CAVEAT BLOGGER: BLOGGING AND THE FLIGHT FROM SCHOLARSHIP

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It is a great pleasure to be here. Indeed, I would say it is a greater pleasure to be here today than it was the last time I was in the Ames Moot Courtroom in 2004. That was for the third of three moot courts that were held before I argued the medical cannabis case of *Gonzalez v. Raich* in the Supreme Court six days later. I was considerably more tense that day than I am today.

I begin by mentioning this because my topic this morning is on the pros and cons of blogging by scholars, and I want to make a comparison between litigating and blogging. I do not think it casts any aspersions on being an oral advocate in the Supreme Court to insist that oral argument is not a form of legal scholarship. Even writing the briefs to the Supreme Court, which is obviously a different kind of legal work than the oral argument itself, is also not legal scholarship.

True, the process of having taken *Gonzalez v. Raich* to the Supreme Court—something I had never done before—taught me an awful lot about the Commerce Clause that my scholarly writings on the Commerce Clause had not previously revealed to me. On remand to the Ninth Circuit, where I appeared for oral argument about four weeks ago, we are now asserting a Fifth Amendment Due Process Clause claim. Like the round that ended up in the Supreme Court, this round of litigation has taught me a lot about the Due Process Clause that I had not known before.

In short, being an appellate court advocate has helped me to see things about the field that I do not think I would have otherwise seen. My involvement in this case has taught me that litigating in a field in which you write as a scholar can contribute to your scholarship. Conversely, being a scholar has enabled me to make moves in advocacy that I would have never seen had I not been a scholar.

I think all of this is true about blogging as well. While some law blogging is serious scholarship—and more could be serious scholarship than is now—almost all blogging, including most law blogging, is not serious scholarship and does not purport to be. Asserting that blogging is generally not a form of scholarship is no more an aspersion on blogging

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than is affirming that arguing in the Supreme Court is not scholarship. If undertaken by scholars, both activities can contribute constructively to one's scholarship, and one might be a better advocate or blogger if one can draw upon one's scholarly expertise. But it would be a mistake to confuse one of these activities with the other. For that matter, the comments I am giving here today hardly constitute scholarship and the mere fact that they are being published in an excellent law review does not make them so.

Now I very much enjoy and believe I profit from blogging. I would probably get even more out of it if I were a more serious law blogger than I am. I tend to use my blogging as a diversion from my scholarship rather than as a way to amplify it, but that need not be the case. Blogging is also an important medium for the transmission of the sorts of ideas legal scholars develop. If I were the sole blogger on the program, I would be making the case for blogging by legal scholars. But—and here is a big "but"—I think law professors who are considering blogging need to be aware of a perennial pitfall that could be called "the flight from scholarship syndrome."

There is a dirty little secret in the legal academy: most law professors do not like doing legal scholarship. So they look for all sorts of excuses to avoid doing legal scholarship and to justify that avoidance—and law professors are quite adept at developing justifications for almost anything. The first manifestation of this syndrome is to disparage legal scholarship by calling it long, arcane, and ponderous, and asserting that few people ever read it. The second symptom is to characterize any activity a professor happens to enjoy as legal scholarship, so they can claim to be doing it.

I have noticed the flight from scholarship syndrome ever since I started teaching. On many law school faculties there is a serious cultural rift between the scholars and the non-scholars. As a member of the scholarly contingent on my faculty, I have observed all sorts of rationalizations for avoiding scholarship. I have also been on the receiving end of some pretty aggressive behavior by non-scholars both disparaging scholarship and justifying their lack of scholarly activity. Sometimes non-scholarly professors go so far as to undercut the credibility with the students of their more scholarly colleagues.

I should probably also mention that a lot of law professors do not like teaching either. Come to think of it, they are also not crazy about committee work. And everyone hates writing and grading exams. So I suppose there are a lot of law professors who would really rather do something else they find more enjoyable and rewarding than legal

scholarship or teaching. Photography for example. Maybe that something else for them is now going to be blogging.

In this way, blogging can contribute to, or result from, the flight from scholarship syndrome. To the extent that law professors use their blogging to justify their escape from scholarship by, for example, claiming that their blogging is a form of scholarship, blogging can become a major obstacle for a successful academic career. Of course, a lot of law professors do like scholarship, but I think those of us who do are a minority amongst the thousands of professors who teach law.

Why do most law professors not like scholarship? Well, for one thing it is hard, it is very hard to do well, and it is extremely hard to do well enough to receive much external recognition for having done it. Most who attempt legal scholarship do not perceive that their work is being read by others. In this regard, I am very lucky. I do get the sense that my scholarship is read, but I know most professors do not.

Of course, I know that it is also hard to blog well and I greatly respect those who master this form of communication with an audience. Whether or not it is easier to blog well than it is to do legal scholarship well—as I believe it is—at minimum, the two activities involve different skill sets. And with blogging you are far more likely to get immediate feedback, which can make blogging seductive for professors who do not enjoy engaging in scholarship.

Before concluding, perhaps it would be useful to provide some idea of why the "long form" of scholarship is so important, and why we should expect law professors to do it and do it well. Most scholarship is about discovery, not dissemination,[1] and there are things one can discover by means of long form scholarship that one cannot discover in other ways. For me, the principal reward of scholarship is not primarily that others will read what I have written, though that is important. The real reward comes from solving some problem or figuring out what I think is right and doing so in some kind of systematic and rigorous way. For many issues, problem solving can only be done in the long form.

An example of this is the originalist work I have been doing in recent years. Discerning the original meaning of the Constitution requires the careful examination of lots of evidence. Over the years, I have tended to write shorter law review articles than others, which may account in part for why my work tends to be read. But I just published an article on the

1. *See* Eugene Volokh, *Scholarship, Blogging, and Tradeoffs: On Discovering, Disseminating, and Doing*, 84 WASH. U. L. REV. 1089 (2006).

original meaning of the Ninth Amendment that is over eighty pages long.[2] I would love to have made it shorter, particularly now that law reviews are favoring shorter works, but I just couldn't. The article had to be that long to carefully define the five models of original meaning of the Ninth Amendment that had been developed over the years, and then to identify and assess the numerous pieces of evidence that are needed to evaluate critically these models.

The sort of analysis I presented in my article on the Ninth Amendment simply cannot be done in the format of a blog post. While I do sometimes blog about the original meaning of the Ninth Amendment, or the Second Amendment, or the Commerce Clause, all I am able to do in such a post is give my conclusion and perhaps one or two items of evidence. It is impossible ever to prove my thesis about original meaning, even to a very engaged and intelligent audience. When it comes to this and many other types of legal scholarship, there is no substitute for the long form. The same would be true of my writings on contract law theory.

Of course, I readily acknowledge that scholars should strive to make their arguments as concisely and accessibly as possible. And there may well be some types of scholarly argument and analysis that can be done effectively in the short form provided by blogging. Moreover, even when blogging is not itself scholarship, it can be of tremendous assistance in exposing one's scholarship to a wider audience. By so doing, blogging can have the very important function of making one's scholarly efforts far more rewarding. In my experience, members of the general public will read serious long-form scholarship if they know it exists and have the sort of easy access that is now available on the web. In this way, blogging can provide the kind of positive reinforcement that bolsters the resolve of those who believe in the value of long-form legal scholarship. But the authentic joys of blogging do not convert blogging itself to a form of legal scholarship. Nor do they provide an adequate excuse for law professors who seek to flee from their academic responsibility, for which they are very well paid, to be both excellent teachers and scholars.

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2. *See* Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1 (2006).