

## Teaching Constitutional Law: Homage to Clio

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Constitutional Law is a required course in the typical law school curriculum. Yet relatively few students will ever litigate first amendment or equal protection cases; and by the time they do so the law may well have changed dramatically. What then is the point of the course?

Most of us would answer that our goal is not so much to prepare students for practice as to give them a liberal education in law. Our graduates become judges and governors, authors and reformers. They are pillars of the community, with an extraordinary role in public affairs. Therefore, every lawyer ought to appreciate our constitutional heritage. This, more than any other rationale, justifies a long, required course in constitutional law.

One implication of this rationale is that our students should learn constitutional history. Any compelling reason for studying contemporary constitutional dilemmas is an even better reason for studying their origins, their relations to major currents in American life, and the lives of the greatest Justices.

How well do we achieve these larger purposes? Under the auspices of the American Bar Foundation, I composed several problems designed to measure students' legal analytical skills.<sup>1</sup> These tests were given to samples of the third-year classes at three distinguished law schools.<sup>2</sup> At each school the students who participated had, on the average, somewhat better academic records than their class as a whole. At the last minute, I added several multiple-choice questions about famous twentieth-century

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1. The results of that study will be published in 1984. It will discuss the methodological details such as how the students were selected in greater detail than seems necessary here. I am grateful to the ABF's Executive Director, John Heinz, for permission to publish the constitutional quiz separately, and to the ABF for providing the funds for the project.

2. All three would be at least plausible candidates for inclusion on a list of the best twenty law schools, though not near the very top of the list. I assured them of anonymity in order to obtain the fullest administrative cooperation. I did indeed obtain it, and for this I am indebted to several individuals who must be nameless here.

About forty students took the test at each school.

Supreme Court Justices,<sup>3</sup> on the hunch that some of the answers would be interesting.

Here are the results.

1. Asked whether Harlan F. Stone "was a member of the Warren Court's liberal wing," only a few students (3%, 12%, and 13% of those who took the test at the three schools) answered in the affirmative. Another alternative, that he "generally voted against New Deal legislation that came before the Supreme Court in the thirties," received the votes of 24%, 42%, and 21% of the students. The most attractive false proposition, that he "was a New Deal Democrat, appointed to the Supreme Court by FDR," got 54%, 35%, and 45% of the votes. "None of the above" was chosen by only 19%, 12%, and 21%.

Conceivably, a few students were confused by the fact that FDR selected Stone to be Chief Justice. Still, it seems clear that most of them did not understand the relationship between Stone's political beliefs and his judicial performance. I wonder whether we ought to discuss judicial restraint, surely a pervasive topic in every Constitutional Law course, without historical examples, including (in their varying fashions and degrees) Stone, Holmes and Brandeis. Should we leave students with the impression that when these Justices dissented from the Old Guard's decisions it was generally because all three simply favored the legislation being challenged?

2. The next question confirmed that many students were indeed ignorant of the history of the controversy about judicial restraint. They were asked whether Holmes, Frankfurter, both, or neither "is generally thought of as an advocate of 'judicial restraint.'" Holmes (alone) was selected by 19%, 37%, and 22%. Frankfurter alone got votes from 38%, 37%, and 43%. "Neither" was marked by 22%, 16%, and 12%. The rest said "both." Thus, at each of the schools a majority rejected the association between Holmes and advocacy of judicial restraint; at one school a majority also rejected this characterization of Frankfurter.

The explanation, perhaps, is that most students forget the *Lochner* dissent (it won't be on the exam) and have encountered no other memorable examples of Holmes's deference to legislative

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3. I asked ten questions, two of which I subsequently discarded as unfair. One of the discarded questions contained the proposition that Charles Evans Hughes "was one of the conservative justices who consistently voted against New Deal legislation in the Supreme Court." I meant this to be false, but have decided that "consistently" is too ambiguous. (On the same question, 24%, 21% and 19% indicated that he "was Chief Justice during the years of the Eisenhower Presidency," while 3%, 21% and 8% thought that he "was a famous constitutional lawyer though not a judge.")

judgments. They probably recall some of his vivid first amendment opinions, and many may think of Holmes as William O. Douglas with a mustache. They are less confused about Frankfurter, presumably because his quarrels with Warren Court activists are a prominent part of the typical casebook—a rather ironical result, since Frankfurter's behavior was more ambivalent than Holmes's.

3. Concerning Holmes's social beliefs, I changed the question after results at the first school revealed that 84% knew he had written "a famous book about the common law." At this school, no one said that he "believed as a private citizen that preventing war was mankind's most urgent priority;" 5% chose the assertion that he "believed that more equitable distribution of wealth should be one of America's major domestic priorities;" and 11% checked "none of above."

At the other two schools, I substituted "both of above" for "wrote a famous book. . . ." At one of these schools a majority checked either "preventing war" (8%), "more equitable distribution of wealth" (20%) or "both of above" (32%). At the third school, most (62%) chose "none of above," and the most popular mistake ("preventing war"—19%) was hardly shocking.

4. The students were asked whether Earl Warren "advocated, during World War II, that Americans of Japanese ancestry be interned in special camps," or "had been governor of California," or both or neither. "Neither" got the votes of 30%, 44%, and 12%. "Both" was chosen by 48%, 28%, and 58%. If we add the "both" votes to the votes for the detention camp alternative, we find that 54%, 35%, and 81% were aware of his advocacy of internment. Most knew that he had been a governor of California: 65%, 49%, and 64%.

5. Most students (62%, 53%, 69%) knew that William H. Taft "was a Chief Justice of the United States Supreme Court." A few (8%, 7%, and 8%) thought that he "was, in his time, one of the leading advocates of 'judicial restraint.'" Another small group (8%, 9%, 8%) identified Taft as "one of the 'Nine Old Men' who usually (though not always) voted to strike down New Deal legislation." Fairly substantial minorities (22%, 30%, 15%) decided that he "was a President who appointed some conservative justices but did not himself serve on the Court."

6. Asked whether Hugo Black "was a Southerner," or "joined Brandeis in several first amendment dissents," or both, or neither, the students responded as follows. That he was a Southerner: 30%, 28%, and 38%. That he joined Brandeis in several

first amendment dissents: 8%, 28%, and 10%. That both propositions were true: 32%, 23%, and 33%. Thus, sizeable minorities—at one excellent school 49%—were unaware of Justice Black's southern origin; and at least forty percent at each school thought of him as upholding civil liberties with Brandeis.<sup>4</sup>

Is this so surprising? Many law students majored in music, accounting or some other field unrelated to American history. At law school they have little incentive to pay close attention to the dates of opinions, much less the biographies of leading jurists.

7. The students were well-informed about certain aspects of Justice Frankfurter's life. Given the propositions that he "was both Jewish and an immigrant to the United States," that he "had been a law professor," both of the above or neither of the above, most (83%, 53%, 69%) chose "both of the above"—not a bad performance, since they might have been expected to be unaware that he was an immigrant, if not that he was a former professor.

8. The next question asked whether Brandeis "believed that, since modern capitalism requires large corporations, we also need a larger Federal Government to regulate the economy," or that "technical barriers to constitutional litigation like 'standing' rules are generally excessively formalistic excuses for avoiding the socio-economic merits of cases," or both, or neither of the above. Substantial minorities (41%, 33%, and 20%) correctly said that he entertained neither belief.<sup>5</sup> That he believed both propositions was the view of 30%, 19%, and 33%. Adding to these the handful who singled out big government as the true answer, we find that 35%, 28%, and 42% were unaware of Brandeis's strictures about the curse of bigness. By a similar process, we learn that majorities of 54%, 59%, and 72% mistakenly thought that he disliked rules limiting access to the courts.

Since there was no penalty for guessing, these figures presumably exaggerate the students' understanding. Be that as it may, their performance was spotty. I think we can safely assume that they would not have done better in response to more sophisticated questions. In any case, shouldn't we reconsider the purposes of the course? It will be said that we haven't enough time to cover much history. If that is so, wouldn't it make more sense to have a required first-year course in constitutional history, followed by

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4. In view of the brief overlap of their terms, this part of the question was flawed, although it seems unlikely that the results were significantly affected.

5. John Cound has unsuccessfully tried to persuade me that this question was unfair, on the grounds that a respondent is entitled to concentrate on the conclusion (about big government) rather than the preceding proposition about big business (I disagree) and this latter proposition (as of, say, 1932) cannot be called simply true or false.

upper-class electives on contemporary doctrine?<sup>6</sup> Which is more important for our graduates to know, the current list of "suspect classifications" or the saga of legal oppression and emancipation? The latest dirty movie decision, or the battle over *Ulysses*? More interpretations of the tenth amendment, or the lives and thoughts of Black and Warren, Stone and Frankfurter, Holmes and Brandeis?

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6. General courses in legal history, while desirable, would not be an adequate substitute for the course I envision on the development of fundamental rights, although the latter might well include English antecedents of our rights, as well as some comparative law. A better approach would be to prescribe certain prelaw courses including constitutional history. That might be my choice if legal education required only two years. But in the context of a three-year curriculum, with considerable inefficiency in our teaching methods, it is more difficult to justify mandatory prelaw studies.