ORIGINALITY

Some people suspect that law professors lead a soft life. As I have often explained to my wife, this is only superficially true. How many architects or doctors have tried to figure out a new argument against strict construction, or a new reason for freedom of speech? Which is easier, treating acne or complying with the bluebook? Designing a living room, or defining equal protection? It's pleasant to chat in the faculty lounge, but on the frontiers of scholarship life is hard.

All of us are capable of summarizing the scholarly consensus on a legal matter; the difficulty, especially in constitutional law, is finding something new to say. One familiar way to mitigate this problem is by joining a school of thought, and then applying the methods of that school to discover new slants on old issues. In constitutional scholarship, several examples come to mind: Critical Legal Studies, Law and Economics, Straussianism, neo-Kantian philosophy, Radical Feminism, and hermeneutics. Unfortunately, these solutions produce mixed results. For example, let us weigh what you would gain and lose by becoming a Marxist. On the one hand, you would have an instant answer to every legal dilemma from the origins of legal formalism to the role of the Supreme Court. You would also be armed with an imposing scholarly apparatus: words like "reification" baffle commercial lawyers, and serve to keep them in their place, thus preserving the one legitimate hierarchy. Better still, as a Marxist you would be entitled to patronize Oliver Wendell Holmes, Jr., Herbert Wechsler, and even Ronald Dworkin. What more could a legal scholar ask?

As the boxer Sonny Liston's manager said, speaking of the former champ's run-ins with the police, "Sonny has his good points. The trouble is his bad points." The disadvantages of becoming a Marxist are almost as great as the advantages. Since you can be labelled and dismissed ("He's one of those Crits"), some bourgeois moron at an unaccredited night school can patronize *you*. One of life's little ironies is that Marxism has a leveling effect on a scholar's apparent brilliance, making him seem better than his betters to some readers, but worse than his inferiors to others. The same is true of most if not all schools of thought.

I have another solution to the problem of how to write an orig-

inal article. My solution rests on an obvious but often forgotten fact of intellectual history. It is known to continental deconstructionists as Koeppen's Axiom. According to this axiom, the great truths of every era were regarded as ridiculous by nearly all cultivated thinkers during a previous era. We all know this, but we commonly overlook Bryden's Corollary: Much of what we regard as ridiculous today will be regarded as self-evidently valid and terribly important tomorrow. It follows that you can write a great law review article by defending preposterous ideas.

As you know, several public law scholars have discovered this truth. For the benefit of any who have not, I will offer an illustrative anecdote. I missed my main chance to write a great article. In about 1967, irritated by some activist decision, I grumbled, "The next thing you know people will argue that *children* have constitutional rights." A distinguished senior colleague laughed heartily at that absurd crack, and scared me off, leaving others to claim the credit for my idea.

I'm a slow learner. My next idea was the Rights of the Ugly. It was on a list of possible article topics that I discussed with another senior colleague several years ago. He frowned: "It sounds too much like a parody." Not yet fully aware of Bryden's Corollary, I took this as a fatal objection. In fact, of course, it was a sign of genius: *all* great constitutional ideas sound like parodies. Before long the *Harvard Law Review* appropriated my idea. The editors of *The New Republic* ridiculed Harvard's piece on discrimination against the ugly, but what do they know? They aren't even impressed by Roberto Mangabeira Unger.

One rub, of course, is that your ridiculous ideas may continue to be regarded as ridiculous for some time to come, perhaps forever, or at least until long after you have departed for the Big Stacks in the Sky. The other rub is that once your idea ceases to be too ridiculous it soon becomes too obvious, and soon thereafter may again become too ridiculous. *Reich's Curve* is the name that has been given to this phenomenon. *Reich Optimality* is the apex of the curve, the point at which an idea ceases to be ridiculous but has not yet become either banal or ridiculous (again)—the fleeting moment during which it is a creative insight. If you wish to write a great constitutional theory today, you need only find some argument that now sounds ridiculous, and will be ridiculous or trite after you are dead, but for which Reich Optimality will occur in your lifetime, long enough before senility to afford you plenty of time for enjoying the applause.

Actually, Reich's *The Greening of America* isn't a perfect ex-

ample, because—like most of us—Professor Reich caught a wave that was beginning to crest. His timing can best be classified as Late Reich Optimal. The more difficult feat is to devise an Early Reich Optimal thesis: to anticipate a wave when the water still looks flat to everyone else. It would be perfect, for example, to have advocated balanced budgets in 1979.

As another example, consider presidential power. You would gain a reputation for soundness, but not genius, by questioning the constitutionality of undeclared wars today, now that everyone knows the evil purposes that they serve. Much worse, you would have lost your job if you had inveighed against undeclared wars in 1940, 1950, or even 1960. Criticisms of the "imperial presidency" became Early Reich Optimal when John Kennedy decided to visit Dallas.

Or take stare decisis. An article finding profound virtues in fidelity to precedent would have been Early Reich Optimal in October 1980. Nine years later the idea has lost much of its freshness, and by 1996 it may be the dullest platitude in constitutional jurisprudence. In 1935 or 1965, on the other hand, ...

If you had advocated rape shield laws in 1930 you would have been denied tenure and died as a crazy and much despised reactionary, insensitive to the rights of the accused enshrined in the confrontation clause. If you advocate them today, you are merely sensible. But if you had advocated them as a youngster of thirty, in 1960, and endured several years of scorn, you'd be famous today.

Maximum hour and minimum wage laws that apply to women but not men, as in *Muller* and *Adkins*, are unpopular today, but were considered essential in Brandeis's time. Wouldn't you like to have attacked them in 1962 or so, on the eve of the great outpouring of feminist literature? For some reason, no one did.

Suppose you had declared, in 1970, that pornography subjugates women. For a while, life would have been tough; but you'd be a hero today, maybe even lauded as The Father of Feminism.

You would gain little by attacking Holmes's opinion in *Buck v. Bell*, upholding compulsory sterilization of mental defectives, now that everyone knows that it was, as one treatise puts it, "callous." If, on the other hand, you had attacked *Buck* in 1927, just after the decision was handed down, Professor T. R. Powell of Harvard might have mocked you instead of Justice Butler, in his famous line about "two generations of imbeciles are enough, Mr. Justice Butler dissenting." Imagine: "Two generations of imbeciles are enough, Professor Steve Krupchak dissenting."

For opponents of eugenics, Reich Optimality seems to have oc-

curred sometime between 1936, when Drew Pearson's *Nine Old Men* quoted T. R. Powell gleefully, and 1942, when *Skinner v. Oklahoma* was decided. In late 1941, perhaps.

The idea of saving the world through litigation has had its ups and downs. If you had argued in 1935, 1953, or even 1963 that "the citizen does not need a bureaucratic middleman to identify, prosecute, and vindicate his interest in environmental quality," because with liberalized standing rules citizen suits can do the job, you'd be selling shoes in Oshkosh today. If you were to say it in 1989, you'd be regarded as a rather odd duck. But in 1971, when a prominent law professor penned that line, the idea was (Late) Reich Optimal.

Speaking of litigation, what if you had argued in 1906, the year after the Court's infamous decision in *Lochner v. New York*, that the Supreme Court's job is to discover and enforce the best American values, a function that politicians can't perform as well because they're afraid of the voters? While you might have survived, life would hardly have been worth living. Today, on the other hand, your colleagues fall asleep in their chairs when they read that politicians are scoundrels and Justices are prophets. To be Early Reich Optimal in defense of judicial activism, you had to publish around 1950. By 1996, who knows?

An idea may be unpopular, and yet Reich Optimal because at another time it would have been even less popular. Indeed, Richard Posner's *Economic Analysis of Law* (1972) is one of the few examples of Early Reich Optimality. Richard Epstein's *Takings* was not exactly trendy even though it came out during the Reagan years. But what if it had been published in, say, 1938? Would anyone even have bothered to refute it? By 1980, Epstein would have been long forgotten. Makes you wonder, doesn't it, how many "mute, inglorious Epsteins" lie buried in Chicago churchyards.

It is, of course, devilishly difficult to figure out which of the ideas that now sound ridiculous will be triumphant tomorrow. The very nature of the enterprise requires all of our intellectual courage and independence. Need I say more?

D.P.B.