

TELLING A CONSTITUTIONAL STORY: EXAMPLES OF CONSTITUTIONAL DIALOGUE

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Most of us teach Constitutional Law because we love it. We are fascinated by the history, the politics, the institutional clashes, and the public values in this arena. It should be easy to share our passion for constitutional law with future lawyers, some of whom will become the next leaders of government and business, shaping our country, with a tremendous impact on the world.

Yet, even in Constitutional Law, we can find it difficult to inspire our students, to engage them fully in our beloved topic. Many things compete for our students' attention: a wide range of legal subjects; jobs, families and other time demands; and vast amounts of information inundating them continuously, particularly through the internet and a range of media. Many of us find that our students are not familiar with major events that shaped constitutional law, including important historical and social events of the past fifty years. These catalysts are meaningful to us; indeed, many of us are personally connected to them. Few students are invested—politically, emotionally or personally—in these developments. Be it the Cold War, the civil rights movement of the 1960s, feminist struggles of the 1970s, or the resurgence of federalism more recently, it is all rather removed history for many of our students. Not surprisingly, they find it hard to absorb how political, social, economic, and other catalysts relate to the major constitutional law decisions they study.

Some of this disconnect is attributable to the generational differences encountered by all professors. However, I believe the disconnect is exacerbated by the snippet-sized, instantaneous focus of current information gathering and reporting, as well as the sheer amount of information our students have absorbed during their lifetimes. When we teach Constitutional Law, we have a particular obligation to bridge this gulf. Social, political, and historical context shapes the development of constitutional law. A student can learn Civil Procedure, ADR, or even Professional Ethics well with only a glimpse of the past: a passing knowledge of common law pleading, colonial arbitral practices, or the precursors to the Model Rules of Professional Conduct. Many courses focus on the present statutory scheme for good reason. While a student can certainly benefit from history to understand the reasons for

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rule changes and to anticipate likely future challenges, teaching my students to contextualize the material is not as pressing when I teach those courses as when I teach Constitutional Law.

A research assistant, whom I hired because she excelled on my Constitutional Law exam, once confided that students resented the heavy reading I assigned in Constitutional Law and the fact that we concentrated on “note” cases more than usual. Later, she and some of her peers realized that they had learned constitutional law principles effectively because we discussed the note cases and thus put the major decisions into a political, social, historical and legal context. As my student wisely said, “[t]he law, like history, is a story to be told, and the best stories are told from cover to cover, not climax to climax.”¹

The note cases help put everything in context. They help create the constitutional story, which often involves a dialogue among a variety of constitutional interpreters. Everything is not resolved by a landmark decision of the Supreme Court. Issues often must be ironed out over time and in response to a variety of events. For example, after a major constitutional ruling, executive branch officials interpret the Court’s decisions, legislatures generate new laws on the topic, people may vote for a referendum on the topic or a related issue, and other courts (state and lower federal courts) interpret the Court’s ruling. Pendulum swings are not uncommon in the areas we cover. We can help our students see the ebb and flow of constitutional law and understand better its contours and potential future currents if we use examples of constitutional dialogue to teach the doctrine.

Constitutional dialogue encompasses a range of activity, from sudden, outright political resistance to a Court ruling to intertwined, subtle developments over time involving economic conditions, social attitudes, and political forces. Constitutional law often develops due to the interplay of Court decisions, resistance and implementation by other branches or political subdivisions, subsequent changes in the law, and lower court rulings that allow an issue to percolate up to the Court in a new factual or legal context. Of course, the Court has many mechanisms to choose from in deciding when and how to address a constitutional issue. It may avoid deciding—or further extrapolating upon—the merits of an issue for a host of reasons, including a desire to avoid controversial, divisive matters, or a desire to defer to other constitutional actors or allow further constitutional dialogue to occur.²

1. Interview with Betsy West Suver, Student, University of Dayton School of Law Class of 2005, in Dayton, Ohio (Nov. 2004).

2. See generally LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW (2001) (discussing the avoidance doctrine and constitutional dialogue examples).

Let me give two examples of how context informs my teaching in Constitutional Law. For a few years, I used the wonderful text by Daniel Farber, Bill Eskridge, and Phil Frickey, in large part because an early chapter focused on a case study of *Brown v. Board of Education*³ to demonstrate constitutional decision making.⁴ The case study begins with the adoption of the Fourteenth Amendment, canvasses the cases leading up to the challenges addressed by the Court in the 1950s, and examines later cases on school desegregation, asking whether *Brown* made a positive difference. The study does not only include Supreme Court cases. Congressional activity and the activity of other constitutional actors is mentioned; empirical integration data are cited.

To inform our discussion of *Brown*, I also read to students an excerpt from one of Judge Abner Mikva's articles.⁵ The article describes Justice Felix Frankfurter's reasoning for delaying decision by the Court in one of the precursors to *Brown* because 1952 was an election year.⁶ Some students are repelled by Frankfurter's direct reference to politics affecting the timing of this landmark Equal Protection ruling; for many, it makes the socially divisive context surrounding *Brown* come alive.

Even dense, difficult cases are often accompanied by a lively political battle that may engage the students. In teaching standing principles, many cover *Allen v. Wright*.⁷ It can be presented as a case challenging IRS policies, with a focus on the basic elements of standing. Certainly, students need to understand that doctrine. By supplying some background information on the growth of "segregation academies" and the showdown between Congress and the executive branch over the tax regulations, students grasp better the reasoning behind the Court's expansion of existing standing principles in *Allen*.⁸ They will be equipped to apply standing principles to future disputes with a more sophisticated understanding of the "socially sensitive issues" and political battle animating that landmark decision.⁹

Federalism decisions are another area where it is helpful to bring in context, including the battles between states and Indian tribes reflected by

3. 347 U.S. 483 (1954).

4. DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (3d ed. 2003).

5. Abner J. Mikva, *The Role of Theorists in Constitutional Cases*, 63 U. COLO. L. REV. 451 (1992).

6. *Id.* at 454–55.

7. 468 U.S. 737 (1984).

8. See generally KLOPPENBERG, *supra* note 2, at 75.

9. See *id.* at 75–83. Chapter 3 contains a discussion of how the Court has developed heightened standing requirements in recent decades in a number of racially charged controversies. *Id.* at 67–92.

cases such as *Seminole Tribe of Florida v. Florida*.¹⁰ When we study substantive due process, I give students a bit of background on the Progressives, the New Deal, and economic and political currents leading up to *Lochner v. New York*.¹¹ By the end of the semester, it becomes a joke between us, as I frequently refer back to *Lochner* when I seek arguments about the appropriate role of the Court. Because the students know a bit about the history, politics, and social currents surrounding *Lochner*, they understand my passion for calling upon it to analyze recent Court decisions. Another former student said: “While you gave history and the evolution of the Court its due consideration, you also demanded that we critically approach the Court’s decisions—not just with regard to mechanics and analysis but perhaps more importantly as to whether the Court had done the right thing. Your approach went a long way towards de-mystifying the Court and subject as a whole.”¹²

My contextualized teaching is informed in part by my scholarship on avoidance and constitutional dialogue. The other driver is the example provided by outstanding constitutional law professors and scholars, including two whom I was extremely fortunate to experience in the classroom. Erwin Chemerinsky excelled at combining coverage and depth. He made sure we understood the doctrine we needed to know for the bar examination and for the constitutional issues a handful of us might encounter in law practice. But his course made a tremendous impact on me because he never shied away from the controversial facts often underlying constitutional decisions—including race, gender, and poverty issues. His eye for the marginalized helped us comprehend some of the important context surrounding the development of various constitutional doctrines. John Jeffries taught me many constitutional issues in Federal Courts. He was a master at emphasizing the role of courts, including the Supreme Court, vis-a-vis other branches. He took potentially dry subjects and enlivened them with note cases and references to the political interchange informing the Court’s positions. Yet he never used the context as an excuse to let us slide by on the tough analytical issues as we discussed the application of standing, abstention, and other doctrines. Others have praised Bert Wechsler, Jim Ellis, Allen Sultan and Rich Saphire. They made history come alive, creating some lawyers who are devoted to reading history or political science works as a hobby. Some of them helped students see the

10. 517 U.S. 44 (1996).

11. 198 U.S. 45 (1905).

12. E-mail from David Hayes, Student, University of Dayton School of Law, to Lisa A. Kloppenberg, Dean and Professor of Law, University of Dayton School of Law (Dec. 6, 2004) (on file with author).

current relevance of constitutional law by supplying news clippings, proposed legislation, and editorials.¹³

The great difficulty in bringing more context to bear in teaching Constitutional Law is how to balance the history and politics with the modern doctrine they need to know to be well-prepared for the bar and represent clients. We must cover an incredible amount of material in a compressed time period. Just a glance at the size of constitutional textbooks demonstrates the growing amount of material many professors consider critical. We need to cut material each year to fit in new cases or developments (e.g., new legislation on security, cybercrime, or pornography). If students do not feel they are learning useful material, many will disengage. Thus, too much focus on the Framers or the Red Scare can turn the course into an undergraduate political science course. If these topics resonate with our areas of research, we may hold fascinating discussions with a few students but will lose the majority and breed significant resentment. While students may not fully realize the value of our teaching methods until well after they fill out our evaluations and take their examinations, if we are not reaching most of our students, we are not performing our jobs effectively.

Constitutional Law professors know we are fortunate. People—including our students—are often more interested in discussing current constitutional controversies than the intricacies of the bankruptcy or tax codes (even given fascinating policy issues surrounding those topics). We teach courses many of our colleagues would like to teach. It is still not easy to “break into” the Constitutional Law “lineup” at many law schools. Unlike Professional Responsibility, Constitutional Law is a course not lightly given up, in part because it is an area of scholarly concentration for many American law professors. It is a gift to teach this important, dynamic subject. In turn, whatever we can do to keep the next generation of leaders impassioned about constitutional law in its broad, rich, contextualized sense is a wonderful contribution to our profession and the world.

13. Interviews with Mark Zunich, American University Washington College of Law, Class of 1992, and Lloyd Spencer, University of Dayton School of Law, Class of 1990 (Nov. and Dec. 2004).