

The Reconstruction Amendments

The Reconstruction Amendments

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Preface

In 2010—my last year as the Academic Dean at the University of Washington School of Law—one of my final responsibilities was to find a faculty member to teach Constitutional Law II, our rights-based constitutional law course covering the Reconstruction Amendments. After knocking on countless doors, I finally came to the conclusion that the only way the course was going to be taught was if I taught it myself.

Although teaching a new law school course is always a challenge, this new course presented a particularly acute challenge—I never learned the material in law school! In the 1997–98 academic year, I took constitutional law as a 2L at Harvard Law School. The course was designed as a comprehensive constitutional law course that covered structural constitutional law; the Equal Protection and Due Process Clauses of the Fourteenth Amendment; and the First Amendment. My professor was very intelligent and was very pleasant to interact with. But he had a near obsession with the Interstate Commerce Clause and other structural aspects of constitutional law. Indeed, several weeks of the course were devoted to the Interstate Commerce Clause alone!

On the syllabus immediately following the Interstate Commerce Clause was a light at the end of the tunnel: a unit on the Fourteenth Amendment. We had four cases assigned to us: *Bowers v. Hardwick* (sodomy laws); *Romer v. Evans* (sexual orientation discrimination); *Planned Parenthood of Southeastern Pennsylvania v. Casey* (abortion); and *Washington v. Glucksberg* (physician-assisted suicide). In preparation for the single day (!) devoted to these cases, I read and re-read them, taking copious notes and trying to make sense of the diametrically opposed majority and dissenting opinions. As a gay male slowly making his way out of the closet, I was particularly intrigued to learn more about the Court's decisions in *Bowers* and *Romer*.

On the appointed day, I arrived in class ready to discuss the cases. Our professor started class by continuing the discussion of the Interstate Commerce Clause from the previous day. As he continued to discuss the fine points of that Clause, I watched in horror as the clock quickly ticked its way toward the end of the class period. With five minutes to go, our professor turned to the four cases and said, “These cases all involve highly controversial issues, and people have very strong emotions about the issues they raise, and we’re not going to talk about them.” That, in a nutshell, was my formal education on the Reconstruction Amendments.

In 2000, I was hired as an assistant professor at the University of Washington School of Law. I taught a variety of subjects in my first few years, including evidence, federal

courts, conflict of laws, and international civil litigation. During my second year as a law professor, the LGBT student group at the law school asked me to help them get a course on sexual orientation, gender identity, and the law through the curriculum approval process. I succeeded in doing so, and began to teach the course the following year. In the process of teaching that course, I slowly began to develop my understanding of rights-based constitutional law.

In 2011, I was scheduled to teach Constitutional Law II twice. Both times, I assigned my students one of the many established and well-regarded textbooks in constitutional law. However, I found teaching from the book to be problematic for several reasons. First, like nearly all constitutional law textbooks, it was general in nature, with chapters devoted to all aspects of constitutional law, including structural issues; the Reconstruction Amendments; and the First Amendment. This made the book huge, and as a result, very expensive for students. Moreover, to keep it from being even bigger and more expensive, all of the chapters were heavily edited, with key historical cases omitted or reduced to references in notes and even the main cases severely truncated. As a result, I was constantly supplementing the book with my own, lightly edited versions of the cases.

That initial step of supplementing the textbook I was using began what has been a nearly ten-year process of writing this textbook on the Reconstruction Amendments—and *only* the Reconstruction Amendments. The book has a number of features that I believe will make it attractive to anyone teaching or enrolled in a rights-based constitutional law course:

- *Length*—At under 700 pages, the book is about one-third the length of most of the constitutional law textbooks on the market. As a result, it is also far less expensive.
- *Depth*—Because this book is *solely* focused on the Reconstruction Amendments, it examines them in much greater depth than do most constitutional law textbooks.
- *Reverse Engineering*—As I indicated above, I did not know that much about rights-based constitutional law when I set out to write this book. I was only familiar with the most recent cases on hot-button issues, so I started with those cases, and then read all the cases referenced within those cases. I continued this process until I arrived at the earliest cases interpreting the Reconstruction Amendments. As a result of this reverse engineering, I figured out which historical cases students needed to be exposed to in order to make sense of modern constitutional law decisions, and included those in the book.
- *Cohesive*—This is the third law school textbook I have written, all of which have been solo projects. Most textbooks, and especially most constitutional law textbooks, are written by multiple authors, many of whom have succeeded earlier groups of authors who have since passed away. While the collective knowledge brings a lot to the table, one often feels as they go from chapter to chapter that they are moving from one book to another, because often the chapters are written by

different people with different approaches. Because I wrote this book from start to finish, movement from one chapter to the next should feel seamless.

- **Historical Approach**—This book is, for the most part, organized in a historical rather than a purely topical order. Thus, the first chapter begins with a case from the 1700s while the final chapters contain cases from 2020. Thus, rather than briefly focusing on a given doctrinal principle before moving on to the next one, never to return, this book returns to each doctrinal principle multiple times in concert with doctrinal developments over time. This historical approach has the advantage of providing insight into how changes in the Court's composition and philosophy over time have impacted all aspects of rights-based constitutional law.
- **Viewpoint Neutral**—If we are being fully honest with ourselves, most law professors are somewhere between left-of-center and extremely left-of-center, and are not always careful about separating their views of what the law *should* be from what the law *is*. As I tell my constitutional law students on the first day of class, most of these decisions are closely divided because there are compelling arguments to be made on both sides of the issue. Accordingly, I have tried to present the materials in a balanced way so as to make sure liberal and conservative constitutional philosophies are given equal consideration.
- **Problem-Solving Exercises**—Law students are very good at learning and reciting doctrine, but find applying doctrine—especially constitutional doctrine—particularly challenging. Drawing on the success of my problem-based approach to evidence law in my evidence textbook, the last seven chapters of this textbook contain over a dozen detailed problems designed to help students apply their knowledge to hypothetical scenarios—some of which are loosely based on actual scenarios and some of which are a part of my wild constitutional imagination but all of which will help students master their skills in applying constitutional doctrine.

I want to thank a number of people who have helped make it possible for me to complete this project. Chief among them is Cindy Fester—the Publications Editor at my law school—who meticulously edited this book from cover to cover. I also wish to thank TJ Smithers, who shepherded the book through the publication process at Carolina Academic Press. In addition, I wish to thank my colleague Professor Kathryn Watts, who has taught out of a draft of this textbook twice and has provided me with detailed feedback. Finally, I wish to thank a decade worth of students—whom I have taught using skeletal forms of this textbook—for engaging in spirited discussions of the materials that has helped me to refine the textbook into what you have before you today.

PETER NICOLAS
Seattle, Washington
September 2020

