TEACHING CONSTITUTIONAL LAW: SOME USES OF THEMES

Carl Auerbach

Since many of our readers are teachers of constitutional law, we try to include something about teaching in every issue. Here is an interview with our distinguished senior colleague, devoted to a few of the problems of the Constitutional Law course.

CC: You know the perennial arguments about whether Constitutional Law should be a first-year course or an upper-class course. Where do you stand on that one?

CA: I believe very strongly that the law-school curriculum still has too much private law. Constitutional Law belongs in the first year, because it's a basic course and so different from the private law courses. It's also a good transition course from college to the first year in law school because it deals with subject matter that should not be entirely unfamiliar to college graduates.

CC: Which casebook do you use, and why?

CA: I now use Gunther, but I don't have a very good reason for not using some others. I used the Lockhart-Kamisar-Choper book for many years and enjoyed it. I switched to Gunther only because a colleague was using it. Without undertaking a comparative analysis, let me say that I particularly like two features of the Gunther casebook: (1) the cases aren't overedited; and (2) excellent textual notes furnish historical background that I appreciate. I should add that students have been unhappy with both casebooks I have used. The volume of cases is now so great and each noteworthy case so long that the task of editing has become almost impossible. I always manage to refer to passages in class that the editors have chosen to omit.

CC: What's the best topic with which to begin the course?

CA: I begin with Gunther's pages 1-35, covering *Marbury* and its implications. Then I go to pages 1604-1614 (advisory opinions) because Marshall's argument in *Marbury* based on the judicial responsibility for deciding cases naturally leads to the topic of advisory opinions. Then back to pages 36-48 (Supreme

Court authority to review state court judgments), 48-57 (congressional power over jurisdiction of federal courts), and so on.

CC: When do you get to standing? Some of us have wondered whether justiciability should be postponed until fairly late in the course. It's certainly a *logical* topic after *Marbury*, but it's tough *pedagogically* to introduce it so early in the course. We've even considered some radical changes, such as beginning the course with the Bill of Rights.

CA: I don't treat standing as a separate topic; I take it up when it is important for an understanding of substantive topics such as Congress's spending power.

I would not approve beginning the course with the Bill of Rights. It is important that the student first think about the role of the Supreme Court in other areas, and particularly about federalism and the separation of powers, before the issues raised by the Bill of Rights are presented. Beginning with the Bill of Rights is sometimes seen as a way to capture the students' interest at the very outset of the course. But I think it is a "cop out" from the effort to make other matters interesting to the student, an effort that I am certain can be successful.

CC: How do you deal with the cynicism, or "legal realism" or whatever you want to call it, that so many students acquire after studying constitutional law for awhile? Or isn't it a problem?

CA: It's a common misconception that private law is more rigorous than constitutional law. You can be very rigorous in analyzing constitutional cases—it's just as good for teaching legal process as private law courses. And private law courses can also be usefully taught with a "legal realist" approach—to break down the idea of fixity and certainty in the law and to stress the importance of "policy"—notions of justice—in every branch of the law.

CC: Pursuing that a little further, are there any places in the course where you try to impart the idea that the wording of the constitutional text is or ought to be decisive?

CA: That's an interesting question, which raises the fundamental issue of the role of the Supreme Court in our society. In my opinion, some parts of the constitutional text must be given an historical meaning. It's interesting to ask why the Court approaches some parts of the text that way but not others. I'll have to admit that the Court has destroyed a lot of my best examples of clauses that ought to be given their historical meaning. I felt that way about "cruel and unusual punishment," for example—it's such an archaic term that I thought it should be given its archaic meaning. And who would have predicted that the Court would

say a "jury" may consist of fewer than twelve persons? We have a "living" Constitution, indeed.

CC: Maybe we should ask about some particular topics. For example, what do you do with the abortion cases? (There's a recent book, reviewed in this issue, that offers an interesting theory about the motivations of participants in the battle.)

CA: Throughout the course, you have to decide what themes you're going to emphasize in particular contexts. Otherwise, class discussions are likely to be too aimless. The abortion decisions bear upon many of the themes I like to pursue.

First, there's the place of the Supreme Court in American history—most casebooks are weak on that. (And historical eras don't correspond to the tenures of the chief justices, as some writers imply.) To what extent can we attribute the abortion decisions to developing constitutional doctrine? Or to changing conceptions of the role of women in our society?

Second, what is the function in a democracy of a Supreme Court that has authority to declare acts of Congress and the states unconstitutional? Did the Supreme Court overstep its proper bounds in the abortion decisions? Prior to *Roe*, was the political process closed to those favoring the abolition of anti-abortion laws? Does the Supreme Court make sense when it defers to legislative judgments in cases involving "economic" or "property" rights, but not "human" rights? Is the distinction justifiable?

Third, what fundamental values does our constitutional law reflect? T.R. Powell, my constitutional law teacher, used to say that the Court is the only authoritative political science department in the country because it not only discusses how choices are made between competing values but actually makes the choices.

What fundamental values are reflected in the abortion decisions? Why did the Court make the choice it did between the values that come into conflict in these decisions—a choice that was so difficult because each of the conflicting values is so important?

Class discussion of the abortion decisions can be made especially valuable by asking students who favor them to try to persuade their classmates who oppose them that they are mistaken and vice versa. This can lead to the very important question of how a democratic society should conduct a dialogue as to the respective merits of competing values, a question that loomed very large in the recent presidential campaign.

Religion, of course, may properly be the source of one's moral values and ethical beliefs. But is it healthy in a democratic

society for people to defend these beliefs and values in the public arena solely on the ground that their religion commands them? That the Pope says so?

Fourth, what are the "process" aspects of constitutional adjudication? For example, how does and should the Supreme Court determine the "legislative" facts underlying its choice of values? The abortion decisions provide excellent material for the discussion of this issue. Judge Friendly, you know, criticized the Court in *Roe v. Wade* for not informing the parties beforehand of the "legislative" facts upon which it was relying and giving them an opportunity to refute or support them. How should the Court decide when "life" begins? When "personhood" begins for purposes of the fifth and fourteenth amendments?

Fifth and finally, what is the impact on society of particular constitutional decisions? What has been the impact of the abortion decisions? Law teachers do next to nothing to assess the impact of the Court's decisions. Such assessment is also necessary to evaluate the place of the Court in our history.

So you see the abortion decisions provide excellent opportunities for pursuing every major theme I think significant for an understanding of constitutional law.

CC: To switch to something more prosaic: do you cover state taxation of interstate commerce?

CA: No, because Gunther doesn't have anything on it. I used to love teaching it, but I am not certain students shared my love. I used this subject matter to demonstrate that the Court sometimes develops constitutional doctrines that are completely divorced from economic reality.

CC: Do you deal at all with state constitutional law?

CA: Only tangentially. For example, in *Minnesota v. Clover Leaf*—the plastic milk container case[1]—the Minnesota Supreme Court declared a state statute unconstitutional on *federal* equal protection and due process grounds. The company did not argue, and the Minnesota Supreme Court did not hold, that the statute was invalid under the state constitution's due process clause or equal protection doctrines. So the state attorney general obtained review by the U.S. Supreme Court that overturned the Minnesota Supreme Court's reading of the U.S. Constitution. So the case gives students a beautiful tactical lesson that I emphasize. Practitioners must become accustomed to raising state constitutional issues.

1. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

In addition, the opinion in *Cloverleaf* reiterates that a state constitution can be stricter than the federal Constitution. This makes it possible to discuss the additional question as to whether state courts should interpret their states' constitutions so as to reach results *more* protective of individual rights than the federal Constitution as interpreted by the U.S. Supreme Court.

This is all I try to do with state constitutional law.

CC: Why shouldn't state courts read state constitutions as they wish?

CA: Well, there's an argument that the possession of a fundamental right should not depend on the state in which one happens to live. The U.S. Supreme Court, therefore, should declare what these fundamental rights are for everyone. People are not enamored with the idea of the states as experimental laboratories for the protection of fundamental rights.

The argument the other way, of course, is that the federal Constitution guarantees only a certain minimum of fundamental rights for everyone and state courts should feel free to interpret state constitutions so as to enlarge these rights.

In any case, I find that this issue interests students and that they divide sharply on it. I think we should do much more with state constitutional law than we do now.

CC: How much time should be spent on the old federal commerce cases?

CA: I spend a lot of time on them, asking why the conservative decisions of the *Lochner* era were wrong. Is it because we now don't share the value they placed on freedom of contract? Or is it because they improperly refused to defer to legislative judgments of policy? These cases are also excellent for a discussion of the basic themes I previously mentioned and set a good stage for the abortion decisions.

CC: Some of your own views of the proper role of the Court were expressed in the book review you did for our first issue. In class, do you explicitly refer to Ely, Perry, and other contemporary theorists of the Court's role?

CA: Yes, indeed.

CC: How do you teach the *Steel Seizure Case*?

CA: Believe it or not, I used to take two weeks on that case, which I believe to have been wrongly decided. I follow Henry Hart's classic analysis of it, which is in the Hart & Wechsler *Federal Courts* casebook. Alan Westin's paperback book on the case provides additional background. I also read to the students the

passages from Truman's memoirs explaining why he acted as he did.

Since Jesse Choper's book appeared, I also use the *Steel Seizure Case* to test his view that the Supreme Court should not get into separation-of-powers issues at all and see what the students think of it.

CC: What about the school busing cases?

CA: My most important goal in discussing that topic is to raise "process" issues. There are significant differences about "legislative" facts in this area. Do blacks favor compulsory busing? Do whites? What have been the consequences of compulsory busing? Does it improve the education of black children? Of white children? Does it contribute to closer relations between black and white school children? What assumptions of fact is the Court making about busing, and are they valid? Consideration of these issues takes us outside the confines of the casebook.

There is also a neglected legal question I like to raise about busing beyond the boundaries of a school district. The Constitution forbids state deprivations of equal protection. In the law of municipal corporations, school districts are just agencies of the state. So why isn't the state depriving black children of equal protection if any school district is doing so and, if so, why can't the state be ordered to adopt remedies that cover a whole metropolitan area?

CC: What themes do you develop in dealing with aid to parochial schools?

CA: That subject is marvelous for exploring the Court's development of doctrine. The decisions can hardly be described as consistent. So one must ask, Why is there so much confusion in this area? It's not due to the justices' lack of awareness of what the Court is doing. But once the Court takes the position that tax exemptions for churches are permissible, what other form of aid is as serious? So it's hard to explain why some other forms of aid are and some are not permissible. And the distinction between the values to be safeguarded by the establishment clause and those to be safeguarded by the free exercise clause becomes blurred. For example, compare the *School Prayer Case* with the *Flag Salute Case.* In the *Flag Salute Case,* the Court did not say that the schools had to abolish flag saluting, but only that the children of Jehovah's Witnesses could not be punished for refusing to salute the flag, but had to be excused from that exercise. In the *School Prayer Case,* the Court required the schools to abolish school-sponsored prayers; it was not sufficient to excuse the children who

did not want to pray. Is there a coherent doctrine that explains the difference between the cases? Free exercise principles do not justify the difference. In the school I went to, nobody paid any attention to a kid who didn't pray, but anyone who didn't salute the flag ran the risk of a beating.

The blurring between free exercise clause and establishment clause values is also exemplified in last Term's decision that a city's inclusion of a nativity scene in its annual Christmas display did not violate the establishment clause.

CC: Do you use the pornography cases to exemplify the need for social scientific data?

CA: Yes, indeed. Also the fundamental values theme. Alex Bickel stressed that pornography detracts from the quality of life, quite apart from any tendency it may have to induce antisocial behavior.

CC: We almost forgot to ask you about Nazi marchers in Skokie.

CA: I'm unorthodox about that issue, which grips students and makes them think deeply about the premises of the first amendment. As you know from my writings, I think it is easier to justify outlawing the Nazi party than it is to prohibit a march of a Nazi party that has not been outlawed. If society doesn't wish to proscribe an organization it's hard to justify discriminating against it when its members ask for a permit to march. Yet the case raises other questions. *Beauharnais* has been assumed to be dead. But Justice Blackmun thought the *Skokie* case should have been used to reexamine *Beauharnais.* Actually, what the Nazis tried to do in Skokie is worse than group libel. The Illinois courts said, in effect, that the Jewish people in Skokie who were too sensitive to witness the Nazi demonstration could stay at home, shut their doors, draw their blinds, and thereby protect themselves from what might otherwise be "fighting words." That's a hell of a solution—it's exactly what happened when the storm troopers took to the streets in Germany. Hitler's successful battle for the streets was pivotal in his strategy for seizing power. So the *Skokie* case has connotations that are very painful for me. And I think these connotations were unjustifiably ignored by the courts. I have no praise for the ACLU in this case.

CC: As the article on pornography in this issue explains, feminists are also trying to revive *Beauharnais.*

We've talked about busing. Now what about affirmative action?

CA: This is an issue that divides students, but which they

are very reluctant to discuss. I begin by asking whether Justice Powell's decisive opinion in *Bakke* makes sense. I agree with Calabresi that it's an invitation to hypocrisy. Law schools disregard the opinion every day, and no one pays any attention. Justice Powell's opinion encouraged this disregard by indicating he would not look over the shoulders of the educational administrators to see whether they were complying because academic freedom was involved. I ask the students whether they are satisfied with this resolution of the issue of affirmative action.

I also use *Bakke* to discuss the validity of the concept of group, rather than individual, constitutional rights. I find that students will express themselves freely on this issue, though many who reject the concept of group rights do not think it necessarily follows that they must reject affirmative action.

CC: Do you discuss the proposed Equal Rights Amendment?

CA: Not at any length. I do raise the question whether the sex discrimination cases in the casebook would be decided differently under the ERA.