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Teaching Constitutional Law Differently.

Philip C. Kissam

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> Another use of reason, much more creative and difficult, leads to an exercise of judgment. You provisionally accept alternative sets of premises, reasoning out of the consequences, and then exercise judgment to choose one set of premises over others. . . .
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> Are we law teachers to be credited with teaching students how to do this kind of hard thinking about law? Even if we accept the inference that students are more skilled at this kind of thinking when they leave law school than when they entered, does it follow that our teaching caused this improvement?
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> — Robert Keeton[1]

In 1989 I completed a study of law school examinations.[2] Among other things, I concluded that the examination process tends to make law professors into boring and negative or excessively critical persons.[3] In addition, I argued that the emphasis in law schools upon end-of-the-semester doctrinal examinations is anti-educational in several ways. This process implicitly encourages professors to teach for the examination in the sense of "preparing students," or "setting them up," to write examination answers that can be graded easily to generate the multiple grade distinctions of contemporary law school grading curves and class ranking systems.[4] Law school exams also encourage and reward narrow kinds of thinking and writing, and they diminish or preclude attention to thought and practice that concern more than the knowledge of doctrine (or given legal premises) and its application to particularized

* Professor of Law, University of Kansas. Kent Bunting provided invaluable research assistance and comments, and Peter Schanck gave his usual careful reading to a draft.

1. Robert E. Keeton, *Delivery of Justice as a Concern of Law Schools*, 53 N.Y.U. L. Rev. 596, 600-01 (1978).

2. Philip C. Kissam, *Law School Examinations*, 42 Vand. L. Rev. 433 (1989).

3. See id. at 483-85.

4. See id. at 444-52, 466-74.

situations.[5] To be sure, the law school examination system teaches basic forms of legal analysis, encourages acquisition of specialized doctrinal knowledge, prepares students to pass bar examinations, and sorts students for employers on some measure of relative productivity. These functions, however, would not seem to require that each doctrinal course employ a problem-solving examination as the basic written work by students. In other words, even if our present system is appropriate on the whole, some of us should be able to (and should) employ different types of writing exercises to teach different aspects of legal work without abandoning the values of the system. Why not, for example, construct devices to implement Robert Keeton's suggestion that we help students learn to make judgments between alternative legal premises?[6]

In 1989-90 I enjoyed the opportunity to spend a year as a visiting fellow in our university's philosophy department. As both a student and teacher I discovered (or rediscovered) the joy and educational value that can be obtained from writing relatively short papers (say three, five, or eight pages) on complex and extensive subjects. I observed that the professors who assign such projects, in some cases to rather large classes, did not seem inordinately burdened by their need to read, evaluate, and comment on these short papers. At the same time I discovered (or rediscovered) the joy and educational values that can be obtained from reading coherent if demanding texts by comparison to our law school readings of fragmented casebooks. Thus, somewhat accidentally, my experience with law school exams and the practices of other academic disciplines motivated me to think about new ways to teach doctrinal courses in law school.

In 1990, upon returning to law teaching, my immediate challenge was to implement these principles of reading and writing in a four-credit required constitutional law course for upper-class students. In reflecting on this problem, I was influenced not only by my past experience but also by the tradition in legal education, limited as it is, that emphasizes student-oriented learning by means of individual research and writing projects.[7] In this essay I shall de-

5. See id. at 440-44, 489-502. See generally Jeffrey W. Barnes, *The Functions of Assessment: A Re-examination*, 2 Legal Educ. Rev. 177 (1990-91).

6. See Keeton, 53 N.Y.U. L. Rev. at 600-01 and accompanying text (cited in note 1); Kissam, 42 Vand. L. Rev. at 500-01 (cited in note 2). Cf. Anthony D'Amato, *Rethinking Legal Education*, 74 Marq. L. Rev. 1, 35 (1990) ("law schools should stop teaching law. Instead, we should teach justice.")

7. See Harry Pratter and Burton W. Kanter, *Expanding the Tutorial Program: A Bloodless Revolution*, 7 J. Legal Educ. 395 (1955); Howard C. Westwood, *The Law Review Should Become the Law School*, 31 Va. L. Rev. 913 (1945). This tradition has become more visible in recent years with the increasing number of law reviews and the expansion of writ-

scribe the new course structure that I developed, and then offer justifications for the design and some comments on my experiences teaching with it. My purpose is to encourage others to experiment with similar course designs and to share ideas and assessments about such approaches.

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In teaching constitutional law in the fall semesters of 1990 and 1991, with 90 and then 120 students, I developed a course structure that is oriented towards individual learning and avoids the law school's traditional use of the case method and problem-solving final examination to teach legal doctrine. This structure features individual research and writing projects by students, readings in Laurence Tribe's *American Constitutional Law*[8] as well as leading judicial opinions, lectures on constitutional doctrine, history, and theory, and discussion sessions that are organized around written statements and questions submitted by students. This design changes the learning and teaching process in important ways without requiring much if any additional faculty time.

The main innovation, which I have developed pragmatically over the past two years, has been the replacement of a final examination with a requirement that each student complete a "limited research, analytic paper" of eight double-spaced typed pages, which evaluates some significant premise choice in constitutional law. The premise choice to be evaluated is developed by each student from one of about thirty to forty approved topics. The "limited research" aspect of the paper requires only that each student make "some use" of at least six relevant sources or authorities: a book or treatise other than Tribe's treatise, two law review articles, and three judicial decisions. I encourage students to evaluate their premise choice in constitutional law by writing a paper that is divided, presumptively, into four parts: a short introduction of the premise choice to be evaluated, two sections of approximately three pages each that develop "the best possible constitutional arguments" for alternative premises, and finally a page or so that presents reasons for choosing one premise over another.[9]

In the fourth week of the semester I distribute a list of the ap-

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ing-oriented seminars, especially at national law schools, but it remains a limited tradition in view of the continuing pervasive use of casebooks, the case method, and problem-solving final examinations in doctrinal law school courses.

8. Laurence H. Tribe, *American Constitutional Law* (Foundation, 2d ed. 1988).

9. This structure is only a recommended one and can be changed if appropriate for a particular project. I also recommend that students consult published Supreme Court briefs in their leading cases but warn that such briefs are likely to be dated at best and not likely to be the source of the "best possible constitutional arguments" today about any given premise choice. See also Note A in the Appendix to this essay, which contains excerpts from my

proved topics on which students may choose to work. These lists have included such topics as "The Constitutionality of the War Powers Resolution of 1973," "Evaluating the Contemporary Dormant Commerce Clause Doctrine," "Evaluating Commercial Speech Doctrine," "Evaluating *Mozert v. Hawkins*,"[10] "Evaluating *Griswold v. Connecticut*,"[11] and "Evaluating Post-*Rodriquez* State School Financing Cases."[12] Some topics include several premise choices ripe for evaluation while others suggest only one, but each topic presents at least one good opportunity to develop persuasive and relatively complex constitutional arguments about alternative premises, rules, or standards.[13]

By the end of the tenth week of the semester, each student must submit a three page "prospectus" that summarizes the sources or authorities that the student plans to use in her paper. I also invite students to specify the premise choice they plan to evaluate and to use their prospectus to ask questions or report problems they are experiencing. I do not grade the prospectus, but I review each one to determine whether the minimum research requirement has been satisfied, to make suggestions about additional research that might be helpful and, if necessary, to help a student clarify an appropriate premise choice to evaluate. In effect, this review serves as an "on-track filter" to help students focus on the process of assessing premise choices in constitutional law. I have been able to review and comment briefly on five or six prospectuses in about an hour, and thus I have returned these prospectuses about two weeks after their submission without much if any undue effort.

The eight page paper is due at the end of the final exam period. I inform my students that I will grade their papers under the same standards I apply to seminar papers.[14] Thus, an "A" paper is one that deals with the complexities and contradictions of the topic in a relatively comprehensive and insightful manner. A "B+" paper would be an "A" paper but for a significant flaw or two. A "B" paper represents effective research, is well-organized and well-writ-

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written guidelines for this project. I will gladly furnish a copy of the complete guidelines on request.

10. *Mozert v. Hawkins County Board of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (denying a free exercise of religion claim by a parent with religious objections to particular texts in a public school curriculum).

11. 381 U.S. 479 (1965).

12. In other words, evaluating the appropriateness of active judicial review of state public school financing laws under state constitutional provisions despite the United States Supreme Court's unwillingness to do so under the Equal Protection Clause in *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

13. Note B in the Appendix contains my list of potential topics for the fall semester of 1992 and some notes on previously employed topics as well.

14. See Philip C. Kissam, *Seminar Papers*, 40 J. Legal Educ. 339, 346-47 (1990).

ten, and makes a reasonable attempt to develop and grapple with systematic arguments on both sides of the premise choice. A "C+" paper would be a B paper but for a few noted flaws or deficiencies, and a "C" paper is adequate in terms of its research and the coherence of its writing or analysis. In effect, under these standards and our school's implicit grading curve that large courses should have an average grade of approximately "B," I have found that I assume the burden of justifying any grade below B and that the writer has an effective burden of persuading me that any grade above B is justified. I did not do this the first time, but at the end of the course in 1991 I mailed to each student a brief note stating the grade on their paper and my reasons for the grade. As I have discovered in grading seminar papers, this kind of written evaluation helps me switch from the role of a "helping coach" to that of a "neutral umpire," and these explanations may also provide some constructive feedback to students.[15]

In addition to the limited research, analytic paper, I try to encourage students to acquire a broad initial knowledge of basic constitutional doctrine by a mixture of methods and exhortation. Most significantly, I encourage them to read Tribe's treatise and the assigned judicial opinions carefully for three reasons: (1) to acquire background and experience in constitutional doctrine and analysis that will help them write effective papers, (2) as a good way to prepare for bar examinations, and (3) as an effective means of familiarizing themselves with an important treatise that they may have an opportunity to use in practice. I also have distributed at the final class session two "take-home exam questions" that require short doctrinal answers (three or four typed pages in the aggregate) of the kind expected on traditional law school exams. The answers to these questions have been due on the last day of the exam period, and the grades on these papers have counted for a minor fraction of the course grade. I have doubts about how effective this "policing device" has been, and reading these answers has added a disproportionate amount of time to normal end-of-the-semester grading efforts. I thus am planning to eliminate this device, or replace it with some more inventive and more cost-effective instrument (if such can

15. See Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 Vand. L. Rev. 135, 169 n.96 (1987). Another device that might help this transition, of course, would be the "blind" or "anonymous" grading of these papers. I have hesitated to employ anonymous grading, however, because of the conferences I have with many students and because in some cases only one or two persons write on a topic. I thus fear that I would recognize some or even many of the authors of papers anyway and this could be unfair either to them or to others.

be found).[16]

This course structure necessarily affects what happens in the classroom. To date, I have divided each week's four class sessions into three categories, and this division seems to work relatively well in terms of attracting class attendance and, more importantly, in terms of supporting the many good papers that I have received from students in the past two years. The first two classes of each week are lectures on aspects of constitutional doctrine addressed by the assigned readings in Tribe or leading opinions. The third class is devoted to open-ended discussions with students about questions they have on the readings or lectures. For these sessions I have asked from six to eight students to give me, a few hours before class, a one page statement that summarizes "the most important aspects" of the week's readings and proposes a question "for class discussion." Typically I have tried to engage specific questioners in dialogues about their questions. These discussions have not always been scintillating, but this process does help me to ascertain roughly the levels of student understanding of the subjects under consideration. Moreover, I have discovered that law students—with time to reflect—tend to ask very illuminating questions about the doctrines under study, and their written questions have enriched our discussions of constitutional doctrine in ways that professorial-directed discussions simply do not.

The fourth class of the week is devoted to subjects that I believe will assist or enrich the individual projects of the students. Early in the semester I talk about research and writing techniques and invite an expert from our library staff to talk about specific bibliographic aspects of constitutional research. I also spend two or three periods describing the approved research topics, and thereafter I offer lectures on constitutional history and the methods and theories of constitutional interpretation. These subjects appear to be of assistance to many students in writing about their premise choice in constitutional law.[17]

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16. One possibility would be to employ a short answer final examination, but this could be unfair to students in terms of the time they spend on my course by comparison to other courses. Another possibility might be to require short essay answers to take-home questions and have the essays graded primarily by teaching assistants. This approach of course would have monetary costs and place some additional time costs on the faculty member.

17. For arguments that more attention should be devoted to history and theory in teaching constitutional law, see David P. Bryden, *Teaching Constitutional Law: Homage to Clio*, 1 Const. Comm. 131 (1984); John D. Hyman, *Constitutional Jurisprudence and the Teaching of Constitutional Law* (reviewing Gerald Gunther, *Cases and Materials on Constitutional Law*, 9th ed.), 28 Stan. L. Rev. 1271 (1976); William H. Rehnquist, *A Comment on the Instruction of Constitutional Law*, 14 Pepperdine L. Rev. 563 (1987). See also Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution* (1990); John H. Garvey and T. Alexander Aleinikoff, *Modern Constitutional Theory: A Reader* (West, 2d ed. 1991).

There are several justifications for employing some kind of "limited research, analytic paper" project instead of a final exam as the written work in doctrinal courses. First, the technique offers a different way for students to study and understand law, through individualized research and a sustained, reflective process of organizing and writing about a complex and contradictory subject. As I have argued elsewhere, the values of learning through this kind of research and writing process are undervalued in law schools by the primacy we give to heroic oral performances and the simulated oral advocacy of "writing" final exams under time constraints.[18] The limited research analytic paper thus promises to provide beneficial pedagogical diversity at relatively low costs. This project should benefit all students by requiring them to learn in a "quasi-clinical" manner that involves their engagement in a sustained project within which complex judgments must be made.[19] In addition, different students surely develop understandings of complex materials in different ways, and this method of learning law may be especially beneficial to students who are disfavored or disinspirited by the law school examination process.[20]

The limited research, analytic paper project also seems to be a good systematic way of beginning to help students experience and develop their skills at evaluating and judging alternative legal premises. Even if the forms I use to define this project are overly scholarly or judicial in nature, the *general process* of assessing and choosing between alternative premises appears to be at the heart of many high quality legal practices.[21] Here then is a low cost way to make legal education more practice-oriented without sacrificing the "theoretical" components of law school work that are involved in the study of legal doctrine.

The limited research, analytic paper also appears to be a good method to help teach an open-ended, value-laden, dialectical subject such as constitutional law. The traditional examination system, with its emphasis on students acquiring or internalizing complex

18. See Kissam, 40 Vand. L. Rev. at 141-51 (cited in note 15).

19. Cf. Kissam, 40 J. of Legal Educ. 339 (cited in note 14) (arguing that writing seminar papers on complex and contradictory issues is a valuable "quasi-clinical" form of legal education).

20. Cf. Kissam, 42 Vand. L. Rev. at 489-90 (cited in note 2) (suggesting that norm referencing of law students by the law school examination process may disadvantage certain categories of students).

21. See D'Amato, 74 Marq. L. Rev. 1 (cited in note 6); Keeton, 53 N.Y.U. L. Rev. 596 (cited in note 1); Anthony T. Kronman, *Living in the Law*, 54 U. Chi. L. Rev. 835 (1987). See generally Donald A. Schon, *Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions* (Jossey-Bass, 1987); Donald A. Schon, *The Reflective Practitioner: How Professionals Think In Action* (Basic Books, 1983).

doctrine and skills at applying given premises to new situations, may be appropriate for teaching rule-dominated legal subjects.[22] In a subject like constitutional law, however, the analytical methods are quite similar from doctrine to doctrine and any full understanding of the analysis and principles or arguments that underlie the doctrine requires complex readings, discussions, much patience, and time. In this situation, a requirement that students try to master one particular doctrinal puzzle rather than survey many seems to make good sense. Final exams on constitutional doctrine may teach many students superficial thinking by comparison to a sustained even if limited research and writing project.[23]

Finally, the limited research, analytic paper assignment may also be justified as a type of "advanced legal research" project. In recent years there have been many complaints about the quality of research skills acquired in law schools.[24] A number of schools have established "advanced research" courses in response to these complaints and various demands for more research training,[25] and indeed some argue that legal research and writing skills are best acquired in upper-class courses after students have developed some familiarity with doctrinal analysis.[26] To be sure, I do not press my students very hard or evaluate them on the comprehensiveness or exhaustiveness of their research for these writing projects. On the other hand, both my sense of student efforts and anecdotal evidence suggest that many students engage in extensive research before selecting their topic and the relevant sources for their paper. In any event, this project allows our library staff and me to remind many students about some of the basic research lessons they first experienced in their first-year research and writing course. The project also forces students to think at various points about the availability of specific constitutional research materials. At least symbolically, the limited research, analytic paper project promotes education in legal research skills.

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22. See Kissam, 42 Vand. L. Rev. 433 (cited in note 2).

23. See id. See also Note C in the Appendix which summarizes the qualities of the different kinds of papers I received in the fall of 1991. Cf. J.B. Biggs, *Teaching for Better Learning*, 2 Legal Educ. Rev. 133 (1990-91) (advising law teachers to establish "motivational contexts" that encourage students to engage in "deep" rather than "surface" learning).

24. Compare I. Trotter Hardy, *Why Legal Research Training is So Bad: A Response to Howland and Lewis*, 41 J. Legal Educ. 221 (1991), with Joan S. Howland and Nancy J. Lewis, *The Effectiveness of Law School Legal Research Training Programs*, 40 J. Legal Educ. 381 (1990), and Thomas A. Woxland, *Why Can't Johnny Research? or It All Started With Christopher Columbus Langdell*, 81 L. Library J. 451 (1989).

25. See S. Blair Kauffman, *Advanced Legal Research Courses: A New Trend in American Legal Education*, 6 Legal Ref. Serv. Q. 123 (Fall/Winter 1986).

26. See Robert C. Berring and Kathleen Vanden Heuvel, *Legal Research: Should Students Learn It or Wing It?*, 81 L. Library J. 431 (1989).

The use of a treatise in place of a casebook for most reading assignments is certainly not innovative.[27] Moreover, I am not sure whether the limited research, analytic paper project is better accompanied by reading assignments in a treatise or a casebook. Although fragmented in nature, the excerpts of judicial opinions in casebooks do provide the helpful concreteness of specific stories and many possibilities for the direct study of the dialectical process of constitutional argument about alternative premises.[28] Nevertheless, I suspect that in an upper-class course many students are encouraged to do the readings and thus obtain an effective introduction to constitutional doctrine by arguments that reading a treatise is a good way to prepare for bar examinations and that acquiring familiarity with Tribe's treatise may have advantages in practice.[29]

In addition, the use of a treatise provides a broad doctrinal context by comparison to casebook readings within which to analyze particular cases and arguments of constitutional law. Tribe's treatise also provides students with many insightful discussions of the dialectical qualities of constitutional argument, and thus promises to help each student's own dialectical work with a premise choice in her limited research, analytic paper. Furthermore, as Jay Feinman and Mark Feldman discovered in developing their course combining contracts, torts, and legal research, the employment of treatise-like readings accompanied by reiterative lectures on doctrine can teach "black letter law" efficiently and thereby provide more time both in and outside the classroom for studying and learning analytical skills.[30]

Lecturing is certainly not innovative either. But this form of education, notwithstanding its drawbacks, seems a helpful if not a necessary accompaniment to the analytic paper project and treatise readings. Twice-weekly lectures on constitutional doctrine provide reiteration and elaboration of main points in the readings or, for those who may not read, an alternative format from which to acquire an introduction to the vocabulary and grammar of constitu-

27. See, e.g., Walter Gellhorn, *The Second and Third Years of Law Study*, 17 J. Legal Educ. 1 (1964) (recommending use of treatise-like readings to "cover" legal doctrine in upper class courses).

28. The possible advantages of the case method of legal instruction are well summarized by Paul D. Carrington, *Book Review*, 72 Calif. L. Rev. 477, 490-92 (1984) (reviewing Robert P. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983)).

29. See text following note 15. My favorite comment that supports this point, albeit from a nontraditional student, was: "It's amazing what you can learn when you're not responsible for the reading."

30. See Jay M. Feinman and Marc Feldman, *Achieving Excellence: Mastery Learning in Legal Education*, 35 J. Legal Educ. 528 (1985).

tional law. I also have a strong sense (and evidence from reading the papers) that the limited research, analytic paper project causes many students to take seriously questions about constitutional theory, interpretation, and method. Some students undoubtedly acquire this interest and seriousness from their study of particular issues or the requirement that they use secondary sources as well as cases in writing their papers. Others seem to benefit from the lectures on constitutional history and the theory and methods of constitutional interpretation, which constitute a major part of the lectures designed to aid writing projects directly. Whatever the causes or motivations, this seriousness about history and theory has been an important difference between teaching with this course design and my prior decade of teaching constitutional law with casebooks, the case method, and traditional problem-solving final examinations.

Student-oriented discussion sessions based on statements and questions submitted in advance seem like a good device to enhance both lectures and readings. One page statements summarizing "the most important aspects" of a week's readings, if taken seriously, appear to focus students on the more important and more difficult aspects of constitutional law. The statements also provide a useful review process. In fact, I encourage students who ask "how to outline" treatise readings to engage in this process on a weekly basis in order to obtain the review advantages that good outlining can provide for the purpose of exam preparation. Furthermore, many of these student questions help illuminate the doctrines under study in several ways: by asking for clarification of difficult points, by asking how a doctrine might be applied to particular cases or hypothetical problems, and by raising insightful evaluative questions.

There are, of course, some inevitable trade-offs in teaching with this design, and each trade-off may be viewed as an objection to the design. I have answers to these objections that mitigate them substantially, but any objections about trade-offs from conventional practices are certainly stubborn ones in our law school world and these complaints may not disappear easily.

Under this design there is less immediate incentive for students to study doctrine broadly and thus acquire the doctrinal knowledge that we believe necessary to pass bar exams and perhaps for practice as well. My answer to this objection is one of ethics or educational philosophy, although this view will not be shared by everyone. My responsibility is to provide opportunities or structures for law students to acquire this doctrinal knowledge, but I do not have a responsibility to police them in this process. Responsibility for

acquiring doctrinal knowledge rests with each individual student.[31]

The absence of a comprehensive, issue-spotting final exam also means that students obtain less training, to some undetermined extent, in identifying constitutional issues and—importantly—in applying the given premises or rules of constitutional law to complex fact situations. This loss worries me at times, especially because there are intellectual as well as legal values in acquiring familiarity with the "means-ends" analysis that pervades so much of constitutional law. My answer to this objection is only a mitigating one. I wonder whether our final examination system *teaches* very much in the way of issue identification and rule application skills, or whether law school examinations are not instead mostly devices to *evaluate* our students' *natural* problem-solving skills for the purposes of employer screening.[32] It seems to me that our final examination system is likely to teach issue identification and rule application skills effectively and broadly, to most students that is, only if final examinations are preceded by much genuine practice and supervised feedback to students.[33] This simply is not done very much in law schools. Still, there is undoubtedly some loss in a valuable kind of skills training from substituting a limited research, analytic paper for a traditional final examination. I believe, though, that this loss is not a very substantial one.

Finally, the necessary use of *qualitative* grading standards undoubtedly produces fewer grade distinctions than can be achieved by grading classic issue-spotting final examinations on a numerical or *quantitative* basis.[34] Under qualitative standards I award more B grades and fewer higher or lower grades than is typical at our school. This may be of concern to students and faculty who believe that many diverse grades are somehow "natural" or "appropriate," or to those who believe more pragmatically that discrete class ranks encourage prospective employers to hire graduates of one's school. My answer to this objection is threefold. A grading system should fit the kind of examination work that is demanded of students, and

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31. Cf. James Boyd White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be*, 36 J. Legal Educ. 155, 164 (1986) ("The first assumption that should go is that everything of importance in the field, or for the exam, will be covered in class. We should feel free to treat our students as grown-ups, able to read and think on their own.") Why are we not able to rid ourselves of this fundamental assumption?

32. See Kissam, 42 Vand. L. Rev. 433 (cited in note 2).

33. See Feinman and Feldman, 35 J. Legal Educ. 528 (cited in note 30); Janet Motley, *A Foolish Consistency: The Law School Exam*, 10 Nova L. J. 723 (1986).

34. Cf. Kissam, 42 Vand. L. Rev. at 444-52 (cited in note 2) (comparing an "Aristotelian" grading approach, in which qualitative standards are applied to student writing, with a quantitative or "objective" approach that is encouraged if not required by law school grading curves that demand multiple grading distinctions).

qualitative grading standards seem like the only reasonable standards to evaluate the construction of constitutional arguments about a choice of premises. Law schools also might be more humane places if fewer grading distinctions were employed. In any event, as long as the bulk of law school courses generate multiple grade distinctions, this should be sufficient to construct the kind of class ranking system that employers are believed to rely upon. Within this system some doctrinal courses might employ less individuated grading, or take a "free ride" as it were, without upsetting the overall values of class ranking.

I wish to move now from reasons that justify this course design to some personal observations about its potential values and dysfunctions. I shall discuss first the values or pleasures I have discovered in both the process and the products of this kind of teaching and then turn to some apparent disadvantages of the design as a matter of my own experience.

The more unexpected pleasures from this course design have been several sorts of process values. I have always tried to achieve an open personal style, but few of my students have wanted to discuss legal or educational issues on an individual basis, which I had always assumed was the essence of good education. Perhaps my classroom style is too forbidding, or perhaps my subjects are too open-ended or theoretical for students to care. In any event this situation has changed dramatically with use of the limited research, analytic paper projects. Many students of their own accord, and many others invited by comments on their prospectuses, have now discovered the location of my office. Significantly, they come well-prepared with thoughtful questions about their projects, and their background understandings make exciting, probing discussions of constitutional subjects possible. Some students need more help than others, but each conference is different and in these conversations there is rarely the repetitiveness or boredom of the mundane that I understand (more by rumor than by experience) is frequent when faculty-student discussions take place about a student's prospective final examination.

A second process value, more observed than experienced, has been the obvious joy or excitement that many students profess or manifest while working on their analytic projects. Most significantly, it seems that these projects and the opportunity of each student to choose from among twenty or thirty different topics allows many (perhaps most) students not only to pursue their own special interests in law and justice but also to exercise their distinctive voices—at least in the part of the project that invites them to choose

and give reasons for choosing constitutional premises. In a small way, this limited research, analytic paper project promotes the educational theories of feminists and critical race theorists that legal education would be more effective and humanistic by allowing for and encouraging greater expression of the distinct experiences and perspectives of women and minority law students.[35]

The third and least expected process value has been the liberating if frustrating experience of changing my classroom style in mid-career so to speak. I have qualms about the values of classroom lecturing, both in general and in regard to my own capacity. I have experienced much classroom boredom, both as a listener to others and as a listener to my own doctrine-oriented lectures. Theater majors have noticed that my voice can lapse into a dreadful monotone, and I am drawn toward abstraction and theory in ways that often seem to lose many if not most listeners. Nonetheless, the opportunity to lecture on the basis of a coherent text like Tribe's and to lecture directly on history and theory in constitutional law has constituted an exciting change from old case-method habits. It will probably take years of practice and many reformations before I feel even moderately comfortable about lecturing, but I can recommend this change as a useful tonic and as a means of recommitment to our basic obligation to teach as best we can.

The major pleasure, not unexpectedly, has been reading the final papers of my students. There is simply no comparison (or, I should say, no adequate way to express the differences) between reading 120 relatively coherent, well-written papers on twenty or thirty different open-ended topics in constitutional law and reading 120 blue book answers to the same set of problems. Reading papers engages me as an interested, sympathetic interpreter of student writing by comparison to the dreary negativism of reading blue books simply to sort them into different grading categories.[36] Moreover, this new reading frequently if not typically provides me with new ideas about constitutional subjects, either directly from a student's paper or indirectly from my own musings about the text before me. Most importantly, this evaluation process provides me with evidence that the vast majority of our students are competent and talented writers and thinkers about complex legal subjects. This, I think, is a significant difference from the negative impres-

35. See, e.g., Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 Natl. Black L. J. 1 (1989); Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 Miami L. Rev. 29 (1987); Catherine Weiss and Louise Melling, *The Legal Education of Twenty Women*, 40 Stan. L. Rev. 1299 (1988).

36. See Kissam, 42 Vand. L. Rev. at 445-47 (cited in note 2).

sions of most students' intellectual and lawyerly abilities that tend to be generated in professorial minds by reading typical law school blue books.[37] In any event, this experience has changed my views about the talents of our students in general. This experience also provides me with evidence to make relatively concrete and positive recommendations to prospective employers—no matter what a student's grade point average or class rank may be.[38]

There have been discomforts as well. I have noted my qualms about lecturing, and I have similar concerns about the quality of the discussion classes based on submitted statements and questions. The statements and questions for the most part have been well done, but can any discussion of relatively unconstrained and open-ended questions in a large classroom ever constitute effective education for most students? Even after years of practice and experience with this process, could one ever expect to measure the learning effectiveness of these sessions in a meaningful way? There is, of course, the record of student contents and discontents expressed on their teaching evaluations, but does anyone think that this record is an accurate or comprehensive measure of educational quality?[39] My current plan is to continue experimenting with this idea and to search for adjustments that might encourage better or more robust dialogues in large law school classes.[40]

Another discomfort concerns the increased opportunities for "cheating" on limited research, analytic papers by plagiarism, by copying from or modeling papers on other student papers, or by the

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37. See Jay Feinman and Marc Feldman, *Pedagogy and Politics*, 73 Georgetown L. J. 875, 879-82 (1985); Motley, 10 Nova L. J. at 723-24 (cited in note 33).

38. At the beginning of the semester I mention the possibility of recommendations based on my evaluation letters, which even for C+ or C grades may contain many positive observations about a particular paper.

39. For reasons why we should not think this, see Richard L. Abel, *Evaluating Evaluations: How Should Law Schools Judge Teaching?*, 40 J. Legal Educ. 407 (1990); Philip C. Kissam, *The Decline of Law School Professionalism*, 134 U. Penn. L. Rev. 251, 272-75 (1986); Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 Am. U. L. Rev. 367, 406-410 (1990); Paul Ramsden, *Evaluating and Improving Teaching in Higher Education*, 2 Legal Educ. Rev. 149, 160-165 (1990-91). Of course, faculty members who obtain the highest marks on student evaluations are likely to think that these evaluations are worthwhile measures (how could they not think this?). And law school deans who must evaluate the teaching quality of faculty differentially and have only student evaluations with which to work probably believe that their "readings" of the evaluations generate worthwhile measures of quality. But see Kissam, supra.

40. On the basis of decidedly mixed student evaluations with many students disliking the discussion sessions and others asking for more discussion, I am contemplating experimenting with a new procedure. I would offer a "black letter law" lecture the first day of the week, in part to assist students in reading Tribe's treatise. On the second and third days, with students submitting statements that outline arguments on both sides of a controversial issue identified in the day's readings, I would provide "lecture/discussion" sessions aimed at developing the best possible arguments on these issues.

employment of substitute writers. Besides careful readings of the papers, I rely on two devices that should mitigate this problem. I change the approved topics list from year-to-year and eliminate more popular topics from prior years, thus reducing the possibility of copying from papers that are "still in the building" as it were. Perhaps more importantly, the statements and questions submitted for class discussions provide some evidence of each student's independent writing and thinking abilities, and this evidence can serve as a check against later submissions of papers that might have been plagiarized, copied, or written by a substitute.[41] Moreover, we have the mechanisms of honor codes and pressure from one's competitive peers to help guard against such cheating.

The most significant discomforts I have experienced concern what I call the subjective downsides of my role as an evaluator of the limited research, analytic papers. My concerns are not with applying qualitative standards, or with the minimal extra effort that is entailed in writing short notes to explain my application of these standards. Such judgments and feedback may be more complex, difficult, or time-consuming than "objective" grading of final examinations, but these kinds of judgment and feedback to students are implicated in our obligation to teach each of our students as best we can. Nor are my concerns about possible fears or perceptions that a non-anonymous grading process may be administered unfairly. To assuage this fear (among students or myself), I keep before me two analogies: law firm partners evaluating the written work of associates for the purpose of salary or partnership decisions, and judges evaluating the briefs of opposing counsel. My concerns instead are with two more diffuse aspects of the complex "power/knowledge relations" that exist among law faculty and students.[42]

First, my ethical obligation to evaluate the limited research, analytic papers under our school's implicit grading curve of an overall B average for large classes is bothersome at times. The limited research, analytic paper projects often engage me as a coach (or limited partner) in trying to help students think through and write about complex, difficult and intriguing projects in the best possible way. There is then, inevitably, something of myself in many final papers. More importantly, most papers in the past two years have presented convincing evidence of a very substantial research effort, thoughtful analysis, and clear writing about complex and contradic-

41. See Kissam, 40 Vand. L. Rev. at 160-61 (cited in note 15).

42. On the nature of power/knowledge relations that arise in modern professional institutions and make possible much professional knowledge and power, see Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Colin Gordon tr., Pantheon, 1980).

tory constitutional arguments. Yet at grading time I am constrained by our school's implicit grading curve to award only a few A or B+ grades and to give mostly Bs or C+s in order to generate an average grade that approximates those in other courses. Fairness in grading among different courses and among different sections of the same course, a concept to which I am attached, competes here seriously and anxiously with the idea of fairness in appropriately evaluating good individual work, a concept to which I am also attached. I have no easy answer for this discomfort, although perhaps additional experience will either increase or dissipate the tension between these two very different conceptions of grading fairness.

Second, the analytic paper project transforms the presence and exercise of power by a faculty member over his students in some interesting and potentially troubling ways. Students no longer have the same incentives to "read" the nuances of professorial discussions in the classroom as indications of possible questions or best answers on final examinations, but they have new incentives and opportunities to seek guidance from me in how to write a paper for the best possible grade. In general these incentives and opportunities improve the educational process for reasons I have suggested earlier. However, each year a number of students appear to be congenitally confused or uncertain about how to proceed with any "next step" in constructing their papers, and they seem to spend inordinate amounts of time in my office worrying about their next steps. Other students appear to be more deliberately focused upon trying to elicit some prior sign from me that if they write such and such it will be an A or B paper.[43]

These attitudes of confusion or solicitation can lead to problematic conversations, although I have been learning to treat these situations by employing another partner-associate analogy. I remind myself, and my students as appropriate, that the limited research, analytic paper project is training for a professional practice in which they will be expected to ask useful and relevant questions of senior lawyers for guidance but not for the purposes of obtaining either detailed instruction manuals or preliminary evaluations of the quality of their work. This then is training in a kind of profes-

43. Kent Bunting has suggested to me that these students, especially the former group, may be disoriented by a sense that the limited research, analytic paper involves "originality" instead of the "imitation process" that they are familiar with from examination experiences, even those of law school. This project does involve a *different kind* of imitation, that of modeling arguments from constitutional arguments that have been made by others, and I hope in the future to be able to explain this difference between different kinds of imitation more clearly to my students than I have in the past.

sional uncertainty. I am not sure how my students understand this analogy, but it seems to me an instructive one. I intend to employ this analogy more frequently, both to encourage uncertain students and to discourage those who only want to "read" me for the purposes of obtaining a certain grade.

There are then some disadvantages and discomforts from teaching constitutional law differently. These disadvantages pale, I think, in view of this design's considerable advantages. I recommend that we experiment with and share ideas about teaching constitutional law (and other doctrines too) by means of student-oriented research and writing projects.

APPENDIX

Note A

Guidelines for Limited Research, Analytic Papers

The following passages are excerpts from the "writing guidelines" that I distribute at the beginning of the semester. I can send a copy of the guidelines to anyone who asks.

Objectives

A primary objective for law school writing projects should be to conduct research and write a well organized paper on a topic that involves some kind of *complexity* (there are different levels) and some kind of *contradiction* (there are several kinds). My goal is to help each of you develop and complete a research and writing project that deals successfully with complexity and contradiction.

The Bibliographic Essay or Prospectus

A bibliographic essay is an essay, not a bibliography! This essay should be three (3) typed double-spaced pages that report on your research to date. *This report should include* (1) a statement of the question or questions you propose to ask and resolve, and (2) a summary of the major works (cases and secondary literature) you have read, with brief informal citations to these works. The report may also indicate open or difficult questions raised by these materials, further research to be done, and other short or tangentially relevant materials you have studied. You may attach a bibliography but please *do not substitute a bibliography* for the essay.

The Strong Introduction

Your paper *must have* what I call *a strong introduction*; a strong introduction should include:

1. a statement of the purpose, the main point, or focus of the memorandum; in other words, a specific statement of the question you propose to address;
2. a statement of the major parts of your memo, which indicates adequately the relationships between these parts or, in other words, the organizing principle behind your paper;
3. a statement of your major conclusions, findings, or thesis—a partner in my former law firm once told me, "Flip, lawyers don't write mystery stories;" in other words, this strong introduction should help *focus* both your attention and your reader's attention by providing a context and standards of relevance that will help both to write and to read the paper;
4. for an eight page paper, this strong introduction probably should be limited to a short paragraph of three or four sentences!

Let me be clear about this requirement. A strong introduction is not "the truth" about expository writing; it is not the only correct way to write. It is, however, a helpful technique for organizing one's thoughts about complex subjects, and you should try this technique at least this one time.

Some Advice on Form

All writing should have *good form*. What good form is undoubtedly varies from genre to genre, subject to subject, writer to writer, and reader to reader, but I think that one uncontestable definition of good form is the following idea from Kenneth Burke:

'*Form* in literature is an arousing and fulfillment of desires. A work has form in so far as one part of it leads a reader to anticipate another part, to be gratified by the sequence.' Kenneth Burke, *Counter-Statement* 124 (1929).

Note B
Potential Topics for 1992

I. Separation of Powers Issues
   A. Evaluating the Power of Judicial Review
      1. Was *Marbury v. Madison* decided correctly?
      2. Framers' Intent Theory: An Evaluation
      3. Originalism versus Nonoriginalism?

4. Do We Have a Formulaic Constitution?
5. Should Judicial Review Be Provisional?
6. Tribe's Model of Structural Justice (see ch. 17) — A Critical Evaluation

B. Evaluating *Curtiss-Wright Export Co.*
C. Evaluating *Youngstown Sheet & Tube*
D. Constitutionality of the War Powers Resolution of 1973

II. Federalism Issues
A. Federal Power, State Power, and American Indians
1. Evaluating *McIntosh v. Johnson* (1821)
2. Evaluating the Cherokee Indian Cases (1830s)
B. The New Deal Revolution: Should the Supreme Court have withdrawn from review of Congress' powers to regulate?
C. The "Dormant Commerce Clause" Doctrine: An Evaluation
D. Judicial Review of State Highway Regulations: An Evaluation
E. The "Market Participant" Exception to the Dormant Commerce Clause Doctrine: An Evaluation

III. Contracts Clause Doctrine
A. Evaluating *Home Building & Loan Ass'n v. Blaisdell*
B. Evaluating *Allied Structural Steel* and its Progeny

IV. Privileges and Immunities Doctrine: An Evaluation

V. First Amendment Issues
A. State Regulation of Religious Schooling
B. Religious Beliefs and Enforced Medical Care
C. Should Political Speech Be Privileged?
D. Should Subversive Speech Be Protected?
E. Campaign Financing and the First Amendment
F. Should Corporations Have Speech Rights?
G. Regulating Racist Speech—A First Amendment Dilemma?
H. Regulating Pornography Beyond Obscenity?
I. Evaluating *Employment Div., Human Resources v. Smith*

VI. Fourteenth Amendment Due Process Issues
A. Administrative Due Process: *Goldberg v. Kelly*, *Roth*, and their Aftermath: Evaluating the "New Property"
B. Substantive Due Process, 1868 to 1937: An Evaluation

C. Substantive Economic Due Process Doctrine under State Constitutions: An Evaluation
D. Privacy Doctrine, Law & Theory:
1. Evaluating *Skinner v. Oklahoma*
2. Evaluating *Griswold v. Connecticut*
3. A Feminist Analysis of Privacy Doctrine

VII. Fourteenth Amendment Equal Protection Issues
A. Congress' Powers Under the 14th Amendment? May Congress Override or Modify Judicial Interpretations?
B. Gender Discrimination Law & Theory: An Evaluation
C. Regulation of Aliens and Equal Protection Law
D. State Constitutional Law and Public School Financing: Equal Protection Law after *Rodriguez* (e.g. NJ and Tex.)
E. Equal Protection, Local Government Regulations, and Community Institutions for the Mentally Handicapped—Evaluating Contemporary Doctrine
F. Equal Protection and "Exclusionary Zoning"—Doctrine, Theory, and Evaluation (of federal and state doctrines)

Previous Topics

Previous topics that were employed successfully have included Evaluating *Bowers v. Hardwick*, Evaluating *Roe v. Wade*, Evaluating *Mozert v. Hawkins*, Evaluating the Commercial Speech Doctrine, Evaluating the Flag-Burning Cases, Evaluating Free Speech in High Schools, and Evaluating Affirmative Action Theories.

Some topics I have used were not successful because the topic appeared to invite students to write a case note rather than develop competing arguments (e.g., Evaluating the Japanese-American Internment cases), or because the inherent complexity of the doctrine involved too much necessary description of alternative premises and competing arguments for an eight-page paper (e.g., Evaluating Establishment Clause Doctrine), or because a topic proved to be too difficult to allow students to recognize basic competing premises that they might evaluate (e.g., Evaluating the Theory of Constitutional Precedents).

Note C
Qualities of the 1991 Papers

The A and B+ papers generally demonstrated what I would call "theoretical depth" in one or more ways. These papers inte-

grated several types or methods of constitutional argument in a relatively accomplished or comprehensive fashion, or integrated conventional methods of constitutional argument with theoretical perspectives, or more conventionally provided thorough and imaginative arguments from relevant precedents on both sides of the issue.

The B papers were well-organized and clearly written and they provided evidence of effective research and good understanding of the basic arguments on both sides of a well-defined premise choice. The C+ papers tended to be well-written and provided evidence of much effective research and good understanding too, but typically these papers were poorly organized to present systematic and persuasive arguments or reflected a misunderstanding of this part of the assignment. On the whole, it is my reading of these B and C+ papers in comparison to my reading of B and C+ bluebook exam answers that lets me believe that the limited research, analytic paper project may teach many students to think more deeply about constitutional doctrine than an examination course does.

The C papers fell into two categories. Some papers seemed clearly written but provided little evidence of much research beyond reading the opinions in a leading case or a single law review article. Other papers provided partial evidence of the kind provided by B and C+ papers but were poorly written or poorly organized. In reading both types, one sensed that these were papers written at the last minute much like a final examination, and in general I would not claim that the C papers evidenced much good thought about constitutional law.

These assessments, of course, are subjective ones and perhaps self-promoting as well. The best way to test these assessments might be similar experiments by others that attempt to develop some intersubjective or collective qualitative evaluations of what can be learned through limited research, analytic paper projects.