are likely to be more suitable in identifying”<sup>19</sup> the distinctive influence of law on judicial policymaking. Gerald Rosenberg, in turn, declares that *The Will of the People* and *The Supreme Court and the American Elite* “belong on the bookshelves of anyone interested in constitutional history,” but he maintains that these “fascinating” works are best read as synthesizing a half century of political-science scholarship and “break no new ground.”<sup>20</sup>

We also believe that this issue makes a strong case for medium-sized book reviews i.e. 3,500 to 5,500 words as important means for identifying and commenting on important scholarly trends. Most disciplinary professional journals feel obligated to review dozens, if not literally many hundreds, of books. Reviewers are rarely allocated more than 750 to 1,000 words for commentary. Law review editors were on occasion hospitable to ostensible “reviews” that ran on for many pages and turned into what could easily be recognized as thesis-driven articles by authors skilled in taking advantage of the student editors.<sup>21</sup> The reviewers we solicited were explicitly told to concentrate on the book(s) in hand and not to use them as simple vehicles for their own views, but they did have the space to develop their responses to the books and to create a genuine “review-essay.”

These medium-size reviews best focus on better books. Bad books are normally not worth reviewing, unless they are already in the public eye or likely to gain public attention because of the notoriety of the author. Little need exists for writing a review asserting, “Don’t bother reading this opus by random professor at Random U.” In the absence of a review, few people are likely to read any opus by random professor at Random U. Medium-sized reviews are likely to be more successful and more important when they call attention to important scholarly developments. Most of the reviews in this collection highlight what they believe are important new directions in scholarship. Ernie Young asserts that we are experiencing a “judicial, political, and intellectual” “Federalist Revival” and that “[t]he three books that form the subject of [his] review provide ample evidence of this third revival.”<sup>22</sup> John Dinan uses his review as a vehicle to highlight “a shift in the focus” of “the state constitutional politics literature.”<sup>23</sup> First generation state politics commentary, he writes, primarily emphasized “independent state court interpretations of individual rights provisions . . . with an eye toward analyzing and informing such judicial decision-making.”<sup>24</sup> The works Dinan reviewed explore whether

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18. Mark Tushnet, *How Courts Implement Social Policy*, 45 *Tulsa L. Rev.* 855, 862 (2011).

19. *Id.*

20. Gerald N. Rosenberg, *The Wonder of It All*, 45 *Tulsa L. Rev.* 679, 679 (2011).

21. See e.g. Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 *U. Pa. L. Rev.* 1597-1658 (1991) (ostensible book review).

22. Ernest A. Young, *What Does It Take to Make a Federal System? On Constitutional Entrenchment, Separate Spheres, and Identity*, 45 *Tulsa L. Rev.* 831, 831 (2011).

23. John Dinan, *State Constitutional Politics*, 45 *Tulsa L. Rev.* 797, 805 (2011). Sanford Levinson’s review similarly endorses renewed scholarly interest in state constitutionalism. Sanford Levinson, *America’s “Other Constitutions”*: *The Importance of State Constitutions for Our Law and Politics*, 45 *Tulsa L. Rev.* 813, 816 (2011).

24. Dinan, *supra* n. 23, at 805.

“distinctive state institutions are contributing to good governance and if not how they might be reformed to achieve this end.”<sup>25</sup> Julie Novkov speaks of “a rapidly growing body of literature that argues in favor of taking the state’s interventions into family structure, legitimate reproduction, and the management of sexuality seriously.”<sup>26</sup>

The reviewers typically not only describe, but also seek to influence, these scholarly trends. Hirschl suggests that comparative constitutional law scholars might place more emphasis on “the socio-political context for the charged domestic-transnational encounters”<sup>27</sup> over constitutional borrowings. Gordon Silverstein proposes that the literature on emergency constitutionalism places too much emphasis on “design[ing] more effective institutions” and “sketch[ing] out wonderful framework legislation.”<sup>28</sup> He thinks less law may be more effective. “Leaving some measure of ambiguity will help,” his review concludes, “and paying attention to fortifying the inculcation of values and norms will . . . help a lot.”<sup>29</sup> Stephen Feldman finds an important interpretive conclusion in the literature he reviews. Recent books on the First Amendment, he declares, “suggest that the separation of church and state, as originally understood in this country, no longer fits the institutions of American religion and government.”<sup>30</sup> Stephen Siegel insists that recent literature on federalism compels a similar conclusion,<sup>31</sup> but one might read Roux’s essay as criticizing comparative constitutional scholars more attracted to what they believe are good results than good law.<sup>32</sup>

Selection bias no doubt influenced the trends reported on the pages below. Both of us are JD/PhDs in government who teach and write with a strong historical focus, primarily in the area of American constitutionalism. Thus, some good reason exists for thinking that the reviews below fairly represent trends in this area. In particular, we note that much interesting work is being done in the area of state constitutionalism, comparative constitutionalism, and constitutional development, even as far fewer scholars seem interested in the grand constitutional narratives that dominated the book reviews in the past. Indeed, we are prepared to declare that the next opus written on the latter subject ought to be regarded as the definitive word on the matter!<sup>33</sup> On the other hand, we confess to no expertise on environmental law, public choice and the law, family law, and many matters far more important to sophisticated legal practitioners than high legal theory. The absence of such works from this edition of the *Tulsa Law Review* reflects our intellectual interests and limitations, and should not be interpreted as reflective of any trend or development.

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25. *Id.* at 806.

26. Julie Novkov, *Review Essay: Put a Ring on It? Law and Ordering the Boundaries of Race and Sexuality As State Work*, 45 *Tulsa L. Rev.* 723, 723 (2011).

27. Hirschl, *supra* n. 6, at 775.

28. Gordon Silverstein, *Can Constitutional Democracies and Emergency Powers Coexist?* 45 *Tulsa L. Rev.* 619, 629 (2011).

29. *Id.*

30. Feldman, *supra* n. 11, at 852.

31. Siegel, *supra* n. 10, at 825-926, 829-830.

32. Roux, *supra* n. 7, at 784.

33. See Jack M. Balkin, *Living Originalism* (Harvard U. Press forthcoming 2011).

## SELECTION BIAS AND INTERDISCIPLINARY LEGAL SCHOLARSHIP

Selection bias certainly affected the conversations found below between legal scholars employed in law schools and legal scholars employed in such disciplines as political science, history, and philosophy. We might well have produced an interesting edition of the *Tulsa Law Review* had we been able to persuade law professors hitherto uninterested in political science to review such political-science classics as Rosenberg's *The Hollow Hope* or to encourage a political scientist who never opened a law review to examine what lawyers think about emergency powers. For better or worse, we tended to ask people we know and respect to do these reviews. The people we know and respect are already deeply involved in interdisciplinary conversations. In short, rather than reviews which seek to enlighten readers as to the previous unappreciated merits of other disciplines or sound the warning about potential invasions from foreign disciplines, we may have produced a volume that preaches to the choir.

What is remarkably nevertheless absent from these essays is any overall disciplinary perspective that sharply unites the political scientist reviewers against their legal academic counterparts. Some essays do suggest a traditional disciplinary perspective. Carol Nackenoff, who teaches political science at Swarthmore College, chides Professor David Richards of New York University School of Law for advocacy scholarship. "While the sense of [the] struggle" for gay rights "is lively," she writes, "competing constitutional visions are not quite as well presented as in the other volumes" in the Kansas Landmark Law Cases that Nackenoff reviewed.<sup>34</sup> Professor Hal Bruff of the University of Colorado Law School is the only other reviewer to raise at some length the charge of advocacy scholarship and one of his targets is Professor Garry Wills, a historian (and distinguished public intellectual) at Northwestern University. Both Wills and John Yoo of the University of California Berkeley School of Law, Bruff claims, "proceed by the technique of selective storytelling, recounting episodes from our rich constitutional history that support their respective theses and largely ignoring contrary ones."<sup>35</sup>

Quite frequently, perspectives identified with one discipline in a particular review are adopted in another review by a reviewer or an author being reviewed from a different discipline. Michael Van Alstine of the University of Maryland School of Law notes that "[as] a political scientist, Professor [Benjamin] Kleinerman's concern . . . is about an excessive focus on legal norms."<sup>36</sup> Oren Gross of the University of Minnesota Law School, in his review, declares as "utterly correct" the observation that "when all is said and done, 'the law cannot solve what is essentially a leadership and intellectual challenge.'"<sup>37</sup> Miguel Schor of Suffolk University Law School identifies as distinct to the social sciences an externalist perspective on the causes of judicial review, but has high praise for David Robertson, a political scientist whose book adopts an internalist

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34. Carol Nackenoff, *Landmarks, Portents, or Just Curves in the Road?* 45 *Tulsa L. Rev.* 659, 663 (2011).

35. Harold H. Bruff, *Placing Your Faith in the Constitution*, 45 *Tulsa L. Rev.* 583, 585 (2011).

36. Michael P. Van Alstine, *Constitutional Necessity and Presidential Prerogative: Does Presidential Discretion Undergird or Undermine the Constitution?* 45 *Tulsa L. Rev.* 631, 638 (2011).

37. Oren Gross, *The Process of Balancing*, 45 *Tulsa L. Rev.* 733, 742 (2011) (quoting James E. Baker, *In the Common Defense: National Security Law for Perilous Times* 5 (Cambridge U. Press 2007)).

perspective on judicial review.<sup>38</sup>

Disciplinary divides do not even emerge when the books and reviews discuss the influence of law on judicial decision making. Conventionally, law professors place far greater weight on the role played by “traditional legal materials,” including legal doctrines drawn from precedents, as factors that influence judicial decision making than do political scientists or historians, who are usually more “externalist” in their perspectives. Novkov’s essay suggests that traditional perspectives influence disciplinary scholarship on law, race, and sexuality. Professor Ariela Gross of the University of Southern California Gould School of Law (who possesses a PhD in history), declares Novkov, “attributes an active and directive role to law,”<sup>39</sup> while works by non-law professors she reviews either see law “as largely reflective of cultural (. . . sometimes religious) norms”<sup>40</sup> or see “law as providing a set of boundaries within which cultural and social struggle play out in ideological terms.”<sup>41</sup> In other reviews, law professors sound like political scientists. Professor Scot Powe of the University of Texas School of Law concludes his review of biographies of Louis Brandeis and Antonin Scalia by asserting “strong preferences trump principles.”<sup>42</sup> Professor Tushnet of Harvard Law School chides Professor Silverstein of the University of California Berkeley Political Science Department for placing too much emphasis on precedent as constraining legal decision makers. Tushnet insists that “a judge seeking to reach a goal but obstructed by adverse precedent can almost always construct a workaround.”<sup>43</sup>

Read as a whole, the reviews suggest that, at least among some scholars, the distinction between law professors and other legal scholars is beginning to blur. When renewed movements for interdisciplinary law conversations began in the early 1990s, fairly clear distinctions existed among political scientists who wished to engage with law professors and law professors who wished to engage with political scientists. A decade ago, Graber asserted,

Interdisciplinary work is also disciplinary work. Rather than working at the border of several disciplines . . . most scholarship with [interdisciplinary] ambitions . . . sometimes goes to the border and crosses over into other disciplines, but the vast bulk of the work is securely located in a particular field. Scholars, even those with nominal appointments in more than one discipline, are primarily socialized and live in one discipline. Like citizens who discover how American they are only when they go abroad, firm attachment to disciplinary norms may become apparent only when one is engaged with another, foreign discipline. We may think ourselves dissidents because we reject several of our home discipline’s norms, but we in fact accept far more than we reject.<sup>44</sup>

These reflections may no longer be accurate (or, at the least, are far less accurate). Over the past decade, law schools have hired an increased number of JD/PhDs (and some

38. Schor, *supra* n. 8, at 789-790.

39. Novkov, *supra* n. 26, at 724.

40. *Id.*

41. *Id.* at 724-725.

42. L.A. Powe, Jr., *Icons*, 45 *Tulsa L. Rev.* 669, 678 (2011).

43. Tushnet, *supra* n. 18, at 861. Gerald Rosenberg, a political scientist, makes the same claim. See Rosenberg, *supra* n. 20, at 687 (judicial decisions “follow Americans’ policy preferences”).

44. Mark A. Graber, *Thick and Thin: Interdisciplinary Conversations on Populism, Law, Political Science, and Constitutional Change*, 90 *Geo. L.J.* 233, 243-244 (2001).

PhDs without JDs), history and political-science departments have given courtesy appointments to more law professors, the number of JD/PhD programs has increased, law professors and other legal scholars more regularly mix at disciplinary conferences, and more interdisciplinary conferences are designed to foster that mixing. The result may be a new interdisciplinary legal scholar. If the essays in this volume are any indication, some characteristics of those scholars and their scholarship are a greater concern for constitutional development than grand constitutional theory, more focus on comparative constitutional law (including state constitutional law), a greater emphasis on constitutional design, and more attention to the influence non-judicial actors have on constitutional practice. As we find all of these to be valuable developments, we hope the essays below have a wide audience and that the demand for this form of legal scholarship will, perhaps, help supplant the standard “tell the Supreme Court what to do” written by a law professor or the standard “judges are simply politicians in robes” written by a political scientist.

#### CONCLUDING THOUGHTS

We hope the reviews below encourage the reader to read many of the fine books discussed in the following essays. In several instances, our reviewers can read reviews of their own books by other reviewers. Several reviewers are publishing books that we hope to have reviewed in next year’s collection of book reviews. That review will have selection biases as well. We only hope next year’s reviewers produce as thoughtful reviews as this year’s (and that the Tulsa editors next year will prove as easy to work with and generous with their assistance as was the case this year, for which we are immensely grateful).