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## TEACHING CONSTITUTIONAL LAW: AN EYE FOR THE FACTS

*David P. Bryden\**

Why do we spend so much time grading bluebooks and so little time considering what they reveal about our teaching? Maybe it's because, as Franklin Roosevelt said to Eleanor about death, one shouldn't think too much about such things. With some trepidation, I propose to ignore this sound advice, by telling you about the answers to a question on my last Constitutional Law exam.

The exam instructions informed the students that they were working in the office of the Senate Counsel of the State of Win-nibigoshish. Their task was to write a response to a state senator's request for advice about constitutional aspects of bills that he had drafted. This was the first question:

A. I've been supportive of our state agencies. But I'm concerned that they haven't hired enough members of minority groups, especially for the supervisory and policy-making positions. They also continue to lag behind in hiring women for such positions. I've had a member of my staff check it out, and these are the figures she obtained:

		<u>% of state population</u>	<u>% of state govt. employees at GS-6 or above (i.e., policy-making and supervisory).</u>
1.	Black (males)	8%	2%
2.	Black (females)	7%	5%
3.	Hispanic (males)	5%	3%
4.	Hispanic (females)	6%	2%
5.	Asian-American (males)	3%	None
6.	Asian-American (females)	3%	None
7.	American Indians (total)	1%	None
8.	Other (males)	32%	68%
9.	Other (females)	35%	20%

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Here's my proposed statute:

403.011. *Notwithstanding any provision of state law to the contrary, all state agencies shall consider, when evaluating applicants for employment, the ethnic group and gender combination to which each applicant belongs, as a factor to be weighed with other factors, for the purpose of reducing disparities between the proportion of an ethnic group-gender combination in the population and its proportion among state employees.*

*"Ethnic group," as used herein, refers to Black Americans, Hispanic Americans, Asian-Americans, and American Indians. "Gender" means male or female.*

The students had read several of the leading cases on racial and gender discrimination, including *Bakke*, *Califano v. Webster*, and *Fullilove v. Klutznick*. They learned that, as one of them put it on the exam, "women are a suspect class, but not as much as minorities." Their discussions of the relevant precedents contained the usual hodgepodge of recollection and confusion. Most of us don't worry much about that, because we don't think of ourselves as engaged in teaching black-letter law, at least not in the Constitutional Law course. We do suppose, however, that we are "teaching them how to think like lawyers." What impressed me most about the answers to this question was their utter lack of careful factual and textual analysis. This is not a novel complaint, but it may be useful to furnish some concrete illustrations. Of the 47 students who took the exam, hardly anyone made the following points.

<u>Idea</u>	<u>Percentage of students who mentioned it</u>
1. The statute refers to all "applicants for employment," while the statistics pertain only to the "policy-making and supervisory" positions. (Conceivably, for example, black males are <i>over</i> represented in state government if all state jobs are considered, relative to their proportion of the population, so that the statute would in effect authorize discrimination against them and in any event would not help them.)	None
2. According to the figures given, the disparity between the proportion of white women in the population and their proportion in state government (supervisory & policy-making positions) is <i>larger</i> than the corresponding disparity for black women.	2%
3. And therefore perhaps this act authorizes unconstitutional discrimination against black women in favor of white women.	None
4. Similarly, the bill appears to authorize various unusual forms of gender discrimination that may be unconstitutional. For instance, if these figures hold for all state employees, black men are to be favored over black women.	None

<u>Idea</u>	<u>Percentage of students who mentioned it</u>
5. And it appears to authorize discrimination in favor of black men as against Hispanic men, and Hispanic women as against black women.	None
6. If the state's Asian-American population consists largely of new immigrants, it would be unreasonable to expect many of them to be supervisors.	2%
7. Asian-Americans are not necessarily poorer on the average than whites.	2%

Perhaps the students would have been more attentive to such matters if they had been given more time, although one of my colleagues claims that they don't do much better on take-home exams. They certainly had enough time (45 minutes, less the time for reading the overall exam instructions) to describe at length the relevant cases and general propositions including (as usual) some pretty dubious ones. They evidently assumed that the facts of the problem were only a customary way of raising abstract questions. They may think that all we want is regurgitation of law, as if (for instance) this question had been simply, "Discuss affirmative action." If so, the results indict our testing more than our teaching.

If a major aim of legal education is to give students a feel for the facts, we ought to give exams that fairly indicate whether we're succeeding.<sup>1</sup> If bluebooks aren't evidence of how well we teach, then let's invent tests or written assignments whose results are worth taking seriously.

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1. I will discuss such matters more fully, and with much more data, in a forthcoming issue of the *Journal of Legal Education*. See also Bryden, *Teaching Constitutional Law: Homage to Clio*, 1 CONST. COMM. 131 (1984).