



DiscoverArchive

Retrieved from DiscoverArchive,
Vanderbilt University's Institutional Repository

This work was originally published as Suzanna Sherry, The Law
Professor as Schizophrenic in 3 Green Bag 2D 273 2000.

The Law Professor as Schizophrenic

Suzanna Sherry

NEAL DEVINS SAYS that we don't put enough political science into our casebooks, and Gerald Rosenberg levels the same charge at our scholarship. And so it has fallen to me to defend the ranks of law professors from these scurrilous accusations. Unfortunately, I can't do it: Rosenberg, at least, is largely right.

Rosenberg's delightful little polemic has accurately diagnosed the problem. Law professors as a group *are* too arrogant, too disdainful of empirical information in favor of grand abstractions, and appallingly willing to write in disciplines of which they are woefully ignorant. There are many exceptions, of course: with or without additional degrees, some law professors are competent – even excellent – historians, political scientists, economists, sociologists, and the like. But too many of us

adopt the “law professor as astrophysicist” model: we think we can master any field in the time it takes to research and write an article.¹ It doesn't help, as Rosenberg points out, that we rarely learn from our students and that we allow them complete authority over scholarly publications.

But what is the solution? Rosenberg seems to despair of finding one, but I think he might be too pessimistic. Not all law professors are – or can ever become – competent in other disciplines, but many can and do. And I'm sure that not all political scientists rank at the top of their fields either. (See, I can do mathematics, too!) Laments like Rosenberg's, and the examples provided by such legal scholars as Mark Tushnet, Barry Friedman, Dan Farber, and others who actually read broadly, will continue to improve the intellectual quality of

Suzanna Sherry is the Earl R. Larson Professor of Civil Rights and Civil Liberties Law at the University of Minnesota. She thanks Jim Chen, Paul Edelman, and Dan Farber for comments. She states at the outset that she has never authored a constitutional law casebook, and indeed no longer teaches basic constitutional law on a regular basis (unless one counts federal jurisdiction as a constitutional course).

¹ For recent – and devastating – critiques of this phenomenon, see Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 *YALE L.J.* 253 (1996), and Mike Townsend, *Implications of Foundational Crises in Mathematics: A Case Study in Interdisciplinary Research*, 71 *WASH. L. REV.* 51 (1996).

legal scholarship.² Moreover, collaborative efforts between law professors and members of other disciplines seem to be on the rise. Patience is a virtue: after all, only relatively recently have law schools begun to think of themselves as academic institutions rather than as mere training schools.

Which leads me to Neal Devins' suggestions. He, too, offers a solution of sorts to the problem Rosenberg identifies. Devins wants to put the political science into the casebooks, where neither students nor professors can ignore it. I will leave aside the question whether casebooks are the best way to broaden the horizons of law professors. And although Devins has certainly made some intriguing suggestions for an ideal constitutional law curriculum, I have some difficulty in understanding why he thinks *law students* need that curriculum.

We'd all like to supplement our constitutional courses with interesting and relevant materials. For example, in addition to the political context of constitutional decision-making, shouldn't we teach our students about the historical context of the Constitution and its interpretation?³ And wouldn't comparative constitutional law add tremendous value to current constitutional courses?⁴ How about a game theoretic analysis of Supreme Court voting behavior?⁵ Or examining the social context

and implications of constitutional doctrine: looking, for example, at the interactions between the ebb and flow of abortion doctrine and abortion rates, unwed motherhood, and children living in poverty?

The problem is that we don't have time for everything that would be interesting and useful. So the question is whether the sorts of materials that Devins suggests are more important than what is currently in the casebooks. And I just can't see how the average law student would be better off reading fewer Supreme Court cases and more material on legislative and executive decisions.

Maybe William and Mary students regularly go off to become lobbyists, and therefore need to be taught how to "advance their interests in both [judicial and non-judicial] sectors."⁶ Most of my students don't, so focusing on basic skills like reading cases and interpreting and using precedent is more important for them. And even lobbying is easier if you can understand and argue the relevant cases: when several law professors testified before Congress that the federal anti-flag burning statute would be constitutional, they had to make some creative (some might say fanciful) arguments to distinguish *Texas v. Johnson*.

In short, Devins overlooks the possibility of using the constitutional law course as simply another vehicle for instructing students in the

2 It's always nice to name your friends in a law review article, which is why I picked these three out of the many possible examples. Apologies to all those whose names would have been equally appropriate.

3 Shameless plug: For those who truly want to supplement a constitutional course with historical material on the drafting and ratification of the 1789 Constitution, the Bill of Rights, and the Reconstruction Amendments, there is a handy paperback available. See Daniel A. Farber & Suzanna Sherry, *A HISTORY OF THE AMERICAN CONSTITUTION* (West 1990).

4 See Vicki C. Jackson & Mark Tushnet, *COMPARATIVE CONSTITUTIONAL LAW* (Foundation Press 1999).

5 Another shameless plug: See Paul H. Edelman & Suzanna Sherry, *All or Nothing: Explaining the Size of Supreme Court Majorities*, ___ N. CAR. L. REV. ___ (forthcoming 2000); Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63 (1996).

6 Neal Devins, *How Constitutional Law Casebooks Perpetuate the Myth of Judicial Supremacy*, 3 GREEN BAG 2D 259, 261 (2000).

common law method, textual interpretation, reasoning by analogy, critical thinking, and all the various modes of legal argument. My experience is that law students need all the practice they can get in these areas, and that many upper class courses already give such skills short shrift in favor of loading up the students with technical knowledge of the particular subject matter. The constitutional law course is ideal as a counterweight, since the subject matter is not highly technical and most students won't need to know the details of the doctrines anyway.

But besides cutting into time more usefully used on other skills, I am afraid that implementing Devins' suggestions would have even more pernicious effects. I taught a traditional case-centered constitutional law course to first-year students for more than 15 years. I have recently begun teaching civil procedure instead. And the differences in students' reactions to the two courses persuades me that following Devins' program would exacerbate all of the problems of teaching constitutional law.

Students come in believing that constitutional law is nothing but politics, and that they're as good at political argument as the next person – or the next Justice. Thus, they often view even the most basic instruction from the teacher as “just Professor X's political bias showing again.” Let me stress that I am not referring to controversial questions on methods of interpretation or validity of results, but only the basic skills of legal analysis and argument. Does any constitutional law teacher think that *Roe v. Wade* is well-written or well-reasoned, even if it reaches the right result? Some of my students have insisted that it is, and that only political considerations would lead one to criticize the opinion. Does any constitutional law teacher deny that *Marbury* contained quite a bit of dicta or that *Brown v. Board of Education* and its progeny ducked some important questions? Many of my students have tried to deny both, and to

attribute any disagreement on that score to political viewpoints.

The problem is that at least some of constitutional law is similar to the rest of law in that it depends on an ability to read (and manipulate) precedent, to interpret (and misinterpret) text, and to make what we have traditionally called legal arguments. The fact that constitutional law is already at the political end of the traditional continuum makes it difficult for students to understand that the constitutional law course is not just a free-for-all debate about the wisdom of particular policies. But because they think it's all politics, they bristle at any attempt to channel or criticize their arguments. Again, I'm not talking about policy or controversial political decisions: I'm talking about basic legal skills. I have had students in constitutional law tell me that my “interpretation” of the Court's actual holding in a particular case was incorrect, insist that strict scrutiny would be applied – under *existing* equal protection precedent – to a hypothetical that explicitly included no intent to discriminate, or suggest that such terms as “privileges or immunities,” “due process of law,” and “equal protection of the laws” are not in the least ambiguous or open-textured, but instead have fixed meanings that can be linguistically (not historically) resolved. And they presume that if I disagree, I am just viewing the cases through a political lens different from their own.

In civil procedure, by contrast, the students are willing – even eager – for any help a professor can give them in learning basic legal skills and deciphering cases, because they don't view the decisions as political or themselves as experts. And it's not the content, it's the attitude. For example, when a student recently tried to make the argument that because the minimal scrutiny test is so weak, a constitutional challenge subject to minimal scrutiny should be dismissed under 12(b)(6), he happily accepted my contention that the more

appropriate judicial response might be to grant summary judgment. Even more tellingly, the students routinely actually try to apply the Court's test(s) for the constitutional reach of personal jurisdiction – a typically slippery constitutional doctrine if there ever was one – rather than resorting to the political arguments they usually made in discussions of due process in the constitutional law course.

Devins' substitution of other materials for court cases in constitutional law simply increases these differences between the two courses, taking even more of the "law" out of constitutional law. Such a curriculum would only reinforce the students' unwillingness to view constitutional law as law.

To the extent that we keep the constitutional course court-centered, we can emphasize its similarity to other subjects and therefore steer the students toward typical legal analysis. While I'm not advocating teaching the students that constitutional decisions are *never* political, I think focusing on the political context of constitutional decision-making would simply strengthen the students' pre-existing belief that constitutional decisions are *always and only* political. And then large numbers of them can write off the course as just a political science seminar that will never be important to them as lawyers.

It should be apparent, then, that I also disagree with Rosenberg's criticism that there is a disconnect between what law schools teach and what lawyers do. The counseling, negotiating, bargaining, and mediating that Rosenberg suggests are the largest part of a lawyer's job all take place against background assumptions about the state of the law and its potential application or alteration. The skills we teach in traditional Socratic classes – the ability to assimilate abstract information in advance and then to respond quickly and articulately to unexpected questions or statements or to additional information – are also vital to the tasks Rosenberg identifies.

Maybe I'm just a traditionalist. But if we make any claim at all to be teaching students something that they do not learn as undergraduates and will need as lawyers, it ought to be the core methods of legal analysis – what is sometimes disparagingly called "thinking like a lawyer." I can think of no better way to undermine this goal than by reinforcing the students' belief that constitutional law is just politics by another name.

The reader may wonder, then, why I think Rosenberg is right to insist that law professors should integrate more non-legal materials into their scholarship but that Devins is wrong to extend that broadening tendency into teaching. The answer turns on the fundamental paradox of law teaching: unlike academics in virtually every other discipline, our students are not going to follow in our footsteps. We are academics; they are going to be lawyers. (There's also another difference between law and every other academic discipline: law is the only field in which the students edit the journals and the professors grade the exams – now what does *that* suggest about the competence of law professors?)

In general, the attitudes and skills that we are trying to teach our students do not always overlap with the demands of scholarship. Let me take one of my own passions as an example: What fascinates me most about current Eleventh Amendment jurisprudence is the wrong turns the Supreme Court has been taking ever since *Hans v. Louisiana*. There is a vast scholarly literature on the historical and political context of Article III, the Eleventh Amendment, and the subsequent cases. To my mind, that literature raises serious questions about current doctrine. My students are minimally exposed to these questions through reading the dissenting opinions in *Seminole Tribe of Florida v. Florida* and *Alden v. Maine*. But except for the handful who might go on to become law professors, they will probably never have to care whether *Hans* (or *Seminole Tribe* or *Alden*) was

rightly or wrongly decided. They simply need to be able to understand and apply the cases, and to be able to argue creatively for limits and extensions. Even the Supreme Court is unlikely to be receptive to a brief that points out that *Hans* was a consequence of the judicial abandonment of Reconstruction – and a federal district court will consider such an argument truly bizarre. So while the scholars exploring these questions should continue to consult as many non-legal sources as possible, there is no justification for a thorough treatment of such sources in the classroom.⁷

It is thus unsurprising, and indeed expected, that there is some divergence between scholarship and teaching materials. Obviously, some scholarly ideas should – and do – make their way into teaching materials. To give but a single example (from among many), John Hart Ely's ideas⁸ provide an accessible and insightful way for students to think about the Court's Equal Protection

cases. Moreover, there is certainly value in helping our students become reflective about law, even if there is no immediate practical import. We are still academics and they are still students, so a partial continuation of their liberal arts education is warranted. But we must be careful not to allow our own intellectual interests to overwhelm the students' legal education. This is a difficult balance to maintain, and Devins' suggestions would destroy it.

Gerald Rosenberg may well be right that we law professors are more like practitioners than like academics. That attribute is detrimental to our scholarship, but it is vitally necessary to our teaching. We must be careful to remember that we are teaching future lawyers, not future academics. At the same time, we should not let that educational mission cabin our scholarship or keep us from intellectual creativity. In other words, we all have to be two people at the same time. No wonder everybody keeps picking on us. *GB*

⁷ Perceptive readers – at least those who happen to teach Federal Jurisdiction – may notice that I do not always practice what I preach. The Eleventh Amendment chapter (for which I was largely responsible) of my co-authored casebook on Federal Jurisdiction probably contains far too extensive a discussion of the “diversity explanation” and its critics, and overly lengthy excerpts from dissenting opinions. But Professor Devins, I take it, would further expand that discussion.

⁸ See John Hart Ely, *DEMOCRACY AND DISTRUST* (1980).