Reordering American Constitutional Law Teaching*

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Constitutional law is the cornerstone of an undergraduate public law curriculum. Political scientists will therefore want to teach constitutional law in the most effective manner possible. To that end, there is a welcome trend to offer constitutional law as a two-semester sequence, a trend reflected by text authors and publishers who are increasingly dividing their constitutional law texts into two parts (Mezey 1993, 2). I say welcome trend because, as anyone who has taught constitutional law knows, there is too much material to cover adequately in one semester.

Traditional Constitutional Law Teaching: Powers First

Invariably, constitutional law courses begin with constitutional powers issues: the origins and scope of judicial review, Congress and the development of national power, the powers of the presidency, the modern administrative state, the states and American federalism, and representation, voting, and electoral politics. In two-semester courses, these issues are addressed in the fall. In one-semester courses, they are covered in the first part of the semester.

After the powers issues have been addressed, attention is then turned to constitutional rights issues: property rights and economic liberty, freedom of expression, assembly, and association, freedom of the press, religious liberty and church-state relations, criminal justice, personal autonomy and privacy, and equal protection. In two-semester courses, rights issues are addressed in the spring. In one-semester courses, they are covered in the second part of the semester.

The rationale for teaching constitutional powers before constitutional rights seems to be, first, that the Bill of Rights and the Fourteenth Amendment, the bases for the vast majority of rights questions, were not part of the original Constitution and, second, that students need a foundation in constitutional powers before they can understand constitutional rights. In the spirit of more effective teaching, I would like to suggest that undergraduate teachers *reverse* the order in which constitutional law is taught. Although this suggestion may strike many traditionalists as heresy, it has proved to be an effective pedogogical technique in my courses. In fact, I have gone so far as to *require* the constitutional rights course as a prerequisite for the constitutional powers course.

Reordering Constitutional Law Teaching: Rights First

The justification for reordering constitutional law teaching is simple: students learn the material better if rights issues are taught first. This is because constitutional rights questions are more intuitive to students than constitutional powers questions. The American people—undergraduate students included—are imbued with the idea that individuals have rights, an idea that is at the heart of the American political tradition. "We hold these Truths to be self-evident," Thomas Jefferson wrote in the Declaration of Independence, "that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the Pursuit of Happiness."

With respect to constitutional law specifically, although for much of American history the Supreme Court's docket was dominated by powers questions—*Marbury v. Madison* (1803), *M'Culloch v. Maryland* (1819), *Gibbons v. Ogden* (1825), *Cooley v. Board of Wardens* (1852), *United States v. E.C. Knight Company* (1895), and *A.L.A. Schechter Poultry Corporation v. United States* (1935), to name but a few of the classic cases—that changed in 1937 when the Court, under the threat of President Franklin D. Roosevelt's infamous "court-packing" plan, stopped striking down the New Deal and redirected its attention to protecting civil rights and liberties. Indeed, ever since the "switch-in-time-that-saved-nine," rights questions have far outnumbered powers questions on the Court's docket (Pacelle 1991). The late Herbert J. Storing made the point well a decade and a half ago. "[I]t seems quite plausible today," Storing remarked, "when so much of constitutional law is connected with the Bill of Rights, to conclude that the Antifederalists, the apparent losers in the debate over the Constitution, were ultimately the winners" (Storing 1978, 32). As a consequence of the rights-oriented character of both American political culture and modern American constitutional law, I have found it easier to introduce students to the sometimes confusing subject of constitutional law, as well as to the daunting task of reading Supreme Court opinions, through issues with which they are more familiar and more comfortable: rights issues.

Lessons from Contracts Law

As strange as it may sound, my recommendation to reorder constitutional law teaching owes much to my former law school contracts teacher, Stanley D. Henderson. In his contracts course and accompanying casebook, Henderson takes the bold step of teaching the rules governing remedies for breach of contract (e.g., damages, reliance, and restitution) before the rules governing contract formation (e.g., offer, acceptance, and consideration) (Dawson, Harvey, and Henderson 1987). Critics of Henderson's approach argue that a contracts course must *begin* with the rules governing contract formation. After all, the argument goes, remedies questions cannot arise unless a contract is formed. According to Henderson, however, it is easier for students to learn the complex world of contracts law through a remedy-centered approach. This is because students are more familiar from their everyday experience with what happens if they breach a contract than they are with the technical rules required for them to form a contract (ibid., xxii). As anyone who has had the good fortune of taking Henderson's contracts course or of using his top-selling contracts casebook can attest, Henderson's unconventional approach, in which he teaches contracts law "backwards," works splendidly.

Although contracts law and constitutional law have little in common substantively, they have much in common pedogogically. Like the rules of contract formation, questions of constitutional powers are frequently obscure and confusing to students. By contrast, like the rules governing remedies for breach of contract, constitutional rights questions are quite familiar and understandable to students, exposed as students are to discussions about abortion and the rights of those accused of crime, for instance, in the everyday discourse of American life. Indeed, I venture to say that, before students step into a constitutional law classroom, few, if any, have been exposed to questions like whether the legislative veto is constitutional, while many have heard about—and possibly even discussed—"hate speech," to name but two typical examples of the constitutional powers/rights dichotomy.

Some Suggestions for Teaching the Rights Course

My reordered constitutional law sequence does not simply entail teaching the material traditionally offered in a constitutional rights course before the material traditionally offered in a constitutional powers course. Although the vast majority of what I teach in the constitutional rights course is traditional constitutional rights material—most notably, landmark cases like *Lochner v. New York* (1905), *Schenck v. United States* (1919), *New York Times v. Sullivan* (1964), *Wisconsin v. Yoder* (1972), *Everson v. Board of Education* (1947), *Mapp v. Ohio* (1961), *Gideon v. Wainwright* (1963), *Furman v. Georgia* (1972), *Griswold v. Connecticut* (1965), *Roe v. Wade* (1973), *Bowers v. Hardwick* (1986), *Brown v. Board of Education* (1954), *Frontiero v. Richardson* (1973), and *Regents of the University of California v. Bakke* (1978)—I spend the first several class sessions discussing the central place of rights in American political culture in the hopes of setting the appropriate mood for the course.

My classroom discussion of the rights-oriented character of American political culture is not limited to the American Founding . . . I also turn the class's attention to the contemporary debate over whether we are too *rights-oriented in the United States.*

I begin by examining the Declaration of Independence, the founding document of the American regime. Indeed, in correspondence with James Madison about the University of Virginia's curriculum, Thomas Jefferson put the Declaration at the top of his required reading list for government and law students (Hellenbrand 1990, 164). While it is certainly not my objective to turn the constitutional rights course into a political philosophy course, I try to give my students a general understanding of the political ideas of the Declaration—and as the students quickly come to appreciate, rights are at the heart of those political ideas.

I follow the discussion of the Declaration of Independence with a discussion of the debate over the ratification of the Constitution. Here, I remind the students that the absence of a bill of rights from the proposed Constitution framed in Philadelphia in 1787 nearly led to the Constitution's defeat, a point I illustrate with some revealing quotes from leading Antifederalists like Mercy Otis Warren, Luther Martin, George Mason, and Patrick Henry. I also invoke the name and forceful language of Thomas Jefferson, author of the Declaration of Independence. Jefferson was initially a reluctant supporter of the Constitution, I explain, and one of his most famous letters to Madison tersely said why. "[A] bill of rights," Jefferson wrote, "is what the people are entitled to against government on earth, general or particular, and what no just government should refuse, or rest on inference" (Peterson 1975, 430).

I close my discussion of the ratification debate by explaining to the students that, in the end, the Antifederalists prevailed in the debate over the Bill of Rights, and the Constitution was ratified only because the Federalists promised to add a bill of rights at the first opportunity. That promise soon was fulfilled by Madison in the first Congress, with Madison's change of heart largely being attributable to his recognizing the importance to the American people of securing

their rights. I quote Madison's closing remarks in his June 8, 1789, speech to the U. S. House of Representatives advocating the adoption of the Bill of Rights to demonstrate the point. "I think we should obtain the confidence of our fellow-citizens," Madison argued, "in proportion as we fortify the rights of the people against the encroachments of the Government" (Meyers 1983, 175).

My classroom discussion of the rights-oriented character of American political culture is not limited to the American Founding, important as that period in our history is for defining who we are as a nation. I also turn the class's attention to the contemporary debate over whether we are *too* rights-oriented in the United States. I discuss both the provocative scholarship of contemporary communitarians like Amitai Etzioni (1993) and Mary Ann Glendon (1991) and the communitarianism of our current president, Bill Clinton.

Most significantly, I alert the class to the majoritarian and communitarian inclinations of today's conservative Republican Court. In stark contrast to the post-1937 Roosevelt and Warren Courts, I suggest, the Republican Court appears to reject the idea that the Constitution commissions the Court as *the* institutional protector of individual rights. I use the "peyote case," *Employment Division v. Smith* (1990), as an example. There, Justice Antonin Scalia, writing for a sharply divided Court, made the startling pronouncement that the values enshrined in the Bill of Rights—individual religious liberty, in particular—are not immune from definition by the political process. My objective at this point in the course is not to engage the students in an extended exegesis on religious liberty, but rather to use the case as a vehicle through which they can begin to acclimate themselves to constitutional law, as well as to reading Supreme Court opinions. That foundation laid, the students are ready to enter the fascinating world of American constitutional law.

Conclusion

In suggesting that constitutional law teaching needs to be reordered, I do not mean to imply that constitutional powers questions are less important than constitutional rights questions. My goal is simply to help students learn constitutional law better. In my experience, the order in which constitutional law is taught does *not* affect students' ability to learn the constitutional rights material. For the reasons discussed above, students have little trouble with the rights material, regardless of whether that material is presented first or second.

With respect to constitutional powers, however, students learn that material much better if they have had an opportunity to acclimate themselves to thinking about constitutional law and to reading Supreme Court opinions through the more accessible constitutional rights material. Hence, my rationale for teaching constitutional rights first. After all, our objective as teachers should be to help students learn—even if that means reordering a subject as dear to political scientists as constitutional law.

Note

*Thanks to J. Timothy Collins for helpful comments. This article is dedicated to Stanley D. Henderson.

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