DOES "PRACTICALITY" HAVE A PLACE IN THE "CANON OF CONSTITUTIONAL LAW"?

*Russell L. Weaver**

In this article, I talk about a hodge-podge of things that I do in my constitutional law classes and books. I am not sure that they rise to the lofty title of "The Canon of Constitutional Law," but I view them as worthwhile and worth discussing.

I. DIALOGUE

In our constitutional law casebook, one thing we do is to engage in a dialogue among the authors.[1] I cannot take credit for this innovation; it was Don Lively's idea. We have a diverse group of authors (racially, sexually and ideologically) with quite different perspectives on constitutional issues, and this diversity produces very interesting discussions. We hope that the discussions benefit our students.

For example, the debate on affirmative action is intense.[2] Don Lively questions the "wisdom of reliance upon legal innovation to fix an acute societal pathology."[3] I question the permissibility and desirability of race-based affirmative action, and argue that it should be replaced by programs that favor the economically disadvantaged.[4] I point out that such programs would have greater impact, yet "disproportionately favor" African-Americans and Hispanics, but would "generate less hostility since they function on a race neutral basis."[5] Dorothy Roberts and Phoebe Haddon articulate passionate defenses of race-based

* Professor of Law, Louis D. Brandeis School of Law, University of Louisville.

1. See Donald E. Lively, et al., *Constitutional Law: Cases, History, and Dialogues* (Anderson, 2d ed. 2000).
2. See id. at 808-14.
3. Id. at 809.
4. Id. at 809-10.
5. Id. at 810.

affirmative action programs.[6] Bill Araiza argues that "as long as there is a reasonable showing of real, explicit or structural historical discrimination with likely effects persisting to the present day, the equality principle of the Fourteenth Amendment must allow legislative attempts at focused race-conscious relief."[7]

II. BLENDING THEORY AND PRACTICE

One of my constitutional law objectives is to blend theory and practice. I have done this for many years in my non-constitutional law classes.[8] In recent years, I have carried this blending over to my constitutional law classes and to a forthcoming First Amendment casebook.[9]

Why do I worry about "practice" and "practical things?" After all, constitutional law is one of the few places where we can focus on the arcane without fear of criticism. I do so for a variety of reasons. First, in light of the MacCrate Report,[10] I have tried to integrate "skills training" into substantive classes. I realize that the MacCrate Report seeks more, but I place my students in "practical situations" so that they are better prepared for practice. Second, and perhaps more importantly, I believe that practical problems reinforce theory and help students take the theory to a deeper level.

Permit me to provide an example. In Kentucky, the establishment clause is a hot issue. Despite the United States Supreme Court's holding in *Stone v. Graham*,[11] one Kentucky school district refused to take down the Ten Commandments. During the last year, nine other districts have re-posted the Commandments. From a "theory" perspective, one can easily say that all of these districts are acting unconstitutionally. Some of the districts have tried to distinguish *Stone* using what I con-

---

6. Id. at 810-13.

7. Id. at 814.

8. See generally Russell L. Weaver, et al., *Modern Remedies: Cases, Practical Problems and Exercises* (West, 1997); William F. Funk, Sidney A. Shapiro, and Russell L. Weaver, *Administrative Procedure and Practice: Problems and Cases* (West, 1997); see also Russell L. Weaver, et al., *Criminal Procedure: Theory Practice and Procedure* (forthcoming West, 2001).

9. See Russell L. Weaver and Arthur D. Hellman, *The First Amendment* (forthcoming, Lexis Pub., 2001).

10. See Robert McCrate, Chairperson of Task Force, *Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (American Bar Assoc. Sec. of Legal Educ. and Admissions to the Bar, July 1992).

11. 449 U.S. 39 (1980).

sider to be makeweight arguments (i.e., the postings are permissible because copies of the Ten Commandments are paid for and posted by private groups). Nevertheless, those who want to challenge the postings face intense practical problems. Many of the districts where the Ten Commandments are posted are small communities with strong social pressures, and no one who has standing is willing to be a plaintiff. So, I ask my students to assume that they are in practice, and ask them how they can remedy this unconstitutional practice. Are there ways around the standing problem? For example, is it possible to sue the Kentucky Department of Education and join individual school districts as defendants? Are there other ways to obtain standing? Unless these "practical" problems can be solved, *Stone*'s injunction is meaningless. Students need to realize this. They also need to think about whether, if no one in the community objects, we should care.

In the last week, a bill was introduced in the Kentucky Legislature that would authorize a school district's voters to decide whether the Ten Commandments may be posted in classrooms in that district. Does this bill make a difference? If Kentucky passes the law, might it be possible to challenge the law and join individual districts?

For a second example, I use a state park that has erected a Christmas display on park grounds. The display contains non-Christian displays including Frosty the Snowman, Rudolf the Red-Nosed Reindeer, Santa Claus, Mrs. Claus, Santa's house, elves, decorated Christmas trees (decorated in a secular fashion), along with lighted reindeer, candy canes, and a sleigh. This is a large display, which covers several miles, and visitors drive through it. A visitor complains that the park has taken the "Christ out of Christmas." She asks the park to include a creche containing the baby Jesus surrounded by the three wise men and camels. Alternatively, if the park is unwilling to erect the creche itself, she would like for the park to permit her to erect one on a piece of land set aside for that purpose. The woman is supported by a Christian legal foundation which intends to sue if her demands are not met. I ask the students to assume that they are representing park officials, and to think about how they would respond to the demands. May the park erect a creche as part of the display? May it allow the complainant to set up her own display? What are the downsides of each approach? What happens if the park allows the complainant to erect a display, and then the Ku Klux Klan asks for permission to put up a cross?

Would the park have to grant the Klan's request, or could it grant the complainant's request and deny the Klan's? So, how do you advise park officials about how to proceed?

In the affirmative action area, I ask students to examine and evaluate the University of Louisville's affirmative action program. For students, those programs include race-based scholarships available only to African-American students, and a doctoral aid program which provides tuition reimbursements and stipends to African-Americans pursuing advanced degrees. On faculty hiring, the University's policies require the hiring of African-Americans. If a recruitment committee is under an affirmative action obligation, and it finds a "qualified" African-American candidate, it is required to hire that candidate (or another African-American candidate). The Committee is not allowed to make comparative assessments between African-American candidates and caucasians (or, for that matter, members of other races). It does not matter whether the Committee views the African-American candidate as "barely qualified" and some of the other candidates as "outstanding" or "sensational." The Committee is still required to recommend that the African-American candidate be hired.

As a general rule, after my students read the University's official policies, many of them are angry. They feel that the programs unfairly discriminate against some citizens based on their skin color, and that the programs are therefore unconstitutional. Initially, I ask students to focus on the theoretical, and I try to get them to do a number of things. First, I want them to consider the history of discrimination in Kentucky. Most of my students are too young to have experienced either slavery or segregation. However, they do have a background of personal experience relating to race. In addition, there is a consent decree between the Commonwealth and the United States Department of Education which details the history of segregation in the state. So, I ask students to consider the decree, which states that there were segregative acts through the 1950s, and that the system was not desegregated until the early 1980s. Second, once students understand the history, we talk about a variety of other theoretical issues: Why did affirmative action programs come into existence? What "ills" were they trying to remedy? Have the programs remedied those ills? Effectively? Ineffectively? At what costs?

Finally, I present students with problems. For example, at the University of Kentucky (UK), a Hispanic student was turned down for a "minority" scholarship on the basis that such aid is only available to African-Americans. The Hispanic student wanted to sue. I ask the students to assume that they are in practice, and encourage them to think about how they would handle this case. How would they begin? Do they need to investigate the facts? If UK does discriminate against Hispanics, is the discrimination justified or permissible? What must be shown in order for it to be permissible? Is it enough to show that there is a history of discrimination against African-Americans in higher education in Kentucky? Does it matter how long ago that discrimination occurred? Does it matter whether there has been discrimination against Hispanics in higher education in Kentucky? Would it matter that "minority" scholarships are being given to African-Americans from California or New York (who, presumably, did not suffer discrimination in Kentucky)?

Finally, if students conclude that UK is in violation of the Constitution, I want them to think about how they would approach the matter in practice. Can they simply file suit against UK? Do they have to communicate with UK first? Even if communication (i.e., a demand letter) were not required, is there something desirable about "talking" before suing? Might it be possible to resolve the matter without litigation?

III. EXERCISES

We are also including exercises in our forthcoming First Amendment casebook. We try to put students in situations like those they may encounter in practice, and ask them to prepare written documents relating to those situations. The course is graded on the basis of class participation and exercises.

By the time students take constitutional law at my school, they are second year students. They have already taken lots of exams, and have demonstrated many of the basic skills tested by such exams (i.e., the ability to "spot" legal issues, to "state" their knowledge of the law, and to accurately "apply" the law to these issues). Since many of these students will be practicing law in a short time, I want them to work with the law in simulated situations. I present students with a constitutional law problem and ask them how they would handle the problem.

For example, I might present students with an establishment clause problem. The City of Louisville recently adopted an ordinance prohibiting discrimination in housing and employment on the basis of sexual preference. A local doctor who is a devout Christian sincerely believes that homosexuality is "sinful" and is unwilling to hire a homosexual. The doctor wants to file suit against the ordinance because it prohibits him from discriminating based on sexual preference. I ask students to assume that the suit has not been filed, and that the doctor has come to their law firm for advice. A senior partner has asked the student to write a legal memo evaluating how to best represent the doctor's interests.

I hope that students will discuss a number of legal issues. First, since the doctor does not presently have a member of the protected class working for him, and has not received a job application from one, I hope that students will talk about potential standing problems. Whether or not the ordinance transgresses the Constitution, should suit be filed now? Must the doctor wait until a member of the protected class applies for a job, or until he discovers that a member of the class is working for him? I also want students to talk about free exercise issues. Does the Free Exercise Clause protect the doctor? Are decisions like *Smith* applicable? Can they be distinguished? Under the Kentucky Constitution, does the doctor have a stronger claim (the Kentucky Constitution is generally more strict on establishment issues, and more protective on free exercise issues)? So, how should the doctor proceed? In my class, I also spend time talking about dispute resolution issues. I would like for students to evaluate whether they should simply file suit (after, of course, sending a demand letter), or whether it would be helpful to talk with City officials. I want students to think about whether there is a mechanism for seeking exemptions from the law's requirements.

The potential downside of this testing method is that students may not study the substantive material as well as they would for a final exam, and therefore will not come away with as good an understanding of the basic material. As a result, my dean, who also asks students to do take home exercises in another substantive course, supplements the exercises with a final exam designed to test the student's knowledge and understanding of basic doctrine. I do not believe that an exam is necessary. A properly constructed take home exercise requires a great deal

of work, and can require intimate knowledge of the basic doctrine.

Does the take home exercise produce different outcomes? In other words, do some students do better on a take home exam than they would have done on a traditional final exam? My sense is "no." Students who do well (or poorly) on a traditional final exam do similarly on a take home exam. The reasons are obvious. Students do better on final exams because they have better reasoning abilities and better writing skills. Students who do poorly generally lack these attributes. These differences reveal themselves in either type of testing mechanism.

Many years ago, at a New Law Teachers' Workshop, a professor told an interesting story about law school grading. A number of professors at different law schools gave the same exam to their students. After the exams were graded, the exams were sent to the other professors for regrading (without any indication of the grade given by the first professor). The study found that professors at the various schools gave quite similar grades. Afterwards, the same exams (again, without any indication of the grades given by the professors) were given to non-law professors, non-lawyers to grade. Once again, the grades given were very similar to the grades given by the professors. The *really* interesting thing about the study was that the testers also asked an English Ph.D student to take the exam. This was a woman who was not a law student, and who had not taken the course. Even though students who sat through the course earned "Ds" and "Fs" on the exam, the Ph.D student earned a low "C."