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“WE RESERVE THE RIGHT TO REFUSE SERVICE TO ANYONE.”

JENNIFER S. HENDRICKS*

The theme of this collection of essays is “Teaching for Social Change When You’re Not Preaching to the Choir.”¹ Not preaching to the choir can mean either that your students are not part of the choir or you are not preaching. My comments are about the decision whether to preach, once you have realized that you are not facing the choir.

In my Constitutional Law class at the University of Tennessee College of Law, there are at least two ways in which my students are not part of my choir. First, my Tennessee students are, on average, more politically conservative than I am and more conservative than the choir that the Society of American Law Teachers (SALT) represents.² They do not subscribe to my particular constitutional hymnbook, especially regarding issues such as gender, sexual orientation, and the separation of church and state.

Second, many of my students do not think that a course on constitutional law is worth their time and question whether it should be required. This surprised me. While there are many criticisms one could levy against the traditional constitutional law curriculum³ and its role in law school, I did not

* Associate Professor of Law, University of Tennessee College of Law. This essay is for my mother Susan O. Hendricks. See *infra* note 19.

1. This collection is based on the remarks of the authors at the 2008 teaching conference of the Society of American Law Teachers.

2. Tennessee has “evolved from being a bluish state to a reddish one.” Michael Nelson, *Tennessee: Once a Bluish State, Now a Reddish One*, in *NEW POLITICS OF THE OLD SOUTH* 187, 188 (Charles S. Bullock III & Mark J. Rozell eds., 3d ed. 2007). The eastern part of the state, where the University is located, is more conservative than other regions. *Id.* at 209. The Society of American Law Teachers (SALT) “is committed to creating and maintaining a community of progressive . . . law professors dedicated to making a difference through the power of law.” Front Page, Society of American Law Teachers, <http://www.saltlaw.org> (last visited January 11, 2009).

3. See, e.g., Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn’t Either*, 38 *WAKE FOREST L. REV.* 553 *passim* (2003) (arguing that *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is in fact far less significant than other cases, that it incorrectly emphasizes judicial supremacy over constitutional supremacy, and that its reasoning “is so shoddy” that it should be used only to illustrate how *not* to engage in legal analysis); Thomas E. Baker & James E. Viator, *Not Another Constitutional Law Course: A Proposal to Teach a Course on the Constitution*, 76 *IOWA L. REV.* 739 *passim* (1991); see also Sanford Levinson, *Why I Still Won’t Teach Marbury (Except in a Seminar)*, 6 *U. PA. J. CONST. L.* 588, 603 (2004) (arguing that beginning a course in constitutional law with *Marbury* “is to feed the monster that . . . courts” are the exclusive interpreters of our Constitution); Eric J. Segall, *Why I Still Teach Marbury (And So Should You): A Response to Professor Levinson*, 6 *U. PA. J. CONST. L.* 573, 573 (2004) (stating that *Marbury* “is a classic that should be treated by courts and academics as an important building block for modern

expect students to start the class uninterested in the material. As it turns out, many of my students, as well as some of my colleagues, do not belong to the choir that sees constitutional law, at least in some form, as an important part of a lawyer's professional life.

For many obvious reasons, I do not preach to my students that they should share my political views, although there is a lot of gray area in discussions of what constitutes a good constitutional argument. On the question of the importance of the topic, however, I have decided to preach. Although I hope the class will prove interesting in its own right, I proselytize directly about the importance of the constitutional law material to their roles and obligations as lawyers and citizens.

When I took a job in Tennessee, I knew, or at least assumed, that it would be a more conservative environment than other places I had lived. Still, I was surprised by the size of the gulf between some of my students and me. Hot button issues like same-sex marriage and religion in the public sphere are often framed politically as questions of judicial deference to the legislature, and I expected opposition to much of the Supreme Court's work in those areas. At least some of my students have taken a further step: while *Roe v. Wade*⁴ was wrong, for example, *Lochner v. New York*⁵ was right, and the Court should prevent the legislature from such illegitimate interference with the free market. I did not expect to find my students pre-disposed against the New Deal.

My own experience in law school was that political differences between the class and the professor could produce an ideal experience. When the majority of the class shares the professor's views, spirited defense of opposing views comes only from a few dissenting students or from the professor's or a student's hypothetical development of counter-arguments. A critical mass of conservative students provides a more robust counterpoint to the professor's own views, sparking real argument from which everyone learns. Occasionally, that happens, and much of what I have learned from teaching this class is from conservative students whose arguments are very different from the ones I would have spun if I had been role-playing "the conservative view."

constitutional law").

I teach a fairly traditional basic course in constitutional law, with slightly non-traditional emphases. It is a four-credit required course in the second year of law school. I use the Farber, Eskridge, & Frickey casebook, and I follow its order of presentation: equal protection, unenumerated rights, and the First Amendment, followed by federalism and separation of powers. See DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* (3d ed. 2003). Compared to the average course, I spend more time on equal protection, partly because I think it is important and partly because it is combined with the overall introduction to constitutional law as a genre.

4. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the constitutional right to privacy includes the right to abortion).

5. *Lochner v. New York*, 198 U.S. 45, 64 (1905) (striking down a maximum-hours law as violation of freedom of contract).

But that does not happen very often. I was warned about this phenomenon. My students are mostly southern, and they are not yet lawyers. They are polite. They are deferential to me (after the first year, I stopped looking behind me when addressed as "ma'am."). They do not wish to offend each other. They are here to learn the law, not to argue about their views on the topics addressed in my class: abortion, the status of women, states' rights, sodomy, same-sex marriage, etc. Even the students who speak up with a conservative argument do not really want to argue with me—they only go one round. If I give a counter-argument to their position, they take it as a correction, perhaps as confirmation that the law (as taught in my class) is against them. Many of these students come to the course skeptical of a Supreme Court that rejects their values, and they are easily alienated by my politics.

Different pitfalls await the students who are in the liberal/progressive choir. These students sometimes feel isolated at UT and seek out like-minded professors. Now in my third year of teaching, I think I have begun to see a trend toward disproportionate enrollment in my class by liberal and progressive students.⁶ These students, however, no less than their conservative counterparts, are prone to miss the law for the politics. Rather than being alienated, they are at risk of being lulled into intellectual laziness and of treating the class as an affirmation of their views.

In my first year of teaching, students in both groups neglected law for politics on an exam question that presented an issue of possible discrimination on the basis of sexual orientation. I received an alarming number of exam essays stating that sexual orientation was obviously a suspect classification. These exams concluded, with no further analysis, that a law that may have been motivated in part by the desire of some legislators to prevent lesbian women from adopting children was obviously unconstitutional. Obviously?⁷ From this, I concluded that my students had accurately assessed my own views.⁸ Unfortunately, they had either confused my views with the current state of the law or concluded that the way to do well in the class was to reflect my views on the exam. My students had found the perfect constitution, but I was not sure whether it was mine or theirs.⁹

6. I do not think it is wrong for a student to choose my course in part because he or she shares my politics. My views about what is important obviously affect the syllabus, and students interested in, for example, same-sex marriage will learn more about it in my section of Constitutional Law than in the others available to them.

7. Aside from any debate about whether sexual orientation is or should be a suspect classification, the question did not involve a facial classification, only the subjective motives of some of the legislators who had voted for the law.

8. Not that I tried to hide them. Even if I could conceal my views, I think doing so is unfair to students, who are entitled to know the perspective from which I teach.

9. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 353–54, 360 (1981) (criticizing constitutional scholarship that "finds" the scholars' policy preferences enshrined in the Constitution). *But see* JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* 15–16 (2003) (rejecting Monaghan's critique).

Now, rather than try to hide my opinions, I try to confront our differences directly. The story of those facile exams is now part of my standard lecture on exam preparation. The moral of the story is that there is nothing more annoying than a bad argument for the conclusion I desire. Either I will be annoyed by the presentation of a bad argument in lieu of available good ones, or, if good ones are not available under current law, I will imagine the client who relies on the false hope of the bad argument. Either way, few exam points will be forthcoming.

My strategy, then, for addressing our political differences and my students' excessive deference is to focus the class on understanding the arguments and what the Supreme Court is doing rather than on debating the conclusions among ourselves. One way to chart a path through the gray area between my political opinions and my assessment of what is a good constitutional argument is to focus on what the Justices think is a good argument and why. The Court actually serves as a convenient anchor, since politically it lies about halfway between my typical student and me. This means I have to be careful not to turn the class into a justification of everything the Court has done—defending it against right and left rather than critiquing it—but it gives us a useful starting point.

What, then, does it mean to teach for social change when most of your students want change in the opposite direction? That question has sometimes made me question my decision to teach at all. I worry that if I succeed in teaching my students to be good lawyers, they will use those skills for what I see as ill rather than good. The answer, I think, is a mixture of humility and faith. The humility, of course, is in recognizing that my own views may prove misguided or poorly reasoned. The faith is in the skills I want them to learn. My co-panelists talked about urging students to consider questions of social change, offering as incentive that it will make them better lawyers to do so.¹⁰ My strategy for the moment is the reverse: the hope that I am helping them to be good lawyers—by analyzing and understanding the arguments rather than rationalizing conclusions—and that doing so will open them up to understanding opposing views. Some day they—and I—might change our minds.

Of course, that hope—that being a good lawyer helps a person develop a vision of and desire for justice—depends on a particular concept of what it means to be a good lawyer. For me, that concept necessarily includes at least some study and understanding of the Constitution. I was surprised to learn how many of my students disagreed.

Constitutional Law was a required course when I went to law school and is a required course where I teach. At first I considered this requirement a formality. Who would choose to spend three years in law school but not be interested in this course, regardless of whether they thought it would be

10. My co-panelists were Professor Susan Becker of the Cleveland-Marshall College of Law, Cleveland State University, and Professor Sudha Setty of the Western New England School of Law.

practical? To this day, I gladly would have paid my three years' tuition for that one class. Admittedly, my professor was a better teacher than I am, perhaps than I ever will be, but the material mattered too.

Walking in with my head in these particular clouds, the biggest surprise of my first year of teaching was the number of students who did not want to be in the class. What, they asked skeptically, did this class have to do with them, and how would it help them in their planned careers as patent lawyers or big-firm associates?

My first response was defensive. I borrowed from a colleague's syllabus to inform students that they would be surprised how much constitutional law they would encounter in a typical practice. Patent law is federal law because of the Constitution!¹¹ Everything is speech, so the First Amendment is everywhere!¹² Rational basis review has teeth at the state level!¹³

The problem is, I do not cover any of that stuff. We do not have time to figure out complicated telecommunications regulations and *then* apply the First Amendment. Even if I did have that kind of time, I would not fill it with the Cable Television Consumer Protection and Competition Act of 1992¹⁴ but with one of a half-dozen absolutely crucial topics I have already had to cut from my syllabus.¹⁵ As with almost every other topic, the week I used to spend on freedom of speech (I cut it this year) was an introduction to basic concepts and not enough to give them competence in any particular subject area.

After an argument with a colleague about the purpose of law school, I decided to change my approach. Now, I preach. That is, I tell my students that conveying specific information that will be useful in their first five years of practice is not the point of my class. Instead, I preach directly about their larger obligations as citizens and members of the bar.

Having decided to preach, I have begun to develop sermons. One of my sermons is titled, "You Have No Idea How Powerful You Will Be." When my students talk about themselves as lawyers, they envision themselves in their first few years of practice. Some of my colleagues share this view and see our mission as preparing the students for this phase of their practice: our goal is to

11. See U.S. CONST. art. I, § 8.

12. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 15–16 (1976) (holding that campaign contributions are speech).

13. See, e.g., Ann L. Iijima, *Minnesota Equal Protection in the Third Millennium: "Old Formulations" or "New Articulations"?*, 20 WM. MITCHELL L. REV. 337, 348–53 (1994) (describing emergence of heightened rational basis standard in cases involving ordinary legislative classifications, such as sentencing disparities between crack and powder cocaine).

14. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992).

15. For the sake of time, I have cut the Free Exercise Clause; all but a quick glance at the rest of the First Amendment; the Dormant Commerce Clause doctrine; the commandeering doctrine of *Printz v. United States*, 521 U.S. 898 (1997); the Commerce Clause between *Gibbons v. Ogden*, 22 U.S. 1 (1824), and *United States v. Darby*, 312 U.S. 100 (1941); and all other enumerated powers, including my favorite, the power to enforce the Civil War Amendments.

produce useful junior associates. My sermon is about what comes after that, particularly for the many students who will become legislators, judges, and other public officials in Tennessee and elsewhere. It begins:

You have no idea how powerful you will be in this society just because you are a member of the bar. Judges will listen attentively to you and take you seriously, no matter how ridiculous the words coming out of your mouth may be. Trust me, I have seen this happen.

What I want the students to see is the connection between the “big ideas” and each of their lives. So, the follow up to “You Have No Idea How Powerful You Will Be” is a looser collection of stories on the general theme, “... And So It Matters That You Understand this Stuff”:

In the hustle and bustle of your everyday life, during a zoning review or a committee hearing or your twelfth bail hearing of the day, every once in a while, suddenly it is going to matter whether you understand, at the core of your being, what it means to be part of a liberal democracy that respects individual rights.

What I want them to learn as lawyers is that law is path-dependent—that history matters—and that the struggles of the past are still going on today. In particular, teaching constitutional law in a southern state, I want to convey to my students the central role of racial struggle and subordination in our legal history and our legal present. Constitutional law sometimes reads like a tale of continuous progress, and once the Supreme Court resolves a question it is resolved. Our case book does a great job showing the complexity of constitutional law through an in-depth case study of school desegregation. Yet, somehow, this does not make much of an impression. For most of my students, school desegregation is ancient history. They are more impressed when we cover *Loving v. Virginia*¹⁶ and I tell them that the last state to take its interracial marriage ban off the books was Alabama, where voters in the 2000 election repealed the constitutional ban—by a 60-40 margin.¹⁷

But smaller things are important too, and one of them is the title of this essay. My class’s coverage of the state action doctrine and *The Civil Rights Cases*¹⁸ includes a discussion of the claim that states have an obligation to redress private discrimination. One of my short sermons is about signs that say, “We Reserve the Right to Refuse Service to Anyone.” These signs persist in retail stores across the country. While perhaps not one of the nation’s pressing

16. 388 U.S. 1, 11–12 (1967) (holding that a ban on inter-racial marriage violated Equal Protection and Due Process Clauses of Fourteenth Amendment).

17. Jeff Amy & Karen Tolkkinen, *Amendment Two Vote Shows State Divide; Mixed Reaction to Marriage Vote*, MOBILE REGISTER, Nov. 9, 2000, at 1 (reporting that 59.5 percent of voters voted for the repeal but that it failed in twenty-five majority-white counties, “sometimes by crushing margins,” and that even some majority-black counties did not support it strongly).

18. 109 U.S. 3 (1883).

crises, the signs are symptoms of ahistoricism and ignorance of context. They have a racist history of which the businesses that post them are usually ignorant.¹⁹

Understanding their offensiveness requires wrapping one's mind around a view of the world very different from the "it's-my-business-I-can-do-what-I-want" attitude of today. At common law, many places of public accommodation had a general duty of non-discrimination, an obligation to serve all comers.²⁰ After the Civil War, some southern states repealed that general duty so that businesses could discriminate on the basis of race.²¹ Posting the sign "reserving" the right to refuse service was an announcement that the business was taking advantage of that opportunity. Many businesses today post these signs just because they have heard of or seen them and foolishly think they are necessary in order to, say, expel a drunken and disruptive customer. One of my small goals in teaching constitutional law is to produce lawyers who will advise their small-business clients not to post those awful signs. I preach this, even if it means I will not have time to cover other law my students—especially those not in my choir—think will be useful.

19. This lesson is an important one to me because it was instilled in me by my mother, who grew up in New Orleans in the 1950s and 1960s and lectured me about it every time we saw one of those signs. A few years ago she finally sat me down to watch *GIANT* (Warner Bros. Pictures, 1956), in which such a sign plays a role in the climactic scene. See also Joe Cutbirth, *McCain's Racist Surge*, THE HUFFINGTON POST, Oct. 15, 2008, http://www.huffingtonpost.com/joe-cutbirth/mccains-racist-surge_b_134868.html ("We Reserve the Right to Refuse Service to Anyone" was catchy little code that actually meant "We don't have to wash black men's shirts at this laundry," and "[W]e don't have to let black families eat at our tables, stay in our hotels or sit in our theaters, if we don't want to.").

20. See Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993, 1995 (1989).

21. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1695 n.16 (2d ed. 1988).

