

1986

Book Review: Cases Lost, Causes Won: The Supreme Court and the Judicial Process. by Alice Fleetwood Bartee; the Law and Politics of Civil Rights and Liberties. by Richard Morgan; Freedom of Speech in the United States. by Thomas L. Tedford.

John Moeller

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Moeller, John, "Book Review: Cases Lost, Causes Won: The Supreme Court and the Judicial Process. by Alice Fleetwood Bartee; the Law and Politics of Civil Rights and Liberties. by Richard Morgan; Freedom of Speech in the United States. by Thomas L. Tedford." (1986). *Constitutional Commentary*. 498.

<https://scholarship.law.umn.edu/concomm/498>

[P]hilosophical hermeneutics may try to clarify these debates about method, but it should not expect to lead to a total change in the empirical practices of the discipline."²⁴ Philosophical hermeneutics may be of some value to those disciplines like constitutional theory whose thinking about interpretation is somewhat muddled. The value of philosophical hermeneutics is in its ability to root out inconsistencies and expose the lacunae in prevailing theories of constitutional interpretation. Beyond that a constitutional hermeneutics has little to offer constitutional lawyers. To suppose that contemporary philosophy might offer us an "exit from the bind" we presently find ourselves in, a bind which is in important respects politically and historically determined, is to make both a political and a philosophical mistake.

CASES LOST, CAUSES WON: THE SUPREME COURT AND THE JUDICIAL PROCESS. By Alice Fleetwood Bartee.¹ New York: St. Martin's Press. 1984. Pp. xiii, 207. Paper, \$10.95.

THE LAW AND POLITICS OF CIVIL RIGHTS AND LIBERTIES. By Richard Morgan.¹ New York: Random House. 1985. Pp. 600. \$22.00.

FREEDOM OF SPEECH IN THE UNITED STATES. By Thomas L. Tedford.¹ New York: Random House. 1985. Pp. xvii, 473. \$29.95.

*John Moeller*²

Most of us who teach constitutional law to undergraduates—whether at state universities or private liberal arts colleges—regard

24. Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135, 137 (1985).

1. Professor of Political Science, Southwest Missouri State University, Springfield.

1. Professor of Government, Bowdoin College.

1. Professor of Communication and Theater, University of North Carolina, Greensboro.

2. Associate Professor of Government, Luther College.

it as the most thoroughly enjoyable course in the curriculum. I am serious when I tell my students on the first day of class that it is the Cadillac of the liberal arts: it touches the entirety of American life (from the vilest crook to the highest elected official); it is a comprehensive history of American ideas (from the transitory economic theories of a particular age to the permanent fundamental principles of a free people); it exudes politics (from the appointment of Justices to the decisions they render); it is totally human (from the contestants to the Justices); it is fascinating and fun (from reading a single opinion to synthesizing a line of cases).

Unfortunately, for the same reasons, a teacher can easily generate excitement and enthusiasm without carefully thinking about the direction and nature of the course. Pose *Griswold* and *Roe v. Wade* with a few snide remarks or tell the story of Willie Francis, embellishing the details and stirring the imagination, and the result probably will be animated students shouting at each other. Because we all feel good when our students are participating actively, the barely planned, undirected debate is seductive. I am not sure, though, that it is good teaching.

At the same time constitutional law has so many facets that one hardly knows where to begin. Some history seems mandatory, but how much? Should one rely on broad generalities or emphasize the details of particular cases? And where does one draw the line between a technical understanding of law and a theoretical understanding of the Constitution? Is it more important to dwell on the ramifications of standing in a series of cases or to propose broad theories that may borrow more from political theory than from case law?

If one regards a constitutional law class as part of that ongoing seminar directed by the Supreme Court, then Court opinions are the text and one must decide how to treat them. Does one take the words seriously or emphasize the personalities behind the words? Does one teach that Supreme Court Justices, feeling the mystery and continuity of a grand institution, deliberate philosophically in search of right answers, or should students learn that because the Supreme Court is like all other political institutions it is important to discern underlying attitudes and ideological voting blocs? Do we want students to regard the Constitution as the fundamental rule of law or to approach it as a statement of the nation's most glorious aspirations?

Prior to answering those questions, one must first identify the student. One teacher may recruit pre-law students with the promise that briefing cases and participating in class will provide a taste of

law school, while another teacher encourages English and biology majors to take the course because its many components can enrich their college experience. It also matters whether this class is likely to be the students' primary exposure to ideas about the rule of law in general and constitutional law in particular.

I cannot speak for professors in the law schools, but I do know that many teachers of constitutional law in the colleges and universities struggle with these questions. Because the choice of texts varies according to one's personal preferences, quality of students, and class format, I hesitate to evaluate how successfully these particular books resolve those questions. Each is designed as an undergraduate text and each carries out its intentions fairly well. Nevertheless, these texts presume three distinct approaches to constitutional law, and that is what I intend to compare and evaluate in this review. I do not want to foist my personal preferences on others, but I hope that by suggesting some strengths and weaknesses of each book, I can contribute to the dialogue about teaching constitutional law—in this case in the colleges—that already has begun in the pages of *Constitutional Commentary*.

I

Richard Morgan's *The Law and Politics of Civil Rights and Liberties* represents the doctrinal, case approach to constitutional law. Each of the book's five parts—speech, religion, rights of accused, equality, and privacy—is divided into chapters on specific legal problems (subversive speech, speech in the streets, symbolic speech, and so forth). The chapters include brief introductions, but primarily consist of a standard selection of edited cases, preceded by paragraph-length backgrounds. I find it difficult to evaluate the editing prior to teaching the cases, but these excerpts are moderate in length, seem to focus on the *ratio* and significance of the case, and include a healthy selection of concurring and dissenting opinions. The book is sufficiently compact that it would be easy to supplement it with other readings. For one committed to the case method, but interested in additional readings, Morgan's text would be a good choice.

But what about the method itself? Relying on impressionistic evidence, I suspect it is the most commonly used approach in undergraduate constitutional law courses. I rarely hear my colleagues debate its desirability, but frequently hear questions about which casebook works best and why. Is there good reason for preference or is it simply inertia?

I think there are at least three good reasons. To begin, it nur-

tures those skills—careful reading of a text, analysis of the components of an idea, persuasion by reasoned argumentation—that are the core of a college education. A ten-page reading assignment covering two cases does not seem like much until one begins to dissect the text, distinguishing the dicta, identifying the tests, and following the chain of reasoning. Although these tasks can take so much effort that little time remains for Socratic questioning, a semester of that, with occasional unedited cases thrown in, invariably sharpens students' ability to read and think critically. I believe those skills are at least as valuable as the mastery of doctrine.

The case approach also reveals much about the idea and growth of law. One can theorize about the rule of law or normatively debate the meaning of the Constitution, but only by confronting a series of cases and experiencing the drawing of lines, step by step, does one get a feel for law's uncertainty and intricacy. And if students read enough concurring and dissenting opinions, they also learn that in addition to the dispute between the two litigating parties there also is the dispute among nine Justices. The student quickly learns that no phrase in the Constitution has a single correct meaning and that judges themselves are constantly torn between the intellectual desire to preserve the rule of law and the emotional pull to guarantee as much justice as possible in particular cases. A good selection of cases has the effect of a Seraut painting: all of those discrete cases, woven together, reveal a full picture that not only makes sense but also has a certain aesthetic beauty.

Finally, the case method makes law both real and fascinating. Those of us in the academy may thrive on intellectual debates about the meaning of constitutional phrases, and we may constantly search for more innovative and creative ways of rationalizing our reading of the Constitution, but we should never forget that law as practiced in the real world of concrete disputes affects human lives. For the person facing imminent execution, it does matter whether Justices regard the eighth amendment as a concept or a conceptualization. That sense of immediacy is essential to a full understanding of law, and quite frankly, it is one reason that constitutional law fascinates both teachers and students.

There is a danger, however, that the student will become fascinated by the individual stories without having a sense of any unifying theory. Memorizing the facts and importance of cases can become so overwhelming that students lose sight of the historical and theoretical underpinnings of the Constitution. Students are more likely to retain a theoretical approach to law than to remember fifty or a hundred cases memorized primarily to pass a test.

Furthermore, learning to synthesize in broad theoretical terms surely is as valuable as learning how to dissect individual cases. Bright, articulate students frequently have strong feelings about the emotional issues that live controversies frequently raise. But without a grounding in theory they can rarely proffer reasons beyond "it doesn't seem fair" or "it's in the Constitution."

II

Thomas L. Tedford's *Freedom of Speech in the United States* is a comprehensive text that systematically presents both a theoretical overview and a historical perspective. The book's four parts examine (1) the historical role of speech in the Western tradition, (2) controls on speech in such areas as sedition, privacy, and obscenity, (3) the special issues of time and place, prior restraint and free press, and technology's impact on free speech, and (4) the theories of Chafee, Meiklejohn, Emerson, and Haiman. Recognizing the central role of Supreme Court pronouncements, Tedford singles out key cases and identifies how the Justices voted, what the opinion declared, and why the case is significant or what rule it established. Treatment of the ensuing cases, with brief summaries and examples of the Court's line drawing, usually follows. In sum, Tedford sets the stage nicely, discusses in detail the development of speech law, and considers the impact and results of many lines of cases.

Tedford's approach has two advantages. First, the student can learn more, quantitatively, about the subject matter than from the case approach, because so much extraneous material is eliminated. Second, the method can shed considerable insight into the legal process. Tedford, for example, shows how landmark cases simultaneously wrap up unsettled issues and open new lines of inquiry. He emphasizes the progeny of his key cases and explicitly identifies which lines need to be drawn and how subsequent cases do that.

A comprehensive view of law—or of one aspect of law—requires a theory to hold it together. Although I already have suggested advantages to a theoretical approach, there also are pitfalls. In seeing primarily the final product, the student may not appreciate the contradictions and messiness that characterize law. Unless one believes that there is an objective telos to law in America, the comprehensive theory can be misleading. It shows the tip of the iceberg—either as it now looks or as the author envisions it looking—seemingly unaware that the tip might look different from another perspective or that real law is constantly churning below the surface. Tedford, for example, may be right to slight the balancing

of interests in some speech cases, but there also may be times in the future, as there have been in the past, when the complexity of social and political conditions elicits that test as a real alternative. Just because we have been free of it for a couple of decades does not mean speech law has evolved beyond it.

The other weakness in the textbook survey method stems from the difference between constitutional law as a body of material to be mastered and constitutional law as a way of thinking or more to the point, the difference between learning constitutional doctrine and doing constitutional law. When I ask my students to write an opinion on a case currently in front of the Court, I am often amazed at the frustrations I engender. They look in every corner of the library, seek out the reference librarian, and come to my office pleading for help. When they finally conclude that their research alone cannot provide any answer, because the Supreme Court has not yet spoken to that issue, they begin to think and analogize and create. Even if that single case is the only thing they remember from a semester of constitutional law, the lessons it teaches about law may be worth as much as the large quantity of learning they might acquire from a textbook packed with legal facts and ideas.

III

Whereas Morgan and Tedford interpret and give meaning to legal products, Alice Fleetwood Barteo, in *Cases Lost, Causes Won*, focuses on the judicial process within which the law develops. Using systems theory, she presents four case studies (*Frohwerk v. United States*, *Minersville v. Gobitis*, *Walker v. Birmingham*, *Bob White v. Texas*) to explain the input, conversion, output, impact, and feedback that characterizes the judicial process. She assumes that one cannot truly understand the formal law without understanding the proceedings that lead up to a decision, the interaction of Justices prior to the writing and delivering of an opinion, and the impact on both individual litigants and the political-social environment.

One does not have to buy into the totality of legal realism to recognize that law is made by nine human beings who do have identifiable backgrounds, well-developed attitudes, and legal-policy preferences, or that law is inextricably tied to politics. Teachers of the Constitution may properly speak about the rule of law with profound feeling or treat the Constitution from the perspective of normative political theory. Nevertheless, it would do a disservice to students to present constitutional law without teaching that at one level it is a political activity that requires accommodation among

nine Justices and that involves the interaction of many external actors. To be perfectly frank, most students sense that already. That realistic attitude about law and politics is not an endearing trait, and one that needs some tempering, but it would be silly to try to make law something it is not for an audience that refuses to be fooled.

The reasons for including the judicial process as it really operates has little to do with pleasing a youthful audience, however, and everything to do with obtaining better insights about the law. At the most elementary level, that involves learning the fundamental facts about the formulating of law. It does no good to talk at length about the opinions handed down by the Court if the student does not understand how those 150 cases were picked from the more than 4000 who appealed to the Court. That might call forth behavioral studies about granting certiorari, but even prior to that it requires discussion of the formal mechanisms for getting to the Supreme Court. I learned my lesson about not assuming too much the day a very good student, who had mastered the cases with some skill, asked me—in the thirteenth week of class—what that Latin word the Court had granted meant.

I know there are many who believe that the focus on process and judicial behavior denigrates the idea of law. Identification and blocs means nothing unless one has some sense of why those blocks formed. It makes considerable difference if they grow out of a planned strategy, reflect common backgrounds and attitudes, or result from five Justices who separately work through cases carefully and with integrity and then reach the same conclusions. Two of Barte's cases seem too atypical to be instructive. To use the *Bob White* case—in which the defendant finally wins a new trial only to be murdered in the courtroom—as an example of winning in court without having the intended impact, seems almost silly when there are so many fruitful illustrations of the relationship between what the Court says and what eventually happens.

What is most striking about the judicial process studies is that, when done well, they affirm the high quality of constitutional interpretation throughout American history. *Martin v. Struthers*, which involved a dispute between the town of Struthers's anti-doorbell ordinance and the Jehovah's Witnesses' desire to preach their faith, illustrates the point well. Recall that after hearing the case and discussing it in conference, the Court came down five-to-four in favor of Struthers, with Justice Black writing the opinion. When Murphy's dissent persuaded Black that he had decided wrongly, Black changed his vote, making a new five-to-four majority in favor of the

Jehovah's Witnesses. Because Black again wrote the majority opinion, the case works nicely when one wants to destroy the myth of mechanical jurisprudence. And yet, does it really teach that a clever Supreme Court Justice can defend just about any position that strikes his fancy? To the contrary, it teaches that Justice Black did not decide simply on the basis of personal preferences or characteristics, but did approach the case with a mind ready to be persuaded by sound, reasoned argumentation. The same is true in Bartee's discussion of the flag salute cases: the flipflop is not proof that law is variable and blows with the wind; it is evidence that law involves the careful deliberation of judges deeply committed to the task of interpreting the Constitution in hard cases.

IV

There certainly are other methods one might use in teaching constitutional law. For example, the revived body of constitutional commentary—primarily out of the law schools but occasionally from those trained in political science—could be integral to a class in constitutional law. One would not have to rely solely on such contemporary thinkers as Perry and Ely. The tradition is a long one, and consideration of Story, Cooley, and Tiedeman would serve the additional purpose of reminding that neither the approach nor many of the conclusions are all that new. Nor is there reason to limit oneself to a single method. One might assign a case book, lecture from a theoretical perspective, and ask for an essay on a judicial biography as one writing assignment.

Teaching is much too personal for me to prescribe a method for others; for the same reason I have been reluctant to evaluate closely the classroom worth of these three texts. I feel particularly strongly about this since I revise my own syllabus and change texts on a regular basis. Nevertheless, there are definite strengths and weaknesses with each approach, and I hope that by recalling some of them I have contributed to the ongoing discussion of how one might best teach constitutional law to undergraduates.