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LAW SCHOOL AND THE CONSTITUTION

PETER K. ROFES*

Since the late eighteenth century, the Constitution of the United States has been our highest law, the Ace of trump in our long and sometimes tempestuous national bridge game. Most of the divisive issues that have emerged throughout our history—including Prohibition, Vietnam, and the battle to replace Johnny Carson as host of *The Tonight Show*—have been issues in which the Constitution has figured prominently. Likewise, much of what practicing lawyers do every day—from laundering money for candidates and political action committees to purchasing child pornography from undercover police officers—is fraught with constitutional considerations. It thus should come as no surprise that the Constitution occupies a central role in the American law school.

The law school treats the Constitution the way a butcher treats cold cuts: by slicing it up and doling out the slices to different customers throughout the day.¹ The typical law school offers an introductory course or two in the law of the Constitution and a variety of more advanced courses devoted principally to discrete doctrinal areas. In fact, despite vigorous debate among legal educators about even the most basic curricular and professional issues—Is it really necessary to teach law in law school? Do students learn better when classes begin with the big hand on the “2” rather than on the “12?” How many top twenty law schools are there in the United States?²—despite

* Associate Professor of Law, Marquette University Law School. B.A., 1978, Brandeis University; A.M., 1981, Harvard University; J.D., 1983, Columbia University School of Law. This essay is part of a larger project in which I examine (in much the same vein as this essay explores the role of the Constitution in the law school) a host of aspects of the American law school, among them the admissions process, the classroom, the final examination, grades, a day in the life of a law professor, the job interview, multiculturalism, the faculty meeting, and the graduation speech. See, e.g., Peter K. Rofes, *Ethics and the Law School: The Confusion Persists*, 8 *GEO. J. LEGAL ETHICS* 981 (1995); Peter K. Rofes, *One Fine Day*, 45 *DUKE L.J.* ____ (1995); Peter K. Rofes, *Grades*, 73 *WASH. U.L.Q.* ____ (1995); Peter K. Rofes, *Getting In: The Why and the How of It*, 1995 *UTAH L. REV.* _____. As for acknowledgements, candor impels me to disclose that, with one exception, none of my colleagues at Marquette has offered anything but scorn for the project. The one exception is a colleague who has offered what can best be described as derision rather than scorn. I remain grateful nonetheless for their collegiality, congeniality, and conviviality.

1. Akhil Amar has made an analogous point, though without reference to food products, in his provocative article *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131 (1991).

2. My current answers to these perennial conundrums are apparently not, I think so, and 11. Because these answers engender substantial confusion in colleagues, I will elaborate on the matter in a subsequent essay.

controversy over issues such as these, an examination of course catalogues from law schools around the nation reveals widespread agreement on the core of the traditional constitutional law curriculum.

There is nothing especially problematic about the constitutional law curriculum that dominates American legal education today.³ But there is something dreadfully wrong with the course descriptions that purport to describe the constituent parts of this curriculum. It's hard to miss the irony: for all the hours constitutional law professors labor to ensure that their courses reflect the latest judicial and legislative developments, the descriptions that accompany such courses in law school bulletins, catalogues, and the like remain embarrassingly obsolete. Set forth below is a proposed set of descriptions that seeks to remedy this problem, to make the typical law school bulletin as fresh and original as the typical law school classroom:

First Year

Constitutional Law (4 Credits)

An introduction to the constitutional system of the United States. Issues to be considered include a) *the judicial role in the constitutional scheme*—how it came to pass that a group of crotchety septuagenarians who have never been elected to anything have the authority to strike down any act of federal or state officials with which they disagree; b) *federalism*—why the commerce power enables Congress to tell an Ohio wheat farmer that he's not allowed to listen to country music in the shower; c) *separation of powers*—why it's OK for presidents to send troops abroad without telling Congress, so long as the White House press secretary refers to them as piano teachers, librarians, or ophthalmologists rather than soldiers, infantrymen, or guerrillas; and d) *due process*—how to identify and greet a viable fetus when you encounter one in your local bowling alley or supermarket.

Second Year

Individual Rights and the Constitution (3 Credits)

A continuation of Constitutional Law, focusing on the principal individual rights protections of the United States Constitution: *equal*

3. With the relatively insignificant exception, set forth below, that only the most gifted lawyers emerge from law school able to prepare pleadings in a constitutional case without having the complaint dismissed for failure to state a claim on which relief can be granted.

protection—a study of a) the evolving meaning of rational basis review in an increasingly irrational world, b) why discrimination on the basis of race or gender is presumptively invalid and morally repugnant, except when white males get the short end of the stick, and c) whether transsexuals in the military are entitled to use any bathroom they please; *freedom of expression*—a look at a) how shouting “fire” in a crowded theater will land you in the pokey without your popcorn, while telling lies about public officials wins you fame, fortune, and kudos from journalism peers, b) how much steamy carnality and other dirty stuff may be depicted in contemporary films before a jury deems them obscene, and c) why George Carlin routines may not be broadcast on radio before ten in the evening but Arnold Schwarzenegger movies can be shown pretty much anytime; and *the requirement of state action*—an examination of why the local public utility can cut off your electricity anytime it wishes while the county is forced to conduct a three-day trial on the merits before terminating food stamp payments to relatives of H. Ross Perot.

Constitutional Criminal Procedure (3 Credits)

The impact of the 4th, 5th, 6th, and 14th Amendments on the rights of the criminally accused. Topics include a) *search and seizure*—how to persuade a magistrate to issue a search or arrest warrant for that special someone, b) *police interrogation/coerced confessions*—whether the use of brass knuckles and an ice cream cone on a four-year-old suspected of pilfering a tricycle from his daycare center renders a subsequent confession invalid, and c) *the right to counsel*—whether impoverished accuseds are entitled to Veronica Hamel as their public defender. The course concludes with a study of the investigative techniques of Paul Drake, Sergeants Joe Friday and Bill Gannon, Detective Steve McGarrett, Mrs. Jessica Fletcher, and Lieutenant Columbo.

Third Year

Seminar in Religion and the Constitution (2 Credits)

An in-depth examination of the Constitution’s twin protections of religious liberty: establishment and free exercise. Establishment issues include a) *school prayer*—why guns and birth control devices flourish unchecked in the public schools but a recitation of the Ten Commandments brings in the feds, and b) *public displays of religious significance*—how it came to be that a nativity scene can be

displayed on municipal property during the holiday season only if surrounded by a wreath of Hebrew National salami stamped "Kosher For Passover." Free exercise matters include the right of Amish communities to first-run Harrison Ford movies and the sacramental use of steroids by Native American football players.

Theories of Constitutional Interpretation (3 Credits)

An examination of competing interpretive strategies used in deriving constitutional meaning and deciding constitutional cases. Issues to be explored include a) *the promise of interpretation*—whether the interpretive enterprise is hopelessly misguided because the document long referred to as the Constitution is itself unconstitutional and b) *the constitutional moment*—preparing for it, determining how many our nation has experienced, and maximizing the prospects that an adequate supply of cigarettes will be available at the end of one. As the semester concludes, each student will be required to present a one-act play depicting his or her favorite theory at work resolving an important constitutional case. Readings from Bruce Ackerman, L. Frank Baum, Raoul Berger, Alexander Bickel, Walt Disney, Jeanne Dixon, Ronald Dworkin, John Ely, Hanna-Barbera, Catharine MacKinnon, Richard Posner, Robert Ripley, Jerry Seinfeld, Dr. Seuss, and Mark Tushnet.

With descriptions such as these, the American law school will continue to do a superb job of imbuing the lawyers of tomorrow with a practical wisdom that enables them to work through a range of contemporary constitutional problems. As one example, virtually all graduates will continue to leave law school deeply aware of the impact Chief Justice John Marshall had on the development of America as one indivisible nation and thus fully able to litigate issues of navigational monopolies granted to ferry owners by the state of New York.⁴ In addition, most students will continue to complete their constitutional studies having learned what a penumbra⁵ is and, to boot, how to pronounce the words mandamus,⁶ certiorari,⁷ non-justiciable,⁸ and prurient.⁹ A few of the most talented law graduates may even be able to prepare a complaint without having the constitutional allegations dismissed for failure to state a claim on which relief can be granted.

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4. *Gibbons v. Ogden*, 22 U.S. 1 (1824).
 5. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
 6. *Marbury v. Madison*, 5 U.S. 137 (1803).
 7. *New York Times v. United States*, 403 U.S. 713 (1971).
 8. *Baker v. Carr*, 369 U.S. 186 (1962).
 9. *Miller v. California*, 413 U.S. 15 (1973).

Yet there remains a dark side to the effectiveness with which the American law school delivers its constitutional law curriculum. Sometimes law students learn their constitutional lessons a bit too well.

Over the Thanksgiving recess in 1994, a law student returning to her parents' home for the holiday caught her mother rummaging through the student's luggage, searching for telltale signs of immoral or illicit activity. Understandably outraged, the student flew into a rage and angrily inquired, "Dammit, mother, haven't you ever heard of the Fourth Amendment's ban on unreasonable searches and seizures?" The student's father, displeased that his daughter had directed a swear word at the mother, promptly reprimanded her for doing so. Without pausing a moment the student replied, "Evidently you don't take much stock in the First Amendment's freedom of expression, do you, Daddy?" The family's interaction grew increasingly testy as the weekend progressed, culminating with the student's lashing out about "a deprivation of liberty without due process" in response to a request from her grandparents to help load the dishwasher. At last report she was seen stuck in traffic on the New Jersey Turnpike a few miles from the George Washington Bridge, hollering about the privileges and immunities of citizens of the United States.¹⁰

10. The events set forth in this paragraph have come to my attention through a series of conversations with the student's family. Concern for the student and her family prevents me from disclosing their identities. Nevertheless, the family has asked me to clarify one point. The student ultimately did assist in loading the dishwasher, though only after muttering something about preserving her objection for appeal.

