

The Federal Courts Junior Scholars Workshop
By Mark Tushnet

This is an unusual entry for JOTWELL, because it presents an event rather than a published work of scholarship. But, I think, it's appropriate for JOTWELL because the event is indeed something I liked a lot. The Federal Courts Junior Scholars Workshop, now an annual event, is representative of an important recent development in legal scholarship – the proliferation of venues for the presentation of work-in-progress by relatively junior scholars. They supplement faculty-organized research workshops, which typically involve the presentation by one scholar (not always junior) to a group of faculty and students at the host institution, but with few or no other junior scholars in the field present. Faculty-organized research workshops seem to me to operate on a catch-as-catch-can basis: the people in charge of the workshops contact people they know to locate scholars with work far enough along to be worth presenting. And, finally, these workshops are sometimes try-outs for permanent faculty appointments at the host institution.

The newer junior scholars workshops are different. They are usually, though not always, self-organized (the Harvard-Stanford-Yale junior faculty workshop is an exception, to which I'll return), by younger scholars in the field. They seek submissions, usually abstracts, for the longer papers that will be presented at the workshop. My guess is that these workshops in their early years may not be all that selective, but as each workshop becomes established selectivity increases. These workshops have multiple purposes. First, at least in self-understanding and advertising, is giving junior scholars the opportunity to present their work before it is finished, to an informed audience whose comments might improve its quality. This is enhanced by the presence of senior faculty in the field as commenters. The senior faculty can sometimes become (unexpected) mentors for the junior faculty, and their commitment of time suggests that they might be available as outside reviewers in tenure and promotion processes. And, of course, the events build a community of junior faculty members in the field, particularly important to a junior faculty who may be the only scholar in his or her field at the junior faculty's home institution. The host institution, which has to provide at least a modest subsidy for the workshop, gets some visibility in the legal academy as well. (This has some implications for issues of design, as I'll note.)

Designing these workshops presents some interesting problems. (1) Timing: Ideally the works presented will be far enough along to support an interesting discussion, but not at a stage where modifications are unlikely to occur. This suggests to me that there ought to be a presumption against presentation of work already accepted for publication, although there are tricky issues associated with the time gap between the submission of proposals for the workshop and the workshop's date: when abstracts are submitted, the piece might not have an acceptance but will have one by the time the workshop occurs. Workshops probably should occur in the fall – after summer research time has produced a substantial draft, which can be modified for submission

when the February window opens – and the spring, in preparation for summer research and submission during the August submission cycle (until it disappears, as seems to be occurring).

(2) Participants: This may be a quite delicate issue. It implicates issues of subsidy and hierarchy. In my view, subsidizing “upward” in the hierarchy of law schools generally makes little sense. Junior scholars at highly resourced institutions probably get enough exposure for their work from their home institutions and in “ordinary” faculty workshops elsewhere. When hosted by a highly resourced institution, subsidies to scholars from other similarly resourced institutions operate as cross-subsidies, and it’s not clear why, for example, Harvard or Yale should subsidize the scholarly work of a junior faculty member at Columbia or Chicago. (An upward subsidy for the senior scholars is almost inevitable, given their role in these workshops). The only argument I can see for an upward subsidy for junior scholars is that the host institution can get some reputational credit for hosting, but that’s offset by the fact that junior scholars can’t really spread the word all that effectively precisely because they are junior (and probably don’t understand, as some senior scholars do, the importance of spreading the word). On the other hand, from the point of view of the workshop’s organizers, making decisions based on hierarchy is likely to be pretty distasteful. Here a rule like “not accepted for publication” might be helpful as a rough proxy (on the theory that law reviews are more likely to accept submissions from junior scholars at high ranking schools more quickly than they accept submissions from other scholars).

Now, on to the substance of the recent Federal Courts Junior Scholars Workshop, held at – here goes the reputational crediting – the University of Georgia Law School. My first observation is about the marketing of articles to law reviews, and has several components. (1) There are an astonishing number of gaps in the literature. One would have thought that most issues in a field as well-ploughed as federal courts would have received some substantial treatment, leaving only interstices to be filled. But no, there are apparently a lot of real gaps. I hope the ironic tone here comes across. Junior scholars seeking to place their articles have to persuade law review articles editors that the pieces they are submitting are worth publishing, and what’s more worth publishing than an article that fills an important gap? (This calls to mind the classic – though perhaps apocryphal – book review that began, “This book fills a much-needed gap in the literature.”)

(2) My regular hobby-horse: the roadmap paragraph. After reading an article’s abstract, table of contents, and several paragraphs or pages of introductory comments, does anyone really read the roadmap paragraph? There’s an obvious collective action problem here – no one, particularly no junior faculty member, has an incentive to be the first mover in resisting the law review’s importuning to include a roadmap paragraph. Perhaps once law reviews convert to all digital publication, articles will have a hyperlink that reads “Roadmap,” which only those who really want a roadmap will click.

(3) The distinctive Part I, the review of the case law and literature on the problem. Almost everyone who reads a law review article on a specific topic knows the material reviewed in Part I, and wants to find out what the author has to contribute. “Almost everyone,” though, and the exceptions include law review articles editors. Part I typically discusses at least some matters that they are familiar with from their introductory classes, and they use that knowledge to make a preliminary judgment that the article’s author knows what he or she is talking about. They can’t do that with Parts II and III, which deal with the details of the distinctive problem. Here too hyperlinking might work – or simply deletion of Part I after acceptance (something that in principle law review editors shouldn’t object to, because the informational function of Part I has been fully performed at that point).

My second set of observations goes, finally, to the specifics of the scholarship exhibited in the junior scholars’ papers. (1) To a quite striking extent, the scholarship in federal courts appears to be the last redoubt for defenders of the position that law is pretty much exclusively a matter of craft. Federal courts questions appear simply to have right and wrong answers, and judges either get the answers right or wrong. Mark Kelman’s line about the federal courts course he took at Harvard comes to mind. Roughly: The first or second time you deal with whether a result comports with the proper allocation of decisional authority between federal courts and state courts, or between the courts and legislatures, it’s sort of interesting, but after that it’s an effing oppression.

Kelman’s comment, with which I basically agree, reflects a certain disdain for “mere” doctrinal scholarship. The scare quotes indicate some of the difficulties. In other fields, the question of whether there can be “mere” doctrinal scholarship is highly contested. When a scholar asks whether a court misinterpreted the precedent on which it relied, for example, some other scholars will respond not that the interpretation was correct, but that the very notion of misinterpreting a precedent rests on interesting and contested jurisprudential assumptions. Not so, it seems from the workshop papers, for federal courts scholarship. Purely doctrinal work dominated the sessions.

I think that that fact raises important and delicate questions about the tenure process and the hierarchy of law schools. As to tenure: it’s simply a lot easier for a junior scholar to do purely doctrinal research than to do historically informed scholarship, or empirical work. The materials are readily at hand, and the apprenticeship of junior scholars in the field of federal courts tends to have been in clerkships and legal practice. Gearing up to do something other than doctrinal scholarship would take time as the tenure clock ticks.

As to hierarchy: I have a strong sense that as one looks higher up in the hierarchy of law schools, one finds increasing disdain for purely doctrinal scholarship. At best, doing doctrinal scholarship well is regarded (at the higher tier schools) as something like a pianist’s finger exercises –

something a good scholar has to be able to do, but not part of the performance repertoire on which reputations are built. At worst, doctrinal scholarship is disparaged as something any reasonably good third year law student can do well. (I think it may be worth an aside that I did some pure doctrinal scholarship pre-tenure at the University of Wisconsin Law School, and did have to “offset” that by presenting other, non-doctrinal work as part of my tenure file. That was about forty years ago, but I’m not sure that things have changed substantially.)

This fact, if it is one, has implications for designing a good junior faculty workshop. For reasons I’ve mentioned, getting senior commenters from higher-tier law schools is an important part of the design. But, the hosts have to be careful to pick commenters from those schools who are willing to engage seriously with purely doctrinal scholarship. I won’t name names, but I could compile a list of people *not* to invite as senior commenters, on just this ground – their lack of sympathy for the enterprise of doctrinal scholarship would severely limit the contribution they can make to improving the papers presented at the workshop.

(2) Related, even putting aside the articles that treat the subject as one of craft and nothing more, there are only occasional gestures in the direction of discussion of the policies underlying alternative allocations of authority. Authors seem to have a checklist of “legal process” type considerations: state courts are good at this but not that, federal courts are good at that and not this, and here’s how this and that play out in this context. But, there’s relatively little engagement with the policy issues at any reasonably fine-grained level.

(3) I found relatively little sensitivity to “real” (rather than, as one article put it, “artificial”) legal history (I suggested that “fairy tale” would be a better term than “artificial history”), to historically informed scholarship about the course of U.S. political development, or formal political science about differing institutional characteristics. A decision rendered in 1884 and not formally overruled or displaced by statute has just as much weight in the analysis as a case decided in 2008. I can understand why a few articles would take that position; it’s a messy scholarly world out there. But, I was struck at the near complete absence of historical sensitivity in the package of papers taken as a whole – a few mentions of the conservative turn since the 1970s, and that’s about it. As I was preparing this submission the newsletter for the Federal Courts Section of the AALS landed in my e-mail. The Section’s session at the AALS meeting in January will be about history in federal courts scholarship, but the real topic is the proper role of originalism in that scholarship. That doesn’t historicize federal courts scholarship in the way that scholarship in other public law fields has been historicized. I don’t think that this feature of the workshop results from the fact that these are articles by junior scholars; rather, it seems to me that it probably reflects the way most scholars in the field think of their subject, which returns me to the “craft” point made earlier.

A reader of a draft of this JOTWELL article found it difficult to understand why I liked the workshop a lot, given the critical comments I have offered on the articles. I liked the workshop a lot because the papers were in general pretty interesting, within the domain they defined for themselves (to be clear, I like well-executed doctrinal scholarship), because I enjoyed meeting a bunch of younger people who I probably wouldn't have run across anywhere else, and because the spirit in the room was high and engaging. That's quite a lot, and worth celebrating.