

FROM: BALKINIZATION

# LEGAL SCHOLARSHIP (1)

IN THE LAW REVIEWS

*Mark Tushnet*<sup>†</sup>

On the plane today I read a terrific article, Brannon Denning and Michael Kent, *Anti-Evasion Doctrines in Constitutional Law*, 2012 Utah Law Review 1773.<sup>1</sup> (And you should read it too.) Without (I hope) casting aspersions on the Utah Law Review, whose editors had the discernment to see the article's quality, I was struck by its "under"placement relative to its quality. Professor Denning tells me that they did a general submission, and Utah was the only offer they received. What might account for this?

First, as to the article itself: It really is very good. Though it's about the structure of constitutional doctrine, it might have been (mis)read as "merely" about doctrine. And it makes an important contribution to the literature on decision rules and operative rules in constitutional law, but it might have been (mis)read as derivative rather than original. Further, it doesn't present itself in a self-consciously "fancy" way, although it's quite sophisticated. And, finally, as to the article, I suspect it would have gotten more attention if the authors had said, "Hey, you know, there's an anti-evasion doctrine in tax law, and we're going to show you that there are similar doctrines in constitutional law." That would have made it cross doctrinal borders in a way that articles editors might like.

But, frankly, the article's so good that all those things are pretty minor. My view is that the reason for its placement is that the au-

---

<sup>†</sup> William Nelson Cromwell Professor of Law, Harvard Law School. Original at [balkin.blogspot.com/2013/08/legal-scholarship-1-in-law-reviews.html](http://balkin.blogspot.com/2013/08/legal-scholarship-1-in-law-reviews.html) (Aug. 6, 2013; vis. Aug. 30, 2013). © 2013 Mark Tushnet.

<sup>1</sup> [epubs.utah.edu/index.php/ulr/article/view/950/712](http://epubs.utah.edu/index.php/ulr/article/view/950/712).

thors teach at Cumberland Law School and John Marshall (Atlanta) – lower tier schools in (of all places) the South. My guess is that the intake articles editors at top N law reviews looked at the authors' affiliations and read the submission with a prejudiced mind: "If this were any good, the authors would be teaching at higher ranked schools." (I know that some reviews do blind evaluations, but I have a strong sense that most top N reviews don't – and doing a blind review at the first, intake stage is exceptionally difficult for over-worked law review editors with little professional support staff.)

The other thing to note is that the star footnote might not signal the article's quality. (In roughly descending order of "heavy-hitter"-ness, from the point of view of articles editors [note that I'm trying to make a judgment about their judgment, not offering one of my own], the acknowledgements go to Eugene Volokh, John Harrison, and either Dan Coenen or Michael Greve.) So, I suppose the advice to scholars writing from second- and third-tier law schools is: Flood the heavy hitters with drafts, on the Nigerian scam e-mail theory that there's some chance that you'll get something back, and then you can put the heavy hitter's name[s] – plural if you're lucky – in the star footnote. (And, if you follow this advice, you'll probably want to push your submission to law reviews back one cycle – you shouldn't send something really incomplete out for comments – if you can.)

(Several disclosures: (1) I don't do many over-the-transom submissions these days, but, as I've blogged about before, my last two were "unsuccessful" – one to the point where I didn't publish the article at all. (2) Two of my own articles that I think are among my best were published in lower ranked law reviews. I won't name the reviews here, though. (3) I read Denning and Kent's article because Denning, who I know, has me on his reprint list – and, though I'm a bit nervous about this disclosure, I read every reprint anyone sends me. They took the effort, and I feel I ought to do something in response, so I read the articles, though I rarely write the authors about the articles. (4) I think I'm not going to make the fourth disclosure.) //