The Teaching of Constitutional Law. In preparation for this paper the writer sent out an informal questionnaire to thirty institutions, large and small, seeking suggestions and information relative to the various aspects of the subject. The answers indicated a surprisingly keen interest in the subject among most of the writers. In the main they were at one in the realization of the existence of a vital problem, in the conviction that there is a real need of an undergraduate course in constitutional law, and in the idea that a combination of text and cases, represented the best methods of approach. As to the place the course should occupy in the curriculum, its relation to other courses, and its scope and content, there was the widest possible variance. On the question of the adequacy of a law school course to meet the needs of political science students, there was a very interesting divergence of views, influenced in many cases by the type of law school course offered in that particular university.

For purposes of discussion it has seemed best to keep the question of teaching constitutional law to graduate students, separate from the problems raised in courses primarily for undergraduates. In dealing with the problem of instruction for graduates the discussion will be confined to the question raised in connection with a general graduate course as distinguished from the problems of specialized study and supervised research that arise in connection with graduate seminars.

Since a large number of universities have a full year course in constitutional law, designed primarily to meet professional needs, attended mainly by professional students, but open to graduate students in the social sciences, the first question that arises is as to the adequacy of such a course in meeting the needs of graduate students. The question of undergraduate students is not raised in connection with this course, because either the course is not open to them, or the legal prerequisites are such as necessarily to bar them.

The great majority of those questioned were of the opinion that a law school course of the type normally given in professional schools is not suitable to the needs of graduate students. Many made their answers depend upon the type of instruction given. The reasons suggested were that in professional instruction the historical, philosophical, and comparative aspects of the subject were ignored, and that attention was concentrated upon the aspects of the field most productive of litigation; whereas many matters of importance to the student of politics are necessarily ignored. In addition there was the objection that professional instruction was too technical, and devoted

too much to the drawing of nice distinctions and not enough to the tracing of fundamental principles in their process of evolution.

In the writer's opinion, most of the reasons given are unsound. Every good law teacher will agree that an able lawyer must not only know the law as it has been expounded by the courts, but he must prepare himself for a much more difficult task, viz., to know how it will be expounded in future cases. The good lawyer must not only be a good legalist, but a legal prophet. He serves clients best who can most accurately forecast the court's disposition of his client's cause. To do this, the law student must not only know the law today but he must also study the law of yesterday, seeking to divine the underlying principles of its development, in order that by extending those same principles into the future, he may forecast the law as it will be tomorrow. Thus the very necessities of professional instruction require a proportionate emphasis upon both historical and philosophical aspects as a means of articulating fundamental principle, and if such is not given, it is due to poor teaching rather than to the professional character of the institution.

The objection based upon the lack of comparative data to be found in law school courses, is generally valid. The value of such an emphasis is much greater to the student of politics than to the student of law, and this is reflected in the type of course generally found in the law school curriculum. This situation can and is largely met in the courses in comparative government. The question may be well asked, if it is not best met in such courses rather than in constitutional law.

The suggestion that a law school course is too technical or pedantic, raises an interesting issue, with which the writer is not in sympathy. In professional teaching much emphasis is placed upon discriminating analysis, nice distinctions, and a searching comparison of the cases. The first purpose is to prepare the lawyers in habits of close and accurate thinking. Surly this is essential to real scholarship, in both politics and law. And if the writer were to venture a criticism of university training in political science, it would be that we have not sufficiently emphasized this very type of mental discipline, and that we might well seek to emulate the work of this kind that is being done in connection with professional instruction.

The real weakness of this objection becomes apparent, however, only when we consider that the criticism was generally made on the assumption that the exhaustive analysis of cases, interfered with the proper emphasis upon the evolution of fundamental legal principles.

To the writer it seems obvious that the accurate formulation and tracing of legal principle, can become possible only after a careful analysis and comparison of decided cases. The criticism has weight then, just to the extent that emphasis upon the mental gymnastics involved in the study and analysis of cases, has prevented due consideration to the problems of underlying principle. This is probably what was in the minds of those who urged the objection. The criticism should then be restated, not as against a proper emphasis upon the close analysis of cases, but as against the tendency on the part of certain teachers to emphasize this aspect, at the cost of adequate attention to underlying principle. It is to be noted that this objection thus becomes valid from a professional standard as well as from an academic one. There is also probably little doubt that this is a mistake less frequently made by the non-professional instructor, than by others. Perhaps what is still more important, law school students will follow with much zeal questions of close analysis and discriminating comparisons, while other students are too eager for the process of generalization without the proper preparation of analysis and comparison.

The final objection to the adequacy of a law school course for graduate students, was that the two groups of students were interested in different portions of the field. There can be little doubt that law school discussion tends to center about the phases of constitutional law most frequently involved in litigation, while the student of government or politics may be equally interested in other aspects of the field. Moreover, by the very nature of his professional interests, the law student is more interested in determining the validity of an existing law, than in the constructive aspects of the subject, viz., how a law may deal with a given subject and do it in a constitutional way. The student of legislation, for example, is interested primarily in the latter, while the law student finds his interest in the former. In other words, the interest of political science seems much broader than the concern of the prospective lawyer, and the same topics may therefore very legitimately receive a different emphasis.

This seems a real inherent difficulty. The writer has had experience in teaching constitutional law to professional, non-professional, and mixed groups, and he believes that here is the real problem. If one is teaching a law school class, with only a handful of graduate students, in spite of all that can be done, the discussion, the emphasis and the interest will be dominated by the professional point of view and where that differs from the interest of the graduate student, he will be the loser.

One may present all the aspects of constitutional law to a law school class, striving to give the emphasis so as to meet the needs of the two groups, but if the class be conducted by the discussion method, the professional interests will dominate and the different interests of the other students will be inadequately met. This is not a criticism of either group or a confession of incompetence on the part of the teacher, but is a mere recognition of the inherent difficulties of the task.

The two outstanding reasons for the inadequacy of the law school course seem then to be, the lack of comparative study and the fact that the two groups were interested, not only in different portions of the field, but also in a different emphasis. It is the writer's belief that the question of comparative constitutional law may be adequately dealt with in the courses on comparative government. Whether the other objections are of sufficient magnitude to justify a separate course for graduate students, will depend upon the condition of the budget, the number of graduate students, and the weight assigned to these particular objections. Some have argued, and with this point of view the writer for the most part agrees, that while the objections are real, there is a certain compensating advantage in having the graduate student come in contact with the intellectual stimulus of professional students who have been specializing in the technique of legal study, where he will get a type of mental discipline, otherwise impossible for him to secure.

We come now to a consideration of an undergraduate course in constitutional law. A few years ago, the writer participated in a discussion of this same subject at Cincinnati, and there the main discussion turned on the desirability of offering any such course in constitutional law. Happily there seems to be little doubt in that matter now. With only one dissenting voter, those who replied to the queries were of the belief that such a course had a definite place in departments of political science. The reasons given for this position, however, were widely different. In fact there were almost as many reasons as there were reasoners.

Obviously no very intelligent discussion of the problems of teaching constitutional law is possible, until we have a working hypothesis as to the need to be met and the purpose to be accomplished. The reasons suggested for offering such a course would seem to fall within one or more of the four following classes:

1. A study of constitutional law as distinct from a descriptive course in comparative government or in American government and politics,

is essential to an adequate comprehension of our governmental system. For example, one's understanding of the fundamental problems of the division of powers between the national and state governments, and the underlying political, economic and social theories that lie back of them, cannot become specific, vivid or profound, until one has followed the development of the commerce clause through judicial decisions and watched the interaction of constitutional principles and the facts of our economic life. Again, the writer has been unable to bring his students to a keen realization of the fundamental need of the continuous adjustment of governmental concepts to modern complicated problems, through any more effective method than the tracing of the doctrine of the constitutional delegation of legislative power to administrative officers. Here they are compelled to face the problem in the light of concrete, specific cases, to the actual necessities of which the principles of law have been applied. Without this method, the student's ideas of such problems are at best nebulous and hazy.

2. A study of constitutional law is essential to the proper understanding of our basic theories as to the reconciliation of private rights with public welfare. The importance of these theories to political thinking can scarcely be denied, and yet it is equally clear that a real understanding of the principles evolved can be secured only through the study of due process of law and its judicial development.

3. The study of constitutional limitations has a great practical value to all students of social science. Many constructive proposals emanating from these sciences necessarily involve legislation or some kind of governmental activity for their practical realization. This means that they may come within the limits of constitutional restraints, and that these restraints become the actual conditions to the legal realization of the ends involved. The unfortunate results that have followed from ignorance of constitutional restraint are too many, varied and obvious to require description.

4. Constitutional law is undoubtedly valuable as a means of mental discipline. Whatever may be the prevailing theory as to the abstract value of mental discipline, there can be no doubt that habits of discriminating analysis and the accurate formulation of general principle are much to be desired; that these are particularly difficult to develop in descriptive courses; and that legal study is peculiarly well adapted to such an end. When that study has such an intimate relation to government and politics as constitutional law, the arguments in its favor, as one of the basic courses, seem overwhelming.

Scope and Content of the Course. Some of the suggestions received as to this aspect of the subject showed the most conflicting views. One instructor declared emphatically for a much more comprehensive course than that offered in the law school, and another came out with equal vigor for a more specialized treatment. The majority, however, agreed that the course should be more comprehensive than the law school course, for the reason that the interests of the students of political science are broader than those of the students of law. In this view the writer heartily concurs. On the matter of what aspects of the subject should be emphasized, there were but few replies. Apparently this was considered of little importance, had received little consideration, or was regarded as more or less conconcluded by the limitations of the available text and case-books. Concrete suggestions as to particular subjects to be stressed were limited to constitutional limitations, separation of powers, division of powers, delegation of legislative powers, and the other constitutional aspects of administrative law. A majority of those reporting on undergraduate courses had outlined the scope of their course largely by Dean Hall's little text on constitutional law and had apparently found that it afforded a satisfactory outline. The writer's experience has been that this was a fairly satisfactory basis except for its inadequate treatment of the delegation of legislative power and the constitutional problems of administrative law.

The lack of definitely formulated ideas on this phase of the subject, and the general tendency towards the same conclusions, with only a few conspicuous exceptions, would seem to indicate that an interchange of views on this subject would be mutually helpful and that to a minimum extent, some degree of standardization might be attained.

Place of Constitutional Law in the Political Science Curriculum. Apparently there is little uniformity of ideas or practice in regard to this question which presents some important problems. One distinguished instructor felt very keenly that such a course should be given in the freshman year and required of all students, not only because of the value of the content of the course, but because of its splendid disciplinary value, while another prominent instructor felt there was no place for such a course at all among undergraduates. The majority practice seems to be to open the course to all students above the freshman year, while a considerable number require junior standing, and two or three institutions require senior standing.

Obviously the question cannot be discussed apart from the matter of prerequisites. Here there is about the same divergence of opinion as to the matter just discussed, one school requiring no prerequisites and another requiring fifteen hours of political science. The most common prerequisite is the course in American government and politics, which runs from three to six hours in different institutions, while a number of schools require six hours of government. Closely connected with this question is the matter of requiring constitutional law as a prerequisite for other courses. The writer was much surprised to find that the course was rarely required as a prerequisite to other courses and that there were very few suggestions that it should be. This is doubtless due in large part to the fact that in many institutions constitutional law is looked upon as one of the advanced courses rather than one of the fundamental courses to be taken early in the undergraduate course. One school requires it for all of the courses in the department, two require it for majors in the department, two for all other courses in public law, and two for all advanced courses in government and administration. The writer is firmly of the opinion that the policy followed at Wisconsin, of opening the course to all sophomores and upper classmen who have had the beginning courses in American government and politics, and of requiring it for all courses in legislation, public law, administration, advanced courses in government, and for all majors in the department gives the best results. To give these other courses without a knowledge of constitutional law requires constant and repeated diversions into the field of law, which involve a large waste of time, and give no commensurate results. The writer has frequently seen courses in government, administration and legislation practically diverted from their original purpose, and forced into second-rate courses in constitutional law, because the students were not grounded in that fundamental subject.

Moreover, some system of prerequisites is essential to prevent wasteful duplication. In such courses as administrative law, legislation and taxation, if one must give an adequate treatment to the constitutional aspects of these various questions, a considerable portion of the time must be given to covering the same fundamental points again and again as they come in connection with each separate course. This problem of correlation to avoid wasteful duplication can be solved only by a rational plan of prerequisites.

The objections that will be made to this point of view are that it interferes with registration in the more advanced courses, and that

there are students in political science and allied departments who need some of these advanced courses, but who cannot take them if a prerequisite is required. To these objections the writer can only urge the futility of taking a specialized course for which the preparation has not been adequately made. It is his experience that the great majority of students will be better prepared for the work in hand if they take the required course, rather than the more advanced course, for which it is a prerequisite, provided the system of prerequisites is a rational one based upon a real interrelationship between the courses concerned.

In view of the foregoing it would seem that the question of prerequisites and required courses may be studied and discussed with great profit.

Method of Instruction. Here there was greater approach to unanimity than in any other aspect of the subject. With very few exceptions all favored a combination of text books and cases, the underlying reason seeming to be that with this method the less important topics could be covered more quickly with a text book, leaving the more vital matters to be dealt with by the study of cases.

The most significant suggestions dealing with methods of class room instruction had to do with the problem method. Apparently this had not been systematically employed by many instructors but wherever it had been, the reports were uniformly enthusiastic. Here the writer's experience seems to be fairly typical of those who have laid great stress upon the method. At Wisconsin, it is the custom to place in the hands of the students a set of problems. Generally these are close cases which have been decided by the courts, together with such pending constitutional questions as have come to the notice of the instuctor, and the constitutional problems that have been raised by the Wisconsin legislative reference library, the municipal reference library, and similar institutions. The problems are arranged in the order of the subject matter of the course, and the students are expected to prepare written opinions, disposing of the cases, in the light of the legal principles developed in the cases, text and discussion.

The advantages of this method are threefold. In the first place, it trains the student in the application of principle to difficult questions of fact, an important matter to every student of government, and yet one that is quite frequently ignored in considering methods of instruction. The mastery of legal science involves two distinct steps, first, the analysis of decided cases and the accurate formulation of under-

lying principle, and second, the correct application of those established principles to new cases. The problem method is essential to any effective training for the latter.

In the second place, by the use of such practical problems the student may be trained to the constructive solution of constitutional problems raised in connection with the drafting of legislation. It is one thing to be able to say that certain proposed legislative measures are unconstitutional. It is frequently a much more difficult task to determine whether or not the same public policy embodied in the proposed statute may be expressed in another statute that will avoid the constitutional defect. To the student of legislation in particular, and to the student of the social sciences in general, this is a very practical and a very important question. For example one instructor submitted a list of problems, some of which were set to illustrate this very point. The student was asked to determine if there was any constitutional method by which the federal government could establish the same public policy represented in the federal child labor law, which the court had held to be void. Another problem asked for suggestions as to how a certain law which the courts had held void, could be so amended as to be valid and at the same time establish as nearly as possible the same public policy as that contemplated in the original act. This type of problem compels the student to canvass the available legislative powers in the light of constitutional restraints, and emphasizes the importance of the question of what can be done rather than what cannot be done.

The third advantage of this problem method is its tremendous pedagogical value. The student finds in the problems, if they are skilfully selected and represent live constitutional issues, a challenge to intellect, scholarship and resourcefulness. The writer has frequently entered the lecture room to find the class in constitutional law gathered in animated groups throughout the room, struggling and contending over the different problems, in a manner that spoke volumes for the interest and enthusiasm that had been aroused. It results in getting students to put in long periods of intensive study on a single question, something which undergraduates are loath to do. But more important still, it means that the student is put to an objective test of correctly stating and applying legal principle to concrete problems. His written opinions on these problems are submitted to the criticism of the instructor and the class, which places a tremendous premium on habits of clear, definite and precise reasoning and expression. Finally it vitalizes the

whole subject and emphasizes the practical every day value of sound scholarship and accurate thinking, for the subject is presented in terms of modern problems of pressing moment.

Ways and means of best utilizing the problem method of legal instruction should receive the full discussion that its inherent importance would seem to justify.

Emphasis upon the Constructive Formulation of Underlying Principle. While this subject has already received some attention, it was only incidental and not commensurate with its inherent importance. Upon this subject, there were practically no suggestions, and the writer must here depend upon his own ideas and experience. This is a subject that has been too frequently ignored, or only superficially covered. This is particularly true with regard to such vague and indefinite provisions as due process of law. Much that has been said by writers and by the courts has been of literary rather than of scientific value. Yet the great significance of the concept of due process will hardly be denied. It is around its development and application that there is being fought out the age long struggle between private right and governmental power. It is being fought with all the power, the brains, and the skill that are always involved where both great material and human interest are at stake. The underlying principles that are resulting are the more significant because of the manner of their evolution. They are not being evolved out of a speculative or metaphysical endeavor to solve the problem, but by a tedious process of proceeding from concrete case to concrete case, step by step, always forced to face practical, real situations, by the constant necessity for the definite solution of the concrete cases submitted for judicial decision.

Here we have a very earnest effort to contribute to the solution of a very important problem. What have been the results of these efforts? Have they contributed anything to our political philosophy? Have they given us any intelligible principles or standards? Back of the judicial rhetoric, the hastily written decisions, the mass of dicta, is there anything articulate, fundamental, or profound? Are there any definite, inherent tendencies that are consciously or unconsciously followed in the development of judicial doctrines? These are problems deserving of greater emphasis and keener study than they generally receive. These would involve the psychology and the technique of judicial decision. They would involve the relation of public opinion to judicial doctrine. They would involve a more careful study of the

outstanding contribution of Mr. Justice Brandeis to the subject of due process, made in his famous brief on the eight hour day, when he secured the judicial recognition of the fact that due process cases involve both principles of law and questions of social facts, and that while they are mutually interdependent for the purposes of judicial decision, they are entirely severable as to the methods of their solution. While the solution of one requires the technique of legal analysis and synthesis, the other question is one of objective evidence and expert investigation. The writer is of the firm belief that much of the judicial confusion is due to a failure to discriminate between the two kinds of questions involved, and the foolish attempt to solve technical questions of fact by the maxims of legal science.

Certainly here is a group of problems for the student of political science. These particular problems may be better suited to graduate than to undergraduate courses; nevertheless, any adequate undergraduate course should raise the questions and stimulate an interest in their study and discussion, for they are fundamental to the understanding of American government. How can such questions be best discussed? How far can such discussions be profitably carried on in undergraduate courses? Upon these and related questions further study and discussion is earnestly invited.

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