

Strategies and
Techniques for Teaching
Constitutional Law

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Strategies and Techniques for Teaching Constitutional Law

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To contact Customer Service, e-mail customer.service@aspenpublishing.com, call 1-800-950-5259, or mail correspondence to:

Aspen Publishing
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-1634-8

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Contents

I. Introduction	1
II. The Big Picture	3
A. <i>Objectives and Limitations</i>	3
B. <i>Emphasizing Scholarly or Critical Approaches in Your Course</i>	6
C. <i>The “Irreducible Content” of Constitutional Law</i>	8
III. Preparing for a New Course	12
A. <i>Initial Steps</i>	12
B. <i>Challenges</i>	14
1. Law and Politics	14
2. Constitutional Law as Meta-Law	14
C. <i>Start and Annotate an Outline</i>	16
D. <i>Selecting a Casebook</i>	17
E. <i>The Shadow Casebook and Other Materials</i>	20
IV. Designing the Course Itself	21
A. <i>A Private Syllabus</i>	21
B. <i>Sequencing Topics</i>	22
C. <i>The Public Syllabus</i>	24
V. In the Classroom: Basics	26
A. <i>Techniques</i>	26
B. <i>Challenges in the Classroom</i>	29
1. Inconsistent Cases	29
2. Wrong Cases	30
3. Sensitive Issues	30
4. The Relevancy Problem	31
5. I Learned Constitutional Law in College	32

VI.	The First Day	33
	<i>A. The Formal Start</i>	33
	<i>B. Illustrating the Themes of the Course</i>	34
VII.	Day-to-Day Teaching Techniques	37
	<i>A. Different Material, Different Approaches</i>	37
	<i>B. Class Notes</i>	38
	<i>C. Teaching Assistants</i>	39
VIII.	Using Technology	40
IX.	Review and Exam	44
	<i>B. Exam Format</i>	45
	<i>C. Exam Content</i>	47
X.	Conclusion	50

Strategies and
Techniques for Teaching
Constitutional Law



I. Introduction

Congratulations! You have the opportunity to teach an exciting and challenging course. Several commentaries on law teaching refer to the prestige of teaching Constitutional Law, often suggesting that Constitutional Law teachers have the highest qualifications and using terms such as “plum assignment.” Many candidates at the Association of American Law Schools Hiring Conference list Constitutional Law as the course they would most like to teach, but then find that most schools are looking for someone to teach a course that they haven’t thought about since the final exam, if they even took the course. After being nominated to serve on the Supreme Court, federal court of appeals judge and Yale constitutional law professor Robert Bork referred to serving on the Supreme Court as an “intellectual feast” because of the opportunity to wrestle with the hardest constitutional questions of the era. For law teachers, this is as good as it gets.

This book is intended to suggest a few ways that you can do the best job you can teaching Constitutional Law. It largely follows the organization of the general guide for new law teachers by Howard E. Katz and Kevin Francis O’Neill, *Strategies and Techniques of Law School Teaching* (Wolters Kluwer 2009). It deviates where Constitutional Law as a teaching assignment, or constitutional law as a discipline, merits special attention.

That first deviation is a pervasive issue throughout this guide. One of the intriguing aspects of the Constitutional Law course is that although it is universally required, there are several variations on its place in the law school curriculum. At many schools, it is a first-year course, but at many others, it is a second-year course. At many schools, it is a one-semester general survey course, usually carrying four credits, but at many others, it is a two-semester sequence, with each component carrying two, three, or four credits. At some schools, it is the only course concerning governmental powers or individual rights that most students take, but at many others, most students take additional electives in any of roughly a dozen areas of constitutional law. The first thing you need to do is to determine how the Constitutional Law course fits into the curriculum at *your school*. If it is a first-year course, especially if it begins in the first semester, you will need to prepare and present it differently than you would an upperclass course. Similarly, the number of credits will affect many aspects of your planning, from scope of coverage to teaching

techniques. These topics are addressed throughout this guide where they seem most important or most likely to be overlooked by a new professor. Many of the answers are intuitive. First-year students need more grounding in basic legal principles than upperclass students; a course that is likely to be a student's only exposure to constitutional law requires broader coverage than a course that only introduces the subject. You might also find first-year students easier to motivate and more receptive to your extra efforts to help them learn how to study. They also have not yet bought in wholesale to some of the fallacies that legal education sometimes instills, such as a belief in judicial omnipotence.

A second point that is true of all law teaching, but perhaps with special application to Constitutional Law, is that you need to remember from the beginning, long before you step into the classroom (and continuing through grading), that the students know less than *you now think you did* when you were taking the course. Part of this is simply that you are wrong—you weren't really that brilliant. We all struggled to some extent early in law school because studying law requires new ways of looking at facts, arguments, and controversies. This is true in all subject areas, but Constitutional Law contains many of the hardest topics. My Constitutional Law professor at Northwestern was Nathaniel Nathanson, and we called the course "Nate's Mystery Hour." It was an apt title. We thought he was daft, but he was brilliant. I didn't fully understand what he was doing until long after the exam, but it somehow made me a better attorney.

In addition to the fact that you were less brilliant than you remember, it is likely that you were a better student than most of your students will be. Only the very best law students become law professors, and if our press clippings are true, only the very best of the very best end up teaching Constitutional Law (don't share this with your new colleagues until after you have tenure). Moreover, the realities of the hiring process mean that you are probably teaching at a school that is less elite than the one you attended. No matter where you are, however, you will discover some students with breathtaking potential. My best students have all been as bright as anyone in my own law school class, and there are many I would recommend for the bench or hire as my own attorney. But in the basic Constitutional Law course, they started out unable to read a complex case or to state

with much confidence or clarity the factors pertinent to analyzing constitutional law issues.

You can help them make the enormous leap from layperson to legal expert. At various places, this book identifies topics that are particularly difficult for confused law students. If you remember that once upon a time you were one of them, you will be much better able to anticipate and navigate those areas.

About half of this book focuses on things you should do before the semester begins. Parts II, III, and IV all address matters you need to resolve during that period. Parts V, VI, and VII address classroom issues, revisiting some of the matters addressed by Katz and O'Neill, but focusing on teaching issues particularly applicable to Constitutional Law. Part VIII examines technology issues, and Part IX focuses on the end game, the review and examination processes.

II. The Big Picture

After learning the format of the Constitutional Law course at your school, you must consider several issues about the nature and structure of the course as you will teach it. Even if you already have a well-formed sense of the course, do some strategic planning now. The worst that can happen is that you will have an even better idea than you do now about why you plan to teach the course in a particular fashion. The issues are (1) what objectives you plan to achieve in the course, (2) whether there are any particular scholarly or theoretical perspectives you wish to emphasize, and (3) what major topics you expect to cover. Consideration of these issues can take some time, which is why it is useful to start your big-picture thinking as early in the process as possible. These are also good topics to raise with fellow Constitutional Law teachers at your school and elsewhere.

A. OBJECTIVES AND LIMITATIONS

The Katz and O'Neill book identifies 19 possible objectives for a law school course and recognizes that individual teachers will add others. Most reflect traditional law school pedagogy. For example, the first three are “giving your students a strong grasp of the black-letter rules,” “teaching them how to apply those rules to

new fact patterns,” and “getting them to see—through problems and hypotheticals—how a seemingly minor change in the facts can produce a change in the outcome.” All of these goals seem applicable to every law school course. Other suggested objectives focus on the procedural setting of cases, litigation perspectives, professional responsibility issues, perspectives from other academic disciplines, such as history or economics, and critiques of law, such as race or gender perspectives.

You cannot pursue all of these objectives, let alone some others you might have in mind, in every course. Good teaching, like good writing, is rooted in careful selection—deciding what *not* to do is as important as deciding what to do. The number of objectives you can realistically pursue is largely a matter of the format of your course—again, how many credits, when your students take it, and the quality of your students. Katz and O’Neill recommend that you include in your list of objectives the three basic goals listed in the previous paragraph, plus “teaching case analysis.”

You might be tempted to resist this advice. After all, many of the black-letter rules of constitutional law are decidedly gray, and many of even the clearest rules were established by Supreme Court decisions that were less than unanimous, so who’s to say what’s right, or even what the black-letter law will be after these students have been practicing for a few years? That misses an important point. One reason that Constitutional Law is a required course is that a good grasp of black-letter law is necessary to understand other courses and to pass the bar exam. At every law school, even the very elite law schools, students expect that a major part of the course will focus on helping them to master black-letter law. One year a professor at the then–University of Bridgeport School of Law was approached to teach an unofficial section of Civil Procedure by Yale students who felt insufficiently grounded in the subject. Those students understood that they couldn’t really learn all the law on their own.

The same is true of the legal process objectives, if for slightly different reasons. The students will get legal analysis in most of their courses, especially in the first year, so there is a temptation to treat Constitutional Law as different. One reason to emphasize analysis, however, is that Constitutional Law *is* different in kind from other required courses. A constitution is superior to and different from both statutes and cases, and students need experience working their way through the legal issues that tend to arise as a result of that

hierarchy. In addition, it is important to communicate the fact that constitutional law cases are argued on logic, theory, precedent, and legal analysis, just like statutory and common law cases, because it is so easy to think of constitutional law as largely political. In fact, one of your objectives in the course might be to present constitutional law at the Supreme Court level as largely political. State and lower federal courts, however, must try to apply constitutional doctrine. The legal arguments in their cases are presented by practicing attorneys whose primary training in constitutional law was courses such as the one you will teach.

Katz and O’Neill wisely point out that you need to come up with a manageable number of objectives in your course. My recommendation is that you study their list of 19, accept their emphasis on objectives (a) through (d), and then think about which additional ones to include. Some seem fairly unsuited for Constitutional Law, such as transaction-drafting exercises. Others are almost inevitably involved in constitutional law cases, and failure to address them in your course would confuse and possibly alienate your students. Others seem to be highly pertinent to constitutional law as a discipline, such as tracing the historical development of the legal rules at issue and trying to develop a coherent theory of the subject.

When I teach Constitutional Law, I add historical perspectives and “race and gender” perspectives to the traditional rules and process objectives. The reasons are simple. Constitutional law can be understood only by those who know the currents of American history from the founding to the present. Those historical trends are best illustrated by examining the expansion of the constitutional community to include African Americans and women, groups disenfranchised in 1787. I also include as an objective trying to impart a sense of the role of nonmajority opinions. I developed this interest after discovering that many students assume that a plurality opinion automatically constitutes the applicable legal guidance. In law practice, of course, sometimes a concurring opinion provides a better guide for future cases than a plurality or even a majority opinion. In others, dissenting justices could more accurately describe doctrine or predict future developments in the area. Plurality opinions, various categories of concurring opinions, and dissenting opinions can all be important to lawyers trying to interpret and apply precedents.

B. EMPHASIZING SCHOLARLY OR CRITICAL APPROACHES IN YOUR COURSE

Many professors prefer to teach Constitutional Law as a straight doctrinal course, using nothing but Supreme Court cases and a fairly limited universe of concepts (e.g., equal protection) and precedents (e.g., *Brown v. Board of Education*) to provide examples of analogical reasoning, which remains the bread and butter of first-year courses. There is nothing wrong with this approach, and it has the virtue of keeping attention securely on the primary objectives, making certain that students learn black-letter law and hone their legal analysis skills.

It is also common, however, to draw on other academic disciplines or critical perspectives to enrich the course. Perhaps the most common way is to emphasize the historical context of many of the leading cases. Most casebooks include at least some historical commentary in introductory sections or notes. The historical materials are so exhaustive in some of the leading casebooks that they test the patience of teachers not emphasizing historical context (and their students), so beware when selecting a casebook. Still, at least for those who have a good grounding in American history, incorporating historical perspectives into class discussions can help students appreciate the law and facts behind the cases. To take a fairly obvious example, the Fourteenth Amendment is just a set of abstract and open-ended rules when taken out of the context of the Civil War and Reconstruction. *Plessy v. Ferguson* and *Brown v. Board of Education* are just facially inconsistent decisions that could be technically reconciled like a pair of run-of-the-mill common law cases (perhaps based on the language in *Brown* about the fundamental nature of education), until one considers race relations early in the twentieth century and the long series of legal challenges to segregation. *Brown* itself, which has enormously influenced constitutional doctrine even outside of racial discrimination, cannot be understood without knowledge of mid-twentieth-century history. Another place in which history plays a critical role in many Constitutional Law courses is *Marbury v. Madison*. Despite the danger of spending too much time discussing the provocative facts leading up to *Marbury*, it is not just antiquarianism to emphasize John Marshall's role in the Adams administration—it is central to understanding the chess game that Chief Justice Marshall played as he “set up” the components of the federal judicial review power in that case and several others.

One common academic approach involves interpretive theories. In the 1980s, largely in response to the popularity of various strands of originalism, interpretive theory became the unifying principle of some Constitutional Law casebooks. Although such issues had long been discussed in individual cases, it was now possible to teach an entire course through the lens of one interpretive theory or another, or to set up most constitutional disagreements as premised on disagreements about permissible theories of constitutional interpretation. Some casebooks still follow this approach.

There are also numerous ways to bring one or more critical legal perspectives, such as feminism or critical race theory, to Constitutional Law. Judicial nominees are now in effect forced to swear fealty to a literalism that almost everyone knows is false. The fact that so much of the constitutional law central to modern controversies is indeterminate leads to classroom discussions that are likely to raise such perspectives, even where that is not the teacher's objective. Feminist and critical race analyses can also explain much of the controversy in the equal protection area over the past 60 years. There is similarly a place for law and economics perspectives on the Constitution. One of the most important historical analyses of the Constitution was Charles Beard's 1913 *An Economic Interpretation of the Constitution*. Some of your students probably will have been exposed to Beard's thesis in high school or college. Raising questions about the role of economic interest groups and theoretical applications of various constitutional interpretations is thus part of a long scholarly tradition.

It is also possible to work through the materials in a typical Constitutional Law class from a straightforward policy perspective, as is commonly done in some other first-year courses, asking what interpretations and applications better serve public policy. This is, frankly, what many of our colleagues who *don't* teach Constitutional Law think the subject is all about. I recommend caution in being heavily policy-oriented. It tends to reinforce the cynical belief that legal analysis has little place in constitutional law, and even if that cynicism is justified about many Supreme Court cases, the attitude obstructs legal analysis of the many constitutional questions that are litigated in lower courts or that never even make it to litigation.

There is one additional caveat about bringing an additional perspective to the course. It is dangerous to teach the course with a particular perspective unless you are well grounded in the discipline

yourself. If you can't integrate the perspective into the course smoothly, you will probably alienate students who find that it just complicates something they find hard enough already. In other words, make sure that the perspective helps explain what is happening in the cases instead of just adding new and potentially confusing variables to the mix. Moreover, until you are confident about your own ability to integrate the perspective in a concise fashion, there is the possibility that it will consume too much time. There is never enough time in Constitutional Law, no matter how many credits are allocated, and any perception that time has been wasted will be attributed to the teacher and not to the difficulty of the material. Last, and far from least in Constitutional Law, there is the very real problem of "student experts." Whether they studied constitutional history in college, have advanced degrees in economic theory, or worked on political campaigns, there will be students who think they know more than you about the additional perspective you add to the course. Don't let them be correct.

C. THE "IRREDUCIBLE CONTENT" OF CONSTITUTIONAL LAW

People teach Constitutional Law in a number of different ways. They nevertheless do so with a fairly consistent universe of core topics. They are the following:

1. Article III, judicial review, and justiciability
2. National legislative power, usually including the federal commerce power
3. Federalism-based limitations on state power
4. Due process, including related theories of implied rights
5. Equal protection

I'm certain that a good course could be designed that does not address some of these five areas, so "irreducible" is an exaggeration, but it would probably be very hard to meet at least the black-letter law objective without covering all of them. Other professors and your students will also expect you to cover them.

In a one-semester, four-credit course, there might not be time for any additional topics. In a two-semester course, on the other hand, there would definitely be time to add several. Part of the coverage

decision at many schools is driven by bar exam concerns. These five topics are routinely tested on the multistate bar exam and on the essay portion of most state bar exams, yet are rarely covered in any other required courses. As with so many other big-picture issues, specific coverage depends on the format of your course. For example, if Administrative Law is required or taken by almost all students, there is no need to cover procedural due process in Constitutional Law.

Article III provides the structural basis for the role of the courts in our governmental system. Many similar questions underlie state common law cases that most students will have already studied by the time they take Constitutional Law, but there judicial powers were largely background assumptions. Here they are examined as legal engineering—the operation of a judiciary within a constitutional republic. It might seem an unwise allocation of limited time to focus on *Marbury* and the several other early cases dealing with related issues, but it is a necessary one. It is better to find ways to prevent wallowing in the Article III section of your casebook, and this book suggests some ways to do so later. There also has to be some consideration of justiciability, largely through the “case or controversy” requirement. A rough outline of this topic is included in Part III.

The one casebook that notoriously skimps on judicial review begins with national legislative power and elevates *McCulloch v. Maryland* to primacy. Perhaps the best reason this topic is necessary is that most entering law students are unaware of the concept of limited legislative powers. Some teachers cover *McCulloch* and a few notes and then skip to other topics. I strongly recommend, however, that you include some treatment of the Commerce Clause. This might disappoint you, perhaps because, like me, you were profoundly disappointed in law school to find yourself taking *Constitutional Law*, the study of civil rights and giant cases about liberty, but spending what seemed like months reading cases about trucks, buses, and chickens, sick or otherwise. In fact, these cases and the sometimes dry progression of doctrine from the late 1800s to the present day is part of a necessary examination of federalism principles and the operation of the Supremacy Clause. There is nowhere else in the required law school curriculum where these issues are considered in any depth. So long as you keep the importance of federalism in mind and are clear about that with your students, you can make this section work for you in achieving your course objectives.

Much as federalism-based limits on the federal government are best addressed through the exercised Commerce Clause, limits on state powers focus on the dormant Commerce Clause. The theories and somewhat arcane cases (which are really the primary causes of law student resentment) provide the necessary balance to federalism limitations on the national government. One reason to include both topics is that they reinforce each other. That is, case law that approves congressional action only tangentially related to actual interstate business dealings provides a reason for courts to find room for states to act in overlapping areas. Similarly, an understanding of the role of state business regulation that affects interstate commerce helps students recognize some of the practical limitations on national power. Exploration of the dormant Commerce Clause also introduces students to the sometimes slippery distinction between discriminatory intent and disparate impact, which helps lay the groundwork for similar analysis in the more problematic setting of race and gender discrimination.

The doctrines addressed in the dormant commerce area also lay the foundation for much of substantive due process. Much as “enumerated powers plus the necessary and proper power” provide the textual support for a broad and powerful national government, the police power provides the basic foundation of state power in our system. In due process, however, the opposing force is individual rights rather than national legislative power. Thus, most courses examine the history of substantive due process beginning with the broad (if unrealistic) notion of the individual right to choose to work long hours for low wages, and then turning to the later judicial acquiescence in governmental power to limit many freedoms in the name of public health, safety, or welfare. They then consider the reemergence of due process in the privacy sphere, leading to some of the central debates of our times—abortion, family autonomy, right to die, sexual freedom. It is hard to conceive of a Constitutional Law course that does not address these latter matters, and coherent presentation largely depends on at least a short trip through time to the *Lochner* era.

Equal protection is the companion to substantive due process. On one hand, a grounding in equal protection theory is necessary to understand the change that has occurred over the last 60 years in judicial review of laws that classify on the basis of race or sex. From a purely civics lesson point of view, therefore, equal protection is an

important subject for all law students, and this course is the only place they get it. On a doctrinal level, equal protection law has developed along with substantive due process, sharing terminology and using similar analytical approaches. There is perhaps no more important concept in constitutional law than the tiers of judicial review, from rational basis to strict scrutiny. Students can learn some of them in due process, but both an in-depth examination of the reasons for the different tiers and a fuller statement of the variations are addressed only in the equal protection materials.

There are, of course, several other topics that can make a strong claim to being “irreducible.” Procedural due process is a critical component to understanding fair process in the modern state. If it is not adequately covered elsewhere, you will need to find room in Constitutional Law. I exclude state action from the list only because I know too many people who do not cover it for one reason or another, perhaps because it often appears at the end of the casebook, or perhaps because they hope it will be learned indirectly in other courses, such as Criminal Procedure. I always include at least a short unit on the First Amendment, generally selecting one fairly discrete topic. I believe that all law students need some exposure to the First Amendment because it provides the most distinctive feature of our constitutional system. A brief examination of the role of the courts in vigorously protecting that right says much about the values our Constitution weighs most heavily. Second, the First Amendment provides an opportunity to complete the structure of constitutional provisions simply through its status as an *enumerated* individual right in the Bill of Rights. The contrast in judicial treatment of First Amendment claims and most right-to-privacy claims provides an excellent vehicle for addressing the limited status of general liberty rights. Equally strong arguments can be made for covering the national powers to tax and spend, presidential powers, international powers, Article IV’s Privileges and Immunities Clause, and other individual rights. Takings law is growing in academic and popular interest and perhaps in legal importance. All of these make excellent topics in two-semester Constitutional Law courses, but most are usually cut from one-semester versions.

III. Preparing for a New Course

A. INITIAL STEPS

You have your tentative objectives, have decided on any particular perspectives you want to emphasize, and have a sense of the core coverage. Now do some reading to bring yourself up to speed on the law, emphasizing developments you didn't see in practice. After all, the Constitutional Law course is a grab bag of topics, and only a very small band of Supreme Court specialists is likely to be familiar with all of them.

You should start with short works that provide an overview of constitutional law. One reason to do this before selecting a casebook is to test your expectations about course content. If your expertise is federal litigation, for example, you are likely to be up to date on Article III. Thus, your reading in that area would largely be review and could go very quickly. In the area of equal protection, on the other hand, you might be quite rusty. Here, you would need to master the Supreme Court's twists in doctrine and terminology, which can shift quickly in areas such as affirmative action. There are quite a few books of this sort available. Some are at the high end of student study aids, such as the *Constitutional Law Hornbook* by John Nowak and Ronald Rotunda and *Constitutional Law: Principles and Policies* by Erwin Chemerinsky, both books that practicing constitutional lawyers use. One step down are more clearly student-oriented books, such as the Examples and Explanations Series and the Nutshells (each has two books devoted to constitutional law). In the interest of learning about the larger landscape, read at least one of the "high-end" books. It will not take you long, as you can skip chapters on topics you know you will not cover in the course. Then read one of the study aids by someone other than an author of the more scholarly books you read. This will give you a sense of how the more complex topics can be boiled down for student learning. Reading books by different authors will give you different perspectives and will also identify inconsistencies and ambiguities, which will help you to be aware of them in your own assignments and teaching. These suggestions might seem to be micro-managing, but are designed to allow you to work efficiently.

If you have time, read something about constitutional theory or at least a more general work, perhaps from a scholarly perspective

you wish to emphasize in the course. If you are going to include a feminist or other critical perspective, look at one of the many monographs taking that perspective, even if it doesn't cover the entire waterfront of constitutional law. The objective here is not to build your foundation in the course as a whole but to develop your sense for particular arguments and for critical responses to the doctrines and cases you will discuss in class. You might also want to read one of the many books about the Supreme Court during the last 50 to 60 years. The surveys will give you topic-by-topic analysis, and a book on the Warren, Burger, Rehnquist, or Roberts court will give you a cross-section of topics for the period covered by the book.

Before I began teaching, I read Alexander Bickel's *The Least Dangerous Branch*. It helped me to see that the topics I planned to teach were largely about the role of courts under our Constitution. At least as presented in the dominant case law of the mid- to late twentieth century, the course revolved around the counter-majoritarian dilemma and the extent of (and justifications for) judicial deference to political decisionmakers. That might not be how I would orient the course today, and even then, I also read books providing critical perspectives, but Bickel was the most help, and something similar should help you.

Here is some reading that you can avoid, at least at this time. There is no reason to read a multivolume treatise on constitutional law. It is good that they exist, and you will probably want to refer to one a few times during the semester. Such works were designed to be encyclopedias, not narratives, and they would take too long to read in any event. Your time now would be better spent with another monograph. You can also skip Laurence Tribe's *American Constitutional Law*. This book was designed to provide a critical prism that could both describe and prescribe constitutional doctrine and analysis. Tribe deserves his reputation as one of the leading scholars in the field, but this book no longer serves its intended function. As I think Tribe realized when he chose not to complete or update later editions, judicial decisions of the past 30 years have left constitutional law an unruly subject occasionally at war with itself. The earlier editions, written when he planned to organize the constitutional universe, are a beautiful extended essay on the subject. Read this work *after* you've taught the course once or twice.

B. CHALLENGES

Everyone who teaches Constitutional Law knows that it is daunting to teach. So as not to drive you back to law practice, I mention only seven of the challenges, and defer most to Part V, as they are variations on student complaints that arise during the semester. Two, however, are of central importance at the early stages because they are relevant to your course planning, so they are mentioned now. They are the claim that there is no constitutional *law*—only politics—and the problem that constitutional law cases are often “about” something other than the apparent subject.

1. Law and Politics

Many people, certainly including some of your students and possibly including yourself, believe that much constitutional law is just artificial rationalization for decisions reached for policy reasons by a sufficient number of Supreme Court justices to form a majority. There is no point in trying to convince anyone that this is totally untrue. In fact, learning to accept the fact that in some areas, this is quite possibly true is helpful to teaching the course. The short answer to keep in mind while preparing your syllabus and class notes is that it is not blasphemous to recognize that justices are human, and inevitably there are cases in which their policy preferences affect their choice of an outcome among credible alternatives. One reason that some students find this to be such a frustrating problem is they do not yet have the ability to see credible alternatives to their own policy choices, which are so embedded that they aren't even aware there is a choice. You can't really tell them that. So remind them that they are learning to be effective lawyers, and lawyers have to make arguments based on precedent and reason. Thus, even if everyone believes that the outcome of a particular case was the result of a naked policy decision, your class needs to take that outcome and try to apply it in hypotheticals now and in law practice later before judges who might not share that policy view. Build this discussion into your course planning.

2. Constitutional Law as Meta-Law

The second of the early challenges is based on a difference in the nature of Constitutional Law from most other courses, particularly

those in the first year. The difference is that many of the assigned materials in Constitutional Law are important for a reason one step more abstract than the specific constitutional provisions discussed in the cases. Most traditional first-year courses are “about” the legal issues addressed in the cases. In Torts, for example, the book contains some cases about intentional torts, which lay out the elements and explain the reasons for requiring those elements, often with one rule per case. Constitutional Law, on the other hand, tends to be “meta.” If your students read *Marbury* at the level of analysis most other courses require, they will see a case largely about what is required for a judicial appointment to take effect. The other issues are there, but it is quite reasonable for a smart first-year student trained to look for a rule to see that rule in the first part of the decision, which states that *Marbury* was validly made a justice of the peace. When class discussion blasts quickly past that to get to the constitutional foundations of judicial review, the only real reason *Marbury* is remembered or assigned, some students will freeze mentally and find it difficult to keep up with the discussion.

The problem doesn’t end with *Marbury*, as many cases are taught as much for subtext as for the actual interpretation of the specific constitutional provision at issue. The Commerce Clause, for example, is highly important to lawyers who draft transportation regulations and tax counsel for interstate firms, but not to the rest of us. We all need to understand Commerce Clause case law, however, because it both illustrates federalism generally and provides models for interpretation of other congressional powers. Even when the significant point involves the meaning of the constitutional provision addressed by the court, such as in most equal protection cases, much class time is spent on more abstract inquiries. Most students want to learn a series of rules: equal protection requires desegregated schools, a gender-neutral drinking age, and voting rights in school district elections even for residents who don’t own real estate; and equal protection doesn’t require mandatory busing, gender-neutral draft registration, or equal application of most commercial regulations. To understand equal protection on a more general basis, however, students must master the tiers of judicial review, which are essentially about the extent of deference courts owe to the governmental bodies that adopt laws, rules, or policies that contain classifications. Some laws receive strict scrutiny, and are usually struck down as violations of strict scrutiny; many others receive rational basis review, and

are usually upheld against equal protection challenges; and quite a few receive one of several slightly different intermediate levels of review. To you, by now, this makes perfect sense—equal protection is largely the study of tiers of judicial review applicable to different classifications. To many law students, however, this is obscure at best and gibberish at worst. Keep this in mind as you plan your course.

C. START AND ANNOTATE AN OUTLINE

At this stage, you will find it useful to prepare an informal outline of what you expect to cover in the course. Your natural objection is likely to be that this is too soon, that you first need to select a casebook. My answer is that you should prepare at least a rough outline as you work through the teaching materials sent by the publishers before selecting your casebook because the process of outlining will help you to select it. You'll refine the outline later based on the casebook you select, as discussed in Part IV.

In *The Brass Verdict*, crime novelist Michael Connelly describes the trial preparation of his protagonist, criminal defense attorney Mickey Haller, as “decorating a Christmas tree.” The same is true of preparing a teaching outline. Haller would start with the unadorned tree (his objectives at trial)—in your case, a list of the irreducible course content, along with any additional major topics you plan to cover. Then you start to fill in the outline with cases and other materials that you think should be assigned. To continue the metaphor, these are the largest ornaments. For Haller, these were the major premises he planned to establish at trial. Whereas he would annotate them with the evidence he planned to introduce to support those premises, you annotate them with the holdings and major legal principles you want to emphasize in the casebook assignments and refer to in class discussion. You conclude with tinsel, the more reflective perspectives you would like to include, such as the historical significance of *Brown v. Board of Education* or critical perspectives on fundamental rights.

Here is an example of the initial portions of an informal outline on Article III:

I. Judicial Power

A. Judicial Review of Statutes and Presidential Actions

1. *Marbury v. Madison*—include review of both Sec’y of State and Judiciary Act

2. Notes on background of case, history of judicial review before *M v. M*
- B. Other Judicial Review Powers
 1. Review of State Decisions—*Martin v. Hunter’s Lessee* (include implications of Va. Ct’s action)
 2. Note on Cohens
- II. Powers of Other Branches re Article III
 - A. Congressional powers—*Ex parte McCardle*
 - B. Extended (?) note on court-stripping
 - C. Executive Powers—appointment, others?
 - D. Design problem illustrating that these issues can arise together
- III. Justiciability—“Case or Controversy” Requirement
 - A. Introductory material—advisory opinions, historical perspectives
 - B. Standing—TBD—maybe *Lujan v. Defenders*, maybe *Allen v. Wright*
 - C. Notes with extract from different case, identify cases with injury, causation, or remedies issues for hypotheticals

If this is an area in which you are comfortable, especially about bringing additional scholarly perspectives to the course, the outline can be expanded to include them. On the other hand, in areas in which you are uncertain what to do, it makes sense to leave some options, such as the one in this outline about using *Lujan* or *Allen* as the lead case on standing. There is no point in trying to be detailed about areas in which you are not yet certain, as that is a chicken-egg problem. What is most important is that you identify and organize what you already know, thereby uncovering the weak spots in your understanding of the course, so that you can then go back to a more general text for further review before finalizing your decisions.

D. SELECTING A CASEBOOK

It might seem odd to select a casebook after you have done so much preparation, but there isn’t much point in picking a book until

you know more about what you want to do in the course. You also don't have to wait until this point to start reviewing books, which can be helpful in preparing the outline. Katz and O'Neill describe the process through which you will receive books from the major publishers. If you are new to teaching, the law school will contact publishers on your behalf; if you are already teaching, you can probably order all the books you need in a half-hour of working the websites. Start that process as soon as you can.

Constitutional Law casebooks will fill your bookshelves in short order. There are many casebooks available, and they range from updated versions of books that have been in use for half a century to experimental models that come with various types of technological support. There are so many books that your initial problem will be avoiding the paradox of choice, which occurs when you have so many choices that you can't make up your mind, a problem that afflicts consumers of products such as cell phones. One way to work through the choices is to think of selecting a casebook as a giant, 20-something option multiple-choice question. Ruling out the wrong books will help you narrow the possible choices to a manageable number. Some of the decisions you have already made will allow you to start ruling out wrong books. If you are going to emphasize a particular theoretical approach, you can start by ruling out books that emphasize a different approach. But don't automatically do the reverse and limit the list of possible books to those emphasizing that approach. You might find that a more traditional book is the best choice because of its topics and structure, and you can add additional materials as you see fit.

Beyond that, it's a labor-intensive task in which there are various competing considerations, some obvious, some subtle. If there are other Constitutional Law teachers at your school, what do they use? They might have good reasons relating to your school's curriculum or students that you might not yet realize. An advantage of using a casebook used by others on your faculty is that there will be someone handy who knows that book when questions arise. There are downsides to consulting with colleagues, however. If one strongly suggests that you use the same book he or she uses, it could be politically inexpedient to choose another book, even if you find it less than ideal. This only gets more complicated if the colleague is thanked in the acknowledgments of that book and the lead author of the one you really want to use turns out to be the law school-arch-

enemy of your colleague, for example. These things actually happen. Welcome to faculty politics.

Katz and O'Neill address two book selection topics that are somewhat different in Constitutional Law than in most other courses. One involves books that use wrongly decided cases. The nature of Constitutional Law is that all of the casebooks include at least some wrongly decided cases. The relevance of this question for you turns on how well the casebook explains or provides a means for students to determine the current understanding of constitutional doctrine. You will also find such explanation valuable in managing student anxiety about inconsistency. The other involves whether you are a "long or short case" person. This is less of a problem in Constitutional Law than in some other courses because most of the real cases are so long that they have to be tightly edited to be of any use in a classroom. Still, some casebooks edit many of their cases down to little more than a paragraph of holding or doctrinal explanation. Such a book will be of little help if you want to discuss case analysis at length. A related point particularly applicable to Constitutional Law, however, is the extent to which the casebook includes concurring and dissenting opinions. As noted earlier, one of my course objectives is that students learn to read such opinions for analytical purposes, to help decide what was and was not decided. For that reason, I prefer a casebook with fairly long case extracts that include the core points of most concurrences and dissents.

Other aspects mentioned by Katz and O'Neill are as applicable to Constitutional Law as to other courses. Look for adequate exposition sections to help you introduce topics and for notes that thoughtfully raise questions and provide explanations for the cases rather than showing off unnecessarily. Books with strong ideological perspectives are fine if you share those perspectives, but even then, the first time through a course, you might be better off with a book that tries to be neutral. A good teacher's manual is a plus. Several contain suggested coverage outlines for longer and shorter versions of the Constitutional Law course. It is sometimes hard to tell if a teacher's manual is good until you've used it, however, so this is another question you can pose to other Constitutional Law teachers. After you have identified a few casebooks that seem to be good possibilities, take the outline you prepared and compare it to the tables of contents. You will probably be happiest with a book that follows the outline fairly closely.

I've used six different casebooks in Constitutional Law over the years. Each had strengths and weaknesses. Over time, I've moved toward books that do more explaining before the cases but include fewer, or at least less dense, notes after cases. Student quality has been fairly consistent over the years, but student learning styles and the format of the course have changed. The bottom line here, as elsewhere, is that the students are the audience. You need a book that suits your students, and the more information you get to help you choose it, the more likely your choice will be a good one.

E. THE SHADOW CASEBOOK AND OTHER MATERIALS

One of the innovative suggestions of Katz and O'Neill is to use a shadow casebook. This book can give you ideas and even specific questions based on the same cases your students are reading, but can also provide a different perspective to add to the class session. There are several ways you can select the book. One is to use your second choice among casebooks. Another is to take a book with a decidedly different approach, such as a book that focuses on history or one of the critical perspectives if you assign a more traditional casebook. On the other hand, if you choose an ideological casebook for the students, your shadow text should be a traditional book. That will provide a warning if the assigned materials overlook important doctrinal or theoretical perspectives that the students will need for other courses or the bar exam.

I also recommend that you keep and routinely refer to one of the higher-end student treatises. If you found one you liked in your early preparation, it can work for you all semester. If not, ask colleagues if they've found a useful resource. The point is that you will need a text that helps you find answers to student questions that you cannot answer easily in class. As discussed in Katz and O'Neill, it is best to defer answering a question when you aren't sure of the answer. It is also frustrating and time-consuming to look for an answer in a casebook, as they are not organized for that purpose. Student treatises are, however, and a good one will either give you the answer or the ammunition for your explanation at the next class that there is no simple answer. You can give a long nonanswer or a short nonanswer at that point, but this is the best way to decide what to do. Here is one last piece of advice with respect to both shadow casebooks

and student treatises: Do not reveal these resources to your students. There is nothing wrong with what you are doing, but if word gets out, many students will read those books instead of the assignments on the faulty assumption that they contain the secret code to doing well in your class.

IV. Designing the Course Itself

A. A PRIVATE SYLLABUS

The first syllabus to prepare is a combination of the rough outline you have already prepared and portions of the table of contents of your casebook. Add approximate time allocations for coverage and key dates, such as vacations, the final exam, and any midterms or quizzes, along with references to additional materials you would like to add. The private syllabus will be a work in progress until you are ready to prepare the final, public, version.

The first and most important step is to take the casebook you have selected and the outline you have prepared and start turning the points on the outline into specific pages in the book. You in essence perform the cliché about constitutional interpretation that Justice Owen Roberts stated in *United States v. Butler*—lay the article of the constitution that is invoked against the law in question. Here, you lay the outline against the casebook. Because you have presumably chosen a casebook largely based on its consistency with your outline, this should be fairly easy. If it is not easy, you might want to rethink either the outline or the casebook. Then start counting the pages you expect to assign. Again, the format of your course is critical. Katz and O'Neill accurately suggest that first-year students can be expected to cover 12 to 15 pages per hour, and upper-class students 20 to 25 pages. A four-credit first-year course spread over a 14-week semester permits coverage of at most 840 pages. Most Constitutional Law casebooks have nearly twice that number of pages. More credits will allow you to cover more pages, and an upperclass Constitutional Law course of four credits can cover 1,000 pages or more. Still, these numbers are as optimistic as a congressional budgetary forecast. In a first-year course, it is probably realistic to cut the 840-page coverage prediction by approximately 100 to 150 pages because some days will be at the lower end of the 12-to-15 spread, assignments will

not neatly fit your daily quota, sessions toward the end of topics will have to be adjusted downward, you will probably want to add some materials, and there is a natural braking toward the end of the semester (a combination of fatigue and a mass secret student conspiracy to prevent you from completing the syllabus). Another factor is the increasing tendency of schools to schedule longer but fewer class sessions per semester. Whatever might be true of other courses, it is hard for law students to cover twice as much material in a two-hour Constitutional Law class as in two one-hour classes. There is also the Bermuda Triangle effect in some sessions. When I took Constitutional Law, we ended one session in the middle of *Flast v. Cohen*, immediately before the citation sentence: “*See Muskrat v. United States.*” We ended the next session, 50 minutes of class time later, still in the middle of *Flast v. Cohen*, but now immediately after the citation sentence: “*See Muskrat v. United States.*”

A more significant problem in determining casebook coverage is that courses tend to cover fewer pages now than they did several years ago. There is probably no single explanation for this phenomenon. One generally positive reason is that today’s students are more likely to ask questions in class, especially if they are engaged, and teachers are more likely to answer. This takes time and knocks courses off schedule. A less positive factor is that too many students are not as well prepared by class time as they used to be, conceivably a result of laptops in class, too much confidence in commercial outline websites, and the ever-increasing number of study aids. For whatever reason, because depth of reading is more important than number of pages covered, you should be conservative in preparing your tentative course coverage outline. The worst that can happen is that you will finish a week or so ahead of schedule, time that can be well spent working on problems that integrate doctrines and themes from throughout the course.

B. SEQUENCING TOPICS

At this stage, you are ready to plan the sequence of the topics. To the extent you assigned a casebook that largely follows the approach of your initial outline, this should be a fairly easy task of matching your coverage to the amount of time you want to devote to each topic.

Most casebooks begin directly with Article III topics, but you might want to introduce the course more generally. As discussed in Katz and O'Neill, it is often helpful to talk about general themes before getting to the traditional "first topic." Many teachers assign the Constitution itself for the first class, sometimes along with a brief extract from one or more of the many commentaries on constitutional law. This takes advantage of student enthusiasm for the course before immersing them in what many of them (and many of us, let's admit) feel is more rabbit hole than wonderland in the intricacies of Article III theory. Another approach is to take a current problem to illustrate course themes before returning to the casebook's order. This strategy is discussed in more detail in Part VI.

Another issue that arises early in the course is something Katz and O'Neill call "the *Marbury* Gap," which occurs when lengthy assignments of historical or theoretical material take up too much class time early in the semester. Judicial review theory becomes a basic assumption of the rest of the course, neither the theoretical nor the historical perspectives are conducive to issue-spotter essay questions, and it is hard to build good class discussions around assignments that are all or mostly textual background. Some teachers respond to these problems by skipping directly from *Marbury* to legislative powers. A variation that seems to work better is to modify the casebook's structure, perhaps cutting some judicial review material that might be repetitive or unhelpful, at least at the fairly shallow level of analysis possible in the first few weeks of the course. You can cover *Marbury*, a truncated version of *Martin v. Hunter's Lessee* (with *Cohens v. Virginia* treated as a classroom hypothetical) and *Ex parte McCordle*, all in about three class hours (or roughly 40 pages in most casebooks) in the beginning of the semester. Then move on to legislative powers, but return to some of the background theory and justiciability at the end of the course. One virtue of this approach is that it leaves the students wanting to learn more about Article III when they leave the topic, a rarity among those who explore all of *McCordle*'s implications and then dive into justiciability. Moreover, many of the limits on judicial power make more sense to students after they learn substantive doctrine in the rest of the course. The version in the earlier rough outline in Part III assumes a trimmed-down version of Article III topics, some of which can be deferred to later in the semester in this fashion.

If you are covering executive powers, a topic sometimes excluded from the course in four-credit versions, you can cover it almost anywhere in the course. You might consider using it as a palate cleanser after whatever chapter you find least enticing. It is no accident that many casebooks place executive powers right after state regulation of interstate commerce.

Beyond the introductory materials, most casebooks follow a fairly similar order, and unless your preferred order differs strongly, it is best to follow the book's order. The macro reason is that if 35 out of 40 casebook authors want the federal legislative powers before individual rights, perhaps they have a good reason. Still, quite a few people move individual rights to earlier in the course, and there are pedagogical reasons to do so. This is another area in which advice from colleagues and teachers at other schools can be helpful. The micro reason for following the book's order, however, is that the book was written with the expectation that it would be read in order. Changing that order can cause problems, especially when necessary background information is included in a section you defer to later in the semester. This could occur, for example, with respect to the tiers of review. The casebook will probably have some background on the terminology and operation of the tiers in whichever of substantive due process or equal protection it covers first. If you switch the order, there could be substantial confusion until the students read their way to the explanation the casebook author intended to be read when the students first confronted the tiers. At the very least, read the casebook carefully to find such content so you can minimize the problem before you shuffle the order.

C. THE PUBLIC SYLLABUS

The syllabus for the class is based on the syllabus you prepared for yourself. Although different schools have different expectations about the need to provide a syllabus, students always find one helpful. The most important component is a list of topics with reading assignments. If you have completed your private syllabus by the beginning of the semester, you can give the students a complete assignment list. If it is still a work in progress or if you want flexibility to modify it as the semester proceeds, you can provide only the first few weeks of assignments. You should still include a full list

of course topics. Make sure that you provide the additional reading assignments a reasonable time before the students need them.

There are four other sections that you should include in a syllabus—an introduction that lays out objectives for the course, comments on secondary materials and study aids, ground rules for the course, and your availability. The introduction can and probably should be short. Think of it as your opportunity to write the foreword to the Constitutional Law casebook you will write in a few years, and simply state those things that your students should have in mind as they start the course.

There are a number of different approaches to discussing secondary materials. Perhaps the most common is to mention student treatises but ignore study aids, erroneously hoping that the subliminal message will work. Another common approach is to give a long explanation of why students should not use study aids, another approach that does not work. Conversely, some teachers personally review available study aids and recommend the ones best suited for the course. That *might* work, but it is time-consuming and dangerous. Even a good study aid that is only a year or two old could contain some seriously out-of-date law, and you might have some explaining to do in exam conferences if you recommend that study aid in your syllabus. As a result, some of us discuss and recommend specific student treatises, but then describe some of the leading study guides by approach, explaining how they can be used to supplement the casebook assignments. In Constitutional Law, I always include a disclaimer along these lines:

The Supreme Court has been changing the landscape of constitutional law in a variety of areas central to this course for a number of years. There have been new and important decisions since publication of some of the secondary sources. I will update the casebook in class or with handouts, but not the secondary sources. For this reason, it is very dangerous to rely on secondary sources as stating what the law “is.”

The last two sections are simple. A “ground rules” section, whatever you call it, should remind students of school requirements, such as attendance and grading policies, as well as any practices you follow, such as expectations about class participation. It is also an opportunity to explain why class participation is important, which can underscore any explanation you give in the first class. Finally, the

syllabus is the place to include information on how to contact you, such as office hours, telephone numbers, office location, and e-mail addresses.

The last point suggests something about your syllabus and communications with your students. Your school might have an electronic course management system that allows you to communicate with your students or otherwise to coordinate handouts and other course materials. If it doesn't, you can readily create your own Web page (your research assistant will probably be able to do this for you, as will any teenager) or use a system such as West's TWEN. The only caveat here is to make sure your students use it. Student practices with electronic media evolve rapidly—e-mail is now passé, although it won't stop some students from e-mailing questions to you at all hours.

V. In the Classroom: Basics

A. TECHNIQUES

Most of what you need to know about teaching Constitutional Law in the classroom is already addressed in Katz and O'Neill. Constitutional Law has a few idiosyncrasies, but for the most part, teaching law is teaching law. Success depends heavily on productive interaction between the teacher and the students. Constitutional Law is a classic example of a course in which the rules are not that hard to learn, although the when and how of application can be intricate and deceptive. Students tend to assume they understand the material unless pressed to apply it. For that reason alone, it is the last course I would teach by lecture. The modern Socratic method is rarely the harsh version used by *The Paper Chase's* Professor Kingsfield. It is instead a vehicle for keeping students thinking productively during class and for providing you with constant feedback about the extent to which your students are absorbing the material. There is one additional reason for using some version of the Socratic method in class, and to me it is the most important. In the end, the most important lessons are in the questions, not the answers. It is not the bottom line—Is something constitutional?—that matters. It is the order and structure of questions a lawyer has to resolve that matter. Stated more simply, the questions provide the necessary foundation

for deciding whether something is constitutional. That bottom line will matter to the client, but attorneys (and your students) can get there only after they learn all the questions they have to answer on the way. The Socratic method is the best way to ensure that your students learn the questions, even if they don't yet understand how or why they are important. I didn't realize this until late in law school, and you shouldn't assume that your students will understand it now.

This leads to the various approaches to conducting the Socratic method in a fashion that minimizes unnecessary stress. Katz and O'Neill address several techniques. Calling on students randomly with a gentle touch and relatively short inquisitions can achieve the highest level of across-the-class preparation while alleviating at least some of the stress, but there are costs. One is simply that as fewer teachers choose to call on students randomly, student resentment of those who do grows, and that resentment itself can obstruct learning. The opposite option is to use a rigid panel method, in which students are "on call" only when on a panel specifically assigned for that class session. Although some teachers find this method satisfactory, it has several flaws. First, total reliance on such a method sends a clear message to students that they are off the hook on those days their panel is not assigned. That tells too many of them to emphasize their other courses while studying. Second, the reliance on a group that knows they are going to be called on results in unrealistically strong answers. This sometimes makes class seem like a dialogic lecture, in which much of the value of working through a problem as a group is lost. In addition, of course, you don't get accurate feedback with this system. Finally, the best way to work with difficult material is to continuously readjust your questions and comments in response to students who are prepared but not polished. A Goldilocks-like compromise that often achieves the best results is to question randomly but send messages that reduce stress. This can be done, for example, by starting each class with a randomly selected participant, but then working through the class by rows. Everyone has to prepare, but after the first few minutes, most students will know whether they are likely to be called in that session. Little things, such as naming the student before you state the question, can also reduce student anxiety and shorten response time. You also have to decide on the extent to which you will use volunteers during the discussion. Like panels, volunteers give you an unrealistic sense of your class. But there are

also positives in including perspectives from students engaged enough to want to participate.

Apart from its potential for abuse, the major problem with the Socratic method is that it “hides the ball.” I prefer to tell students that “I don’t hide the ball, *the courts* hide the ball.” What I mean is that the real problem lies in constitutional law opinions that are opaque, poorly explained, or plainly at odds with Supreme Court precedent. Much classroom discussion is dedicated to identifying such judicial ball-hiding. Classroom ball-hiding was once seen as a virtue. But it is our job as teachers to explain our expectations about what students need to learn and what they should be able to do at the end of the course, essentially the same objectives identified when first assigned to teach the course. Most students will have no experience with classroom learning focused on skills rather than knowledge, and they need to understand what is expected of them. I repeat to my students, probably too often, that learning holdings and rules is not learning to be a lawyer. That would be like trying to learn how to run by reading about muscles and body movement or how to play the violin by listening to music. This leads back to why we use the Socratic method. Much of the antagonism toward that method dissipates when students understand that it is used to help them learn rather than to show them up. I really don’t think there is any downside to being as open as possible about what we expect and why we do what we do.

The last issue is probably another variation of transparency, this time focused on substance. In creating your initial list of objectives or teaching outline, you will probably identify themes that run through the materials in the course. Three that I always emphasize are (1) the role of courts (as opposed to political decisionmakers), (2) the existence of constitutional “revolutions” (periods of great rapid change, such as the early Marshall court and the New Deal period), and (3) the expansion of the constitutional community from the propertied white males of the founding period to all citizens and even some aliens today. Each of these themes occurs to some extent in every topic covered in a typical Constitutional Law course. You can let your students discover the relevance of the themes for themselves, and you should give them that opportunity by *not* emphasizing the themes at the beginning of each new topic. But you should also make sure that the class doesn’t leave the topic without at least a brief reference to the relevant themes at some point. Katz and O’Neill

refer to the need to situate material throughout the course. This is a variant of that notion. Make certain that your students have the keys to understanding how such seemingly unrelated topics as the interstate commerce power and the First Amendment are connected.

B. CHALLENGES IN THE CLASSROOM

Part II introduced some of the problems of teaching Constitutional Law. Here are several additional problems that can arise in the classroom.

1. Inconsistent Cases

Any capable attorney looking at certain lines of Supreme Court decisions knows that the results are inconsistent, even if each decision is supported by a majority and there is no language in the later case asserting that it is overruling the earlier one. Lawyers know this to be one of the frustrations of practicing law, but it scares students because most of them are anxious enough about learning “rules” that they find learning inconsistent rules to be a serious intellectual challenge. One thing I do that alleviates the problem for some students is to demonstrate that most of the justices would agree with them that many of the Court’s decisions are inconsistent. The simple existence of dissenting opinions proves the point. More is necessary to convince many students, though, and over the years I’ve collected different examples that illustrate the point succinctly. The best is *Apodaca v. Oregon*, a criminal procedure case from 1972. Apodaca’s conviction by a nonunanimous jury was upheld by the Supreme Court, even though a majority of justices concluded that the Sixth Amendment requires a unanimous verdict, and a majority of justices concluded that the Fourteenth Amendment grants to state defendants the same jury trial rights they have under the Sixth Amendment. This anomalous outcome happened because the majorities were made up of different justices. Eight concluded that the constitutional requirements are the same, but they were equally divided between four who concluded that nonunanimous juries are permissible in both settings and four who concluded that unanimous juries are required in both settings. Justice Lewis Powell, the swing justice of the era, rejected the notion that the requirements are the same for state and federal juries, and voted to affirm the state conviction despite noting that he would reject a

federal conviction in the same circumstances. Tell your students that if eight out of nine justices agree that two results are inconsistent, there is nothing wrong with them believing it, too.

2. Wrong Cases

If you are teaching Constitutional Law from a historical perspective, you will necessarily include a number of long and difficult cases that include analysis and legal conclusions that are no longer valid law. Even if you are not presenting the course with a historical outlook, you will likely spend more time on overruled cases than in any other course. Common examples are *Lochner v. New York* and *Bowers v. Hardwick*, and there are numerous cases that have been so nibbled away that all meaningful law comes from later decisions interpreting and limiting them. There is almost always some student resistance to such cases, even though we know that reading them is often necessary to understand the cases that follow. My recommendation is to be upfront with your students at the beginning, to talk about how modern decisions necessarily build on earlier cases, and that in this sense, constitutional law is closer to the common law they learn in other first-year courses. Still, this is one downside to putting an emphasis on history. Students work hard in all their courses, and there is much to cover in Constitutional Law; spending much of your limited time on what students see as unimportant could cost you more than you gain by doing it your way.

3. Sensitive Issues

There are numerous sensitive subjects in Constitutional Law. In the 1960s, children were taught that it is impolite to discuss politics, religion, or sex in public. Teaching Constitutional Law requires us to violate all three aspects of that advice. As a result, many topics create a danger that you or a student will blunder into saying something that offends some students. It *will* happen at some point. The greatest danger is not necessarily at the most obvious places. Most of the class will recognize that individual views about abortion are deeply felt, and that there is nothing to be gained from hurting classmates by insensitive comments, so the abortion discussion might be uneventful. But other fundamental rights topics, such as the right to die, are more likely to spark an ill-considered comment or two, perhaps because the

students are less likely themselves to have faced end-of-life decisions than unintended pregnancies. Racially insensitive comments are also a cost of teaching parts of equal protection, particularly affirmative action. No area is immune—an unintentionally offensive comment once punctuated a discussion about a state environmental regulation challenged under the dormant Commerce Clause. The best response is to control the discussion in dangerous areas a little more than elsewhere, perhaps by setting more of the basic premises through your own introductory comments and then using very specific, occasionally even leading, questions. And that guy in the last row wearing a cap emblazoned with a comment even you find offensive, the one who has given smart-alecky unresponsive answers to questions throughout the semester? This might be a very good day to find him invisible, no matter how often he raises his hand. When someone says something inappropriate, move on as quickly as possible, and if you feel you should say anything, make it short and focus on the failure of the comment to add anything to the discussion.

4. The Relevancy Problem

Many law students do not see the connection between constitutional law and the day-to-day work of attorneys. This might be aggravated by our colleagues, who have been known to say things such as “*Real* lawyers do secured transactions.” Although procedural due process is an exception to this comment (which is one more reason for including it in the course), the relevancy of many of the topics in Constitutional Law to law practice is not obvious to many students. Most students doubt they will ever argue before the Supreme Court or even serve as counsel in a case of first impression at any level. I try to minimize such thinking by talking about some of the cases at their initial stages, when an aggrieved person needed legal advice and found a lawyer, sometimes a sole practitioner, willing to take the matter. There are plenty of such cases, even in the Constitutional Law course. I also look for a local connection. The recent funeral protest case, *Snyder v. Phelps*, was brought by a local plaintiff and an attorney in a regional law firm, facts I make sure are in the assigned materials. The full answer about the relevance of Constitutional Law even for practitioners who never litigate is that constitutional analysis is a necessary tool for lawyers, especially those who work for a government or represent clients with business

or disputes with government, which makes constitutional law part of almost every attorney's work. Students are more likely to react to the story of the small-town attorney in the big arena, however, than to a lecture about the importance of constitutional analysis in the small arena.

5. I Learned Constitutional Law in College

Perhaps the reverse problem relates to students who took Constitutional History or a similar course in college, looked forward to taking it in law school, and expect to do very well based on that experience. Many of them are highly interested, are major contributors to classroom discussions, and do well. But a substantial minority find that Constitutional Law in law school is different from the college course they enjoyed, and they blame the law school teacher. The reason more often than not is that college Constitutional Law courses are usually about political science or history rather than constitutional analysis. They are valuable courses, but they do not help prepare students to read constitutional law cases critically. Some students who do well in college courses do not recognize that more is expected of them in law school. In fact, the reading assignments in law school tend to be notably *shorter* than those in college. We understand the reason—law students must read cases slowly and carefully to understand and to apply the analysis of the sometimes several opinions to different factual settings. To college students, *Marbury v. Madison* established judicial review. To law students, it is a vehicle for exploring the nature of judicial review in a republic, the counter-majoritarian dilemma, the difference between structural and textual interpretation, and the distinctions between executive actions subject to judicial review and those immune from judicial review. Some of those students who think they know *Marbury* from college will resist accepting that they need to do all these things. As with so many of these potential problems, the best defense is transparency. Explain the different nature of legal exploration of constitutional *law* and argue that it is why *lawyers*, rather than politicians or historians, argue and decide such cases.

VI. The First Day

A. THE FORMAL START

The first class is your best opportunity to provide an overview of important themes of the course. Katz and O’Neill discuss several different approaches to this first day, and their observations are fully applicable to Constitutional Law. I would add two points. These are first, a brief description of how Constitutional Law differs from other courses the students have taken, and second, how the issues in the course relate to one another.

How you approach the “difference” question again largely depends on the place of the course in your school’s curriculum. If your course is in the spring of the first year, the students will already have become accustomed to case-law-driven courses in which judges are largely free to make the law. If your course is in the second year, that notion will be even more deeply rooted, although the more heavily statutory courses most second-year students take might lessen the presumption of unfettered judicial discretion as the semester progresses. Regardless of the format, however, you need to start the students thinking from the first day that this course is not *just* judicial policymaking, even though they will find a lot of it in the course. One way to do this is to note one of the very specific provisions of the Constitution and get the class to agree that such provisions cannot be changed by judicial decision. The minimum age of the president is a good example. Then turn to one of the open-ended provisions, such as due process or equal protection, where meaning is debatable and some level of judicial creativity is necessary.

The question of how issues relate to each other largely results from the fact that on a superficial level, Constitutional Law seems to be largely a collection of selected topics that are important but don’t readily fit into other courses. Thus, we consider congressional power under the Commerce Clause and the right to free expression, but not congressional power under the Bankruptcy Clause or the right to a jury trial. The answer is the key to understanding the course, something you probably discovered when you took Constitutional Law. It is that the course and the portions of the Constitution it addresses are about the general outline—the bullet points—of the basic treaty or charter or contract—whatever metaphor works best for you—between the people and the national government. These

provisions are the “big-picture” examples of what the government can and cannot do. Those “dos” and “don’ts” range over a wide territory, but what holds them together is that they were important enough to become part of that basic agreement and remain important enough to be relevant to constitutional conflicts today.

B. ILLUSTRATING THE THEMES OF THE COURSE

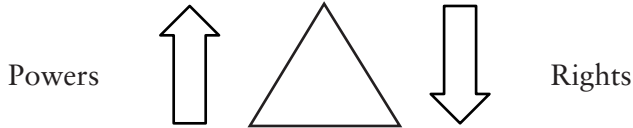
I recommend turning to problems in the first class as soon as the formal introduction is over. The problems should be designed to illustrate that a variety of constitutional issues can arise from one set of facts. There are endless variations on what you can do, but the key is to use problems rather than hypotheticals; that is, longer and more complex sets of facts that you provide to the students ahead of time. A good starting point is congressional legislation that raises individual rights questions, and the best source of such problems is current events. The 2010 Patient Protection and Affordable Health Care Act has provided a great basis for discussion, but you should use different examples every year or two to keep ahead of the Court (and your students). A simple example that you could use would be a federal law requiring individuals to recycle specific items, such as bottles or cans, and to pay a “litter tax” if they fail to do so. A logical first question would be this: Where does Congress get the power to enact the law? If you assigned the text of the Constitution itself for the first class, the students should be able to make arguments about the commerce, taxing, and necessary and proper powers. A slight variation dealing with federally subsidized landfills could add a Spending Clause aspect. There is no need to get into cases such as *Wickard v. Filburn* or *Gonzales v. Raich* at this point. Instead, simply ask whether individual actions or even nonactions can be regulated under these powers, and under what possible theories. This can lead to a discussion of possible limitations on government power, such as due process, asking students to focus on the concept as a legal restriction on government and not just as a political slogan. You can then discuss whether there are natural rights or other unstated liberty interests involved, and if so, how an unstated right can defeat a power expressly granted to government. It is easy to add an equal protection component in the form of statutory exceptions. If your course is going to consider the First Amendment, it is equally easy to

add a small free speech wrinkle, such as regulating the information that waste and recycling companies must provide to their customers.

You can then use a wholly different problem to introduce federalism issues. It would be possible to include a state law that comes into conflict with the federal recycling law, much as Virginia's statute granting its citizens a right of freedom from health insurance was fashioned to counteract the federal health care law. But it might be wiser to explore a different area to expand the scope of the discussion. For example, you could use the very common example of a state education law that imposes performance standards on both public and private schools. This would start the students confronting the concept of state police power and should also lead to questions about religious freedom and parental control of their children's education. Here the national-state conflict can be efficiently presented using a simplified version of the No Child Left Behind Act of 2001, which presents issues of state powers and federal preemption. Equal protection issues are easily added by limiting the application of the state law to schools with a history of underperformance or in specified cities.

These two problems together should take well over an hour and, with the other formal introductory materials, could fill a two-hour first class (or the first two classes of hour-long sessions). I would conclude with a brief overview, somewhat consistent with what Katz and O'Neill call the "Goodyear Blimp Overview." This can be done at the beginning of the second two-hour session (or roughly the third hour of the course in whatever format). It takes about half an hour. It restates the themes from the problems, clarifying their basis in constitutional text and emphasizing any issues that were overlooked in the discussion. The critical point is not to rehash the problems but to put them together again piece by piece, this time in the order of the topics in the course. For example, if you are beginning with Article III, you can start by referring to the part of the introductory discussion where the class discussed challenging the laws in federal court. Mention that the first issues the course will address concern how federal courts have the authority to decide such questions, and then show the variety of subsidiary issues that can arise when judicial power is challenged. Continue on through the legislative powers, presidential powers, state police power issues, and the various rights-based objections to the laws.

I end with something that makes two more appearances in the course, once on the day we transition from powers of government to individual rights, and once at the end of the course. It is a triangle with arrows at its sides and the words “Powers” and “Rights,” which serves as a visual representation of much of our constitutional analysis.



I tell the students that constitutional analysis resembles climbing up and down a triangle (or a pyramid or the slopes of a mountain, if they prefer). We all start at the bottom. To be valid, a law must “climb to the top” and be able to stay there. A governmental action is not constitutional unless it is within that government’s powers. So on the left side of the triangle, the students should include all of the constitutional rules and principles concerning governmental powers. These are the steps to the top. Some laws are simple and can be satisfied in one step. For example, a federal law establishing an army is specifically authorized in Article I, section 8. Others require more analysis, such as a law regulating business transactions that occur in one state. We would need to find facts and make an argument to demonstrate a sufficient connection to interstate commerce (probably including a boost from the Necessary and Proper Clause). If we succeed, the law climbs to the top of the triangle. State laws have to satisfy the police power to make the climb. Then, even if the left, or government powers, side of the triangle is satisfied, laws must also satisfy the right (individual rights) side as well. Here, the pyramid and mountain metaphors work well because students see that they mean the law has to “stay on top.” All sorts of rights can defeat laws that satisfy the powers side. Those usually taught in the Constitutional Law course are due process, equal protection, and the First Amendment. To succeed, therefore, a law must be within the powers of government (left side) and *not* defeated by constitutional rights (right side). All issues from the course can be placed on this chart.

This variation on the Goodyear Blimp Overview serves several purposes, as generally set out in Katz and O’Neill. The only things it adds is that by drawing on the opening problems, this version combines factual analysis and legal categories, and it does so in the

form of an easy-to-remember visual example of the relationships among the seemingly unrelated topics considered in the course.

VII. Day-to-Day Teaching Techniques

A. DIFFERENT MATERIAL, DIFFERENT APPROACHES

Although Constitutional Law is best taught using a conversational rather than an inquisitorial form of the Socratic method, some topics lend themselves to variations. For example, although you will definitely want to question students about *Marbury*, it is best to use very direct questions. The students are just beginning the course, and *Marbury* is too rambling an opinion for open-ended questions. You need to focus on its facts, holdings, and significance, taking advantage of Chief Justice John Marshall's carefully disciplined (and choreographed) flow through the issues. You might want to begin by charting the structure of the opinion on the board, and then ask the students to think about why he addressed the issues in that order. If the students have already taken Civil Procedure, they might pick up on the fact that he addressed jurisdiction only after considering the merits. This point will be contrasted within a few sessions with the opening words of *Ex Parte McCardle*: "The first question necessarily is that of jurisdiction." In discussing *Marbury*, you will want to follow with questions designed to lead to the central legal aphorisms found in the case, which you will find opportunities to revisit throughout the course. You should go through *Marbury* rather methodically, as befitting its central place in the canon. The best way to avoid what Katz and O'Neill call the *Marbury* Gap is to limit general discussion of judicial review theory and move quickly through much of the Article III material that follows it. You can present the key facts of many of the remaining Article III cases yourself and quickly focus the class on analysis. You can also defer "case or controversy" until later in the course, as discussed earlier in Part IV.

If you are looking for an area in which you can cover ground rapidly, you can present executive powers by lecture, perhaps asking a handful of questions primarily to make sure the students are following you. The material does not lend itself to traditional case analysis, the cases are butchered to fit the allocated pages, and the law is sufficiently dismembered that if your students satisfactorily

reconcile the holdings of the leading cases, something is wrong. You will do no harm by carrying the ball yourself on this topic.

Study of the tiers of judicial review also lends itself to creative teaching. After you have covered the black-letter law of both due process and equal protection, you might work up a series of short problems for students to identify the issues and apply the appropriate standards of review. Then break the class into small groups to discuss the questions for a short while (have different groups start with different questions to be certain that all questions are addressed). When the groups report their answers, they will probably discover that what appears to be formulaic on the surface hides some ambiguities. Ask the students to read over their notes and submit short answers electronically before the next class. Then begin that class with a summary of the answers, adding your own comments where necessary. It is a time-consuming process, but worth it, because too many students make sloppy errors about the tiers of review on the final exam, and this should help them avoid those mistakes.

Some teachers use role-playing in Constitutional Law. My impression is that students today are less comfortable with role-playing than in the past, but some use of it in discussing problems can work. More important, using problems helps alleviate the difficulty many students have envisioning themselves as attorneys involved in major constitutional controversies. Part VIII and the Conclusion include references to Internet sites and law review articles that might help in this regard.

You should experiment with these approaches, as you will find that the more you teach the course, the more your experiences will suggest additional and better alternatives.

B. CLASS NOTES

There are many valid approaches to preparing and using class notes. Some teachers write out a nearly verbatim script, and at the other extreme, some prepare without any written notes at all. The key is to discover what works best for you. I add the following suggestion because it seems to describe what some of the best teachers I know do.

Garrison Keillor does a weekly story or monologue of about 20 minutes on *Prairie Home Companion*, a nationally syndicated radio

program. He was once asked how he tells the stories so well. His answer boiled down to this: He writes out a fairly complete version of the story on a series of index cards, reads through them often in the days leading up to the broadcast, and then tells the story without looking at the cards. Many professors, especially in their early years of teaching, find that methodically writing out what they hope to cover—"the story"—helps them absorb its structure, central points, and even some of the specific questions to ask. They read over those notes several times. In class, however, they converse with their students, asking questions for the most part, but making occasional assertions or giving answers. They do so when the discussion begins to range too far from their story. They keep the notes on the podium but look at them only for details, such as page numbers or specific language in an opinion, or a more dire emergency, such as a professorial brain freeze. Again, it's not the only way, but it is a good way of combining the advantages of rigorous preparation with those of spontaneity, and it frees the teacher to move about the room.

C. TEACHING ASSISTANTS

Many law schools now provide teaching assistants, at least in first-year courses. They aren't quite like the graduate assistants you remember from college, who seemed to do most of the work, but they can help you teach your course more effectively. For the most part, law school teaching assistants are third-year students who did well in the course and have the temperament to help other students learn. You, however, need to provide them with guidance and support. At my school, teaching assistants hold weekly office hours where they both field questions and help students outline material from previous class sessions (the limitation to previous sessions is important—you do not want teaching assistants introducing new topics). Not all students make use of the assistants, and not all who do find them helpful, but some do.

Teaching assistants can also be a great help to you. They provide good feedback throughout the semester on what is working (and, more important, what is not working) and the areas that the students find most difficult. This allows you to modify the syllabus to revisit some of the problem areas, perhaps by showing how they relate to topics that students find easier to understand. In addition, students

are willing to tell teaching assistants things that they won't tell professors. Good teaching assistants find ways of letting you know those things.

VIII. Using Technology

Most classrooms are now wired for electronic presentations of different media. For the most part, these are quicker and more convenient versions of old technology, but some recent developments have greatly enhanced teaching presentations. Many current law teachers attended school when a chalkboard was about as sophisticated as the technology got. We tend to be good aural learners and, of course, know where our class discussions are headed, so we ourselves have little need for the visual cues provided by most classroom technology. It is therefore not surprising that many law teachers make little or no use of technology, even a chalkboard.

That is a mistake, even for the very best classroom teachers. Studies show that many contemporary students are visual learners who need to *see* as well as *hear* in the classroom to fully grasp the content. This is probably true even at the most elite institutions. As a result, you will help your students if you make thoughtful use of classroom electronics.

Electronic whiteboards, such as SMART Boards, are excellent for presenting outlines or bullet points along with your oral presentation. You can use Microsoft PowerPoint, which provides numerous bells and whistles (literally) to present text, photos, drawings, symbols, and sounds to underscore your main points. Whiteboards also project word processing documents, which might be more effective and easier to use than PowerPoint when you want to work with constitutional or statutory text in class. An Elmo document camera is the modern equivalent of an overhead projector. I recommend that you consider these older school techniques because some teachers have a tendency to overdo PowerPoint. What is useful when used in a limited fashion can become distracting or even overbearing when used to excess. It can also affect classroom discussions, as some people design the structure or content of their presentations by what looks cool in a PowerPoint presentation. At least until you become comfortable teaching with an electronic whiteboard, plan your oral presentation, then build a visual accompaniment.

The whiteboards also make available blank screens that can be used just like chalkboards. They have, however, the very important added capacity to save and store for future reference everything that is written or drawn on the screen by one of the electronic markers (or even a fingertip). Some teachers routinely open this program at the beginning of class and leave it on even during a PowerPoint presentation. This allows them to tap the board and have the blank screen immediately operational whenever something requires an unplanned visual explanation. As a practical matter, one can also do this in PowerPoint by including a blank screen in the presentation and filling it with material during the discussion.

These techniques are particularly useful in Constitutional Law because often the purpose of a discussion is to make a list of relevant factors or the steps of resolving a problem. An example of the former would be those facts or conclusions relevant to constitutional interpretation in a particular case or problem, such as constitutional text, intent of the framers, constitutional structure, and precedent. An example of the latter would be the steps of equal protection analysis, from identifying the classification through applying the standard of review. Revealing the list or order of steps at the beginning of the discussion would eliminate much of its value (this is sometimes a problem with overreliance on PowerPoint). Using a blank screen and having the students provide the factors or steps, much as was done in past generations using chalkboards, on the other hand, works equally well electronically. If you find it necessary to correct student errors or to use different terminology, you can prepare a slide of the “perfect” list or steps before class, place it at the end of the PowerPoint slideshow, and bring it up at the end of the discussion. The students will then copy your version, and you can explain the differences from the one developed in class if you choose to do so.

There is also a role for videos in class, as there was when we were students, but their use is now integrated into the electronic whiteboard. Here are three you should strongly consider using in Constitutional Law. The first is so valuable that you should find a way to use it even if you are fighting a losing battle against time. It is *The Road to Brown*, a documentary film about the legal battles that preceded *Brown v. Board of Education*. It tells the story of the NAACP Legal Defense Fund’s equal protection challenges to segregated schools (many of them law schools), and does an excellent job of explaining the importance of Charles Hamilton Houston and

Thurgood Marshall to a generation that has too little knowledge of either. The second is a series from which you might select one or two programs. It is *The Constitution: That Delicate Balance*, a series of PBS broadcast seminars conducted by Fred Friendly and several law professors. Each program is a role-playing Socratic class with real decisionmakers in the student seats. They were filmed during the 1970s and 1980s, but most of the programs remain timely. A side effect of watching them is that students who feel self-conscious discussing the issues of national importance considered in Constitutional Law might find it easier after they see that real presidents, members of Congress, judges, and other national figures also stumble in the attempt to apply constitutional law. Finally, whenever I teach the First Amendment, I assign the *South Park* episode “I’m a Little Bit Country.” In that episode, the citizens of South Park debate the free speech implications of demonstrations about the Iraq and Afghanistan wars, confronting flag-burning and physical violence, among other provocative issues. The climax is a sing-off between prowar and antiwar protestors, who perform a parody of the *Donny and Marie Show* feature “I’m a Little Bit Country, I’m a Little Bit Rock and Roll.” A key plot element is that Cartman knocks himself out (literally) to flash back in time to determine the original intent of the framers (see if your students can identify a major factual error here). You can find many more commentaries on constitutional issues in episodes of *South Park* (you might want to delay publishing your findings until after receiving tenure). I assign the *South Park* episode for outside viewing because it is available for free online at southparkstudios.com and, of course, it is an assignment the students relish. I’ve found it more difficult to find accessible versions of *The Road to Brown*, although the introduction is on YouTube, or *The Constitution: That Delicate Balance*. Both are available for academic purchase and are owned by numerous university libraries, however, so you should be able to present them in class.

The Internet has also become a major teaching resource. There is far more there for Constitutional Law professors than you could ever fully explore. SMART Board technology allows you to use the Internet in class. I’ve found websites most useful in class where the words in a case do not fully convey the context of the legal dispute. I often bookmark sites with photographs or other materials relevant to a case and switch between the whiteboard and the Web site during the discussion. This is particularly helpful for First Amendment

topics, as you can often find the actual speech or publication at issue on interest group or academic websites. In discussing *Snyder v. Phelps*, for example, the Westboro Baptist Church and their many opponents have posted photographs of demonstrations, counter-demonstrations, and written commentaries, all of which make good discussion points in class. Supreme Court oral arguments are available at several Internet locations, and can be played in class or assigned as outside work.

Here are some Internet Web sites and blogs that routinely post materials that you will probably find helpful in course preparation or day-to-day class preparation:

- Scotus (Supreme Court of the United States) Blog: <http://www.scotusblog.com/>
- Constitutional Law Professor Blog: <http://lawprofessors.typepad.com/conlaw/>
- How Appealing: <http://howappealing.law.com/>
- Jurist Legal News and Research: <http://jurist.law.pitt.edu/>
- American Constitutional Law Society: <http://www.acslaw.org/>
- Federalist Society: <http://www.fed-soc.org/>
- Prawfsblog: <http://prawfsblawg.blogs.com/>
- Dorf on Law: <http://www.dorfonlaw.org/>
- The Volokh Conspiracy: <http://volokh.com/>
- Balkinization: <http://balkin.blogspot.com/>

A device now used in many law school classrooms is the remote personal response system, usually called a “clicker.” Each student receives one of these devices, which looks and works somewhat like a remote control. Instead of changing channels on the whiteboard (which is probably what the students would like to do), the students use the clickers to respond to yes–no or multiple-choice questions, which you then discuss in class. Using one or two clicker questions in an hour-long class provides students with feedback on their own understanding of the material and the teacher with snapshots of the class’s performance as a whole.

Another valuable resource is a class Web site. Many schools have platforms that allow you to create a Web site for each course. If not, TWEN can be used for most law school courses. You can post to the Web site all pertinent materials from the course, such as the syllabus, handouts, PowerPoint slides, updated assignments, and a discussion forum for the class, as well as links to cases and Web pages. A

Web site is especially valuable in Constitutional Law because you can regularly update with developments from the Supreme Court, including links to argument transcripts, audio recordings, briefs, and decisions.

Podcasts are a growing part of the teaching arsenal, although not yet to the extent of these other technologies. Podcasts are suitable for presenting material where lectures can be effective, and they provide enormous flexibility for both teachers and students, although group interaction is lost. Creative use of a discussion forum on a class Web page and short papers can probably make up for much of this limitation. My law school developed a contingency plan to teach most of a semester by podcast in the event of a flu pandemic. Although that would have greatly changed the educational process, occasional use of podcasts would cause few problems and could be used to help classes stay on schedule without the burdensome practice of scheduling makeup classes when teachers are ill or need to travel.

IX. Review and Exam

A. REVIEW

The recommendations in Katz and O'Neill about review sessions all apply to Constitutional Law. Here are a few additional thoughts. Many students are unusually wary about the Constitutional Law exam because they fear that they will not be able to spot the issues or will otherwise get lost in a mass of complicated facts. I doubt that this is any more likely on Constitutional Law exams than on other tests, but it is a common perception, and one way to reduce student concerns is to hold effective review sessions. You might find it useful to conduct at least two, one at the midpoint of the course and the other at the end, preferably after the last class. The advantage of the early review session is that most students will organize and outline the material from the beginning of the course prior to the review session. It is also useful to provide examples of the sorts of questions you will ask on the exam. Once you've taught the course a few times, it's easy to make one or two old exams available. If you are new, however, your students will be even more anxious about your exam, and you will have no old exams for them. The best solution is to ask colleagues for exams that they have already released to

their own students. You can probably find some questions that are similar to those you expect to give. If you strike out there, reach out to Constitutional Law teachers elsewhere or check study aids. If you use questions from study aids as sample exam questions, however, tell your students what you are doing so that they do not find them on their own and misinterpret your action as revealing that you will also draw your actual exam questions from such sources.

B. EXAM FORMAT

The three- to four-hour essay test at a scheduled time and place remains the most common exam methodology for Constitutional Law exams. The exam could be open- or closed-book, with several “partially open” variations. Some teachers prefer to use take-home exams. The best aspect of a take-home exam is that it provides students with additional time to think about the questions and to organize their answers. Take-home exams can also cause problems, however, especially if you are not confident about the integrity of the process. Although integrity issues can arise anywhere, they seem more likely to be a problem where competitive performance is critical to success. That might be one reason that take-home exams are more popular for electives than for first- or even second-year required courses.

Before writing the exam, you should review your course objectives. Then you should draft a test that emphasizes those objectives. Some objectives are better served by an open-book test, others by a closed-book test. I generally prefer a closed-book exam because in terms of black-letter law, I try to teach those rules and principles that a lawyer needs to know *before* starting legal research. My analytical objectives are less affected by whether the exam is open- or closed-book, but on balance, I want to test how well the students can perform on their own, without a net. Also, and perhaps too paternalistically, I feel that many students do less well on open-book exams because they spend too much time looking up things they already know. On the other hand, many teachers who expect finely tuned answers find a take-home exam to be a better alternative. Most people who use take-home tests report that one- to three-day testing periods are the best option. Longer times tend to leave the teacher with a very high pile of exams, too many of which try to discuss the entire course in the answer to every question.

There is a growing tendency to add components to the exam beyond typical “issue-spotter” essay questions. One is the short essay, a concise question that can usually be answered with a few sentences. Short essays typically ask a direct question about a constitutional theory, issue, or case. One reason to ask such questions is that some first-year students who work hard and are capable do not yet have the knack of responding to fact patterns. Short essays give those students an opportunity to showcase some of their skills. Some of the most thoughtful comments I’ve ever read on an exam were made in short essays, as was the most idiotic comment. Exams that include short essays typically have several such questions, along with one or more longer issue-spothers.

The other exam format commonly used on Constitutional Law exams is multiple choice. I resisted using multiple-choice questions for many years, but finally gave in for two reasons. First, they expand test coverage. When using only essay questions, I would begin the semester knowing that the exam could at most test half the content of the course, and as some topics are hard to combine with any others, they were very likely to be excluded from the exam. I tried not to let it affect my teaching, but can’t guarantee that it worked. Now every topic in the course, even a fairly minor side excursion occasioned by a student question in class, can find its way onto the exam by way of a multiple-choice question. Second, they are a form of long-range planning for the bar exam. Although practicing attorneys do not face legal issues in multiple-choice format, the multistate bar exam includes approximately 30 multiple-choice constitutional law questions. Thus, regardless of how we might feel about testing such a highly nuanced subject in a multiple-choice format, the students will have to cope with that format on the bar exam.

Just taking a final exam that includes a multiple-choice component, of course, does not prepare anyone for the bar exam. What happens, however, is that both you and the students read and think with multiple-choice testing in mind. Before I started including multiple-choice sections on my exams, I would hand out to my students a set of sample multiple-choice questions. I used the same set every year, and because no one was going to be graded on their answers, I never polished them in the way I polish essay questions. Few students took advantage of them in any event. The result was that my students ended the course with (hopefully) a good grounding in constitutional law, but without experience in resolving

the highly focused “no explanation possible” type of question that would constitute most of the constitutional law testing on their bar exam. Now I include 20 multiple-choice questions for one hour of a three-and-a-half-hour exam. The questions are very hard to write, and it takes much longer to write 20 good multiple-choice questions than to grade an hour’s worth of essay exams. But it is worth it, even though I still philosophically oppose multiple-choice exams on constitutional law. The students and I now work on the handout of sample multiple-choice questions with much more care, and I hold a special review session to go over the questions with them. They learn a good deal about how to analyze constitutional law multiple-choice questions at this session. They also learn at least something about constitutional law, if only because it forces them to look at the small picture as well as the big picture.

C. EXAM CONTENT

There are no real content issues with short-essay or multiple-choice questions. Although writing the questions is difficult, and you will need to reread and edit every question carefully after you draft it, it is not hard to test about virtually everything covered in your casebook or likely to come up in class.

Essays are a different story. Some topics are awkward to work into fact-based essay questions. Although the best answers to issue-spotter questions draw on constitutional theory or refer to historical developments in explaining the analysis, for the most part, long essays are driven by text, doctrine, and precedent. In fact, sometimes very good students find Constitutional Law exams particularly challenging because they want to give a complete answer, and the wide range of avenues to explore makes it hard for them to find time or a place to include some of the theoretical points that were important during the semester. The lesson for you is important and counterintuitive. The major theoretical or interdisciplinary components of your course are often best tested through multiple-choice questions or short essays that speak directly to those aspects of your course. Essays, at least issue-spotter essays designed to take a half-hour or longer, are best for showing traditional legal analysis and doctrinal knowledge, much as in other courses.

Constitutional Law exams do a good job of sorting the students. Even the simplest, most straightforward exam will reveal the best and worst students. This is because only the best students recognize the subtleties in doctrine that require a little more explanation or a few more “however’s” in explaining the answer. Stated differently, well-crafted constitutional law issue-spotters with a few twists will identify the group of students who see those twists and can ride them out without panicking into incoherence. For example, any question that draws on the limits of congressional power recognized in *New York v. United States* is likely to reveal that most students have a hazy notion of that concept, but also that a few excellent students did the work carefully and understand the limitation, perhaps as well as the Supreme Court itself understands it. Similar topics that reveal the strongest students include limitations on Congress’s power to curtail jurisdiction, the fact that the necessary and proper power is not needed for specifically enumerated powers, (in contrast) that the Necessary and Proper Clause justifies many collateral regulations, such as conditions on exercises of the spending power or tax reporting requirements, the relationship between the commerce and spending powers, state action problems that are not obvious, meaningful definitional limits on unenumerated fundamental rights, and the distinction between *classifications*, which are reviewed under the Equal Protection Clause, and *restrictions on liberty*, which are reviewed under due process.

On the other hand, some issues are straightforward enough that they provide a good indication of whether a student deserves a passing grade. It is amazing that a student can see a federal statute in the facts of a question and never address whether Congress had the power to pass such a statute. Similarly basic and seemingly obvious applications of procedural due process are missed by some students. In general, if you lay down facts without announcing the applicable legal issues even in the most straightforward settings, some students will miss key doctrines and possibly even the issues, and will certainly make errors in the analysis. So if you include some of the harder topics from the previous paragraph along with some of the easier ones from this one, you should be able to identify the top and bottom performers with ease.

The rest of the students can be placed along the spectrum largely by how they do on the bread-and-butter applications of basic constitutional doctrines. Save the show-offy “all constitutional issues

from the course in two paragraphs” questions for the faculty lounge. Try to include at least two essays so that students won’t get all twisted trying to organize everything into one three-hour (or longer) answer. Then be straightforward, but add a little spice. A question involving a federal statute is obvious, and as discussed earlier, allows you to include some harder issues for the very best, and at the same time, to identify those students who never figured out the basic premise of Article I. More important, the facts you include will provide material for the rest of the class to show their facility with the more pedestrian explanations of congressional authority. The question should also include a classification, which will allow the students to show their understanding of equal protection. Depending on the time allotted for the question, you might also include a due process component. If you covered the First Amendment, one tip is that almost any regulation can be tweaked to contain a speech aspect. The second question might involve a statute or another form of government action, such as litigation or a local administrative order that raises jurisdictional, due process, equal protection, or First Amendment issues. If you use a second statutory question, use a state statute this time because of the different constitutional authority issues posed. Again, include some subtle and some obvious issues to set the ends of the curve, and allow the bulk of the class to slog it out in the middle by showing how coherently they can explain and apply doctrine.

Here is a last piece of advice that could apply to all courses but seems to have special application to Constitutional Law because the connections among doctrines might be very obvious to us but not to all students. Make sure that you test at least one topic twice, preferably as part of two different essays, and make sure that you do not test at all on at least one topic. *Then tell your students that you do this.* The reason is to protect students from their own anxieties about issue spotting. If they think there will be only one question with equal protection, and only one question with Commerce Clause, and only one question with due process, and so on, there is a good chance they will panic if they see one of those issues for a second time. Conversely, if they’ve made it to the last exam question and not found a big, juicy equal protection issue, they will turn that question into one, even if it has nothing to do with equal protection. However, if they understand that some issues will be on the test more than once and some issues won’t be there at all, they are much less likely to let strategic thinking prevent them from doing a good job. You want them to do the best

they can, and this odd little exam writing practice helps prevent them from defeating themselves through flawed gamesmanship.

In the end, don't despair about your exam. It's hard to write an exam, and whatever you do, after you finish grading, you will probably identify some ways it could have been better. One of the best pieces of advice I ever received about exams was this: "A good exam is better than a mediocre exam, but not by much." It is very true. So long as an exam does a reasonable job of including facts that raise constitutional issues for the students to confront for three to four hours, it will probably do a fairly good job of sorting the answers by quality. A better exam would be more accurate on the finer distinctions, but not by much.

X. Conclusion

Many law professors are happy to talk about teaching issues, and most will be happy to talk with you about any of the points addressed in this book or, more important, any points you wish had been addressed here.

Here are some additional sources that include commentaries on teaching Constitutional Law:

Symposium: *Teaching Constitutional Law*, 49 St. Louis U.L. Rev. 633 (2005).

Constitutional Law Casebook Review Issue, 21 Seattle U.L. Rev. 719 (1998).

Symposium: *The Canons of Constitutional Law*, 17 Const. Comment. 187 (2000).

Barbara J. Flagg, *Experimenting with Problem-Based Learning in Constitutional Law*, 10 Wash. U.J.L. & P. 101 (2002).

Robert P. Davidow, *Teaching Constitutional Law and Related Courses Through Problem-Solving and Role-Playing*, 34 J. Legal Educ. 527 (1984).

Web Site for Institute for Law Teaching and Learning: <http://lawteaching.org/index.php>.

Rick Garnett, *Teaching Constitutional Law*, post and comments:
<http://prawfsblawg.blogs.com/prawfsblawg/2007/08/teaching-consti.html>.

Gerard Magliocca, *Teaching Constitutional Law*, post and comments:
<http://www.concurringopinions.com/archives/2009/10/teaching-constitutional-law.html>.

I hope you find the job challenging and fun. The best thing about teaching Constitutional Law is that you get to do it all over again next year.