

Michigan Law Review

Volume 85
Issue 5 *Issue 5&6*

1987

Intergenerationalism and Constitutional Law

Ira C. Lupu
Boston University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), and the [Legal Education Commons](#)

Recommended Citation

Ira C. Lupu, *Intergenerationalism and Constitutional Law*, 85 MICH. L. REV. 1390 (1987).
Available at: <https://repository.law.umich.edu/mlr/vol85/iss5/45>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

INTERGENERATIONALISM AND CONSTITUTIONAL LAW

*Ira C. Lupu**

CONSTITUTIONAL LAW. By *Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet*. Boston: Little Brown & Co. 1986. Pp. lxxxix, 1536. \$38.95.

CONSTITUTIONAL LAW: CASES — COMMENTS — QUESTIONS. By *William B. Lockhart, Yale Kamisar, Jesse H. Choper, and Steven H. Shiffrin*. St. Paul: West Publishing Co. Sixth Edition, 1986. Pp. cxv, 1601. \$38.95.

The transmission of ideas from one generation to the next is vital to the maintenance of culture. The social importance of continuity in the law suggests that legal culture, including its constitutional law subculture, is especially dependent upon such transmission processes.

For the typical lay person, superficial study of constitutional history in high school and/or college, augmented by journalistic accounts of Supreme Court decisions, probably is the source of most knowledge of that subculture. For lawyers, however, the process of acquiring constitutional knowledge is far more intense and complicated. Even the lawyer who does no more than take a single course in the subject in law school is exposed directly to the thinking of her instructor and, more subtly, to the view of the subject put forward by the authors of her casebook. In their selection and editing of cases, organization and structure of chapters, and inclusion of notes, questions, and other secondary material, casebook authors exert a significant influence over the way a legal subject is taught and learned. Both classroom teachers and casebook authors, in turn, have been shaped and influenced by a wide variety of sources — their own teachers, the literature in the field, judges for whom they've clerked, colleagues with whom they have consulted, and many others. Those sources themselves have similarly been influenced by forces further removed from the present; the network extends backward and forward in time in a web more seamless than the law itself.

The process thereby described is of course no simple retelling of tales. Each generation has its own political crises and other consciousness-shaping events. Overlapping with such experiences are intellec-

* Professor of Law, Boston University. A.B. 1968, Cornell University; J.D. 1971, Harvard University. — Ed. Thanks to Nancy J. Altman, Pnina Lahav, and Avi Soifer for generous and helpful comments on an earlier version of this review.

tual trends, social rearrangements, and, for those in the constitutional law subculture, landmark legal events. Each generation thus receives and reinterprets its culture's past in light of its own felt needs and experiences.

The invitation to write a comparative review essay on these two recent, and very fine, casebooks, presents an opportunity to reflect on this process. The generational gap between the two sets of authors suggests that these books in particular are prime candidates for such a comparison. Three of the four authors of the *Stone* casebook — Professors Seidman, Stone, and Tushnet — graduated from law school in 1971;¹ the fourth, Professor Sunstein, graduated in 1978. By contrast, Dean Lockhart earned one law degree in the early 1930s and another in the early 1940s; Professor Kamisar and Dean Choper completed law school in 1954 and 1960, respectively. Professor Shiffrin, the recently added co-author to the sixth edition of the *Lockhart* casebook, is a 1975 law graduate, but he attended law school later in life than any of the other seven authors, and is older than all of the authors of *Stone*. In Part I, below, I address the possible relationship between authorial experience and intellectual mode suggested by these two casebooks.

Of course, not all that may be said about these 3000-plus pages will fit the intergenerational rubric. In Part II of this review, I turn to a more conventional approach to the task of reviewing casebooks,² and reflect on some additional qualities of these two offerings.

I

Having asserted that one can trace a connection between age and intellectual inclination, I feel compelled to offer several caveats before engaging in the enterprise. The books being compared in this review are a first and sixth edition, respectively. There is no doubt a strong tendency on the part of casebook authors to develop, in their first edition, an approach which becomes the baseline for all subsequent modifications. As a consequence, a comparison between a first and sixth edition may be misleading. Lockhart, Choper, Kamisar, and Shiffrin

1. All references in this paragraph to age and year of law degree attainment are made on the basis of information provided in ASSOCIATION OF AM. LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 1986-87.

2. For reasons that must be obvious to anyone who has ever opened a casebook, reviewing one (or, what's worse, two) is no simple task. I'm not sure I know what a conventional approach is, but I do know that I have benefitted from reading Marshall, *An Advance in Tradition* (Book Review), 53 U. CHI. L. REV. 1508 (1986) (reviewing *Stone*); Schauer, Book Review, 31 J. LEGAL ED. 680 (1981) (reviewing G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (10th ed. 1980)); Sedler, *Constitutional Law Casebooks: A View from the Podium* (Book Review), 79 MICH. L. REV. 1020 (1981) (reviewing seven extant casebooks); Monaghan, Book Review, 90 HARV. L. REV. 1362 (1977) (reviewing initial edition of P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (1975)); Karst, Book Review, 89 HARV. L. REV. 1028 (1976) (reviewing G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (9th ed. 1975)).

might well write a different book than the one they have produced if they were to set out today to create a wholly new one.

The second caveat arises from my differential experience with the two books. I taught a four-hour basic course in constitutional law in the fall of 1986 using *Stone*, and focused only on parts of it; although I once taught from the fifth edition of *Lockhart*, I have never taught from the sixth.³ My comparative familiarity with *Stone* has no doubt influenced my perception of the qualities of the two books.

Cursory examination of these works suggests strong similarities between them. Christopher Stone (not the Stone whose casebook is here under review) pointed out twenty years ago⁴ that most constitutional law casebooks follow a fairly set structure, dividing material into large categories on judicial review, federalism, separation of powers, and individual rights, and, within that structure, dividing material further into smaller, more clause-bound categories. In these last two decades only one casebook⁵ has abandoned this model, and it has achieved only mixed success. Neither *Lockhart* nor *Stone* makes any daring departure from this conventional structure.⁶

The similarities between the books at the level of basic structure reveal the power of legal categories and suggest that processes of intergenerational transmission have worked most effectively. Despite their obvious common commitment to these categories, however, *Lockhart* and *Stone* reveal differences of intergenerational import. These differences include bold matters of intellectual style and more subtle matters of sequence and priority within the material.

Because sequencing choices can be avoided by teachers using the book, while intellectual style cannot, the latter seems more significant. *Lockhart* is strongly pluralist in orientation. Many of its chapters contain lengthy series of paraphrased or quoted commentary on the problems under consideration.⁷ Unlike recent editions of Professor

3. In my dozen years of teaching constitutional law, in both basic and advanced courses, I have used casebooks authored or co-authored by Professor Gunther far more than any other. It would be reasonable to conclude, therefore, that I am not steeped in experience in teaching from either of the books under review.

4. Stone, *Towards a General Theory of Constitutional Law Casebooks*, 41 S. CAL. L. REV. 1 (1968).

5. P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* (2d ed. 1983).

6. *Stone* deviates in modest ways, several of which are discussed in Part II *infra*. Although Christopher Stone criticized the longstanding conventions as intellectually bankrupt, I do not share his views. The conventional categories and clause-bound approaches fit the ways in which judges and lawyers have thought about this material for two centuries. Focusing students on epistemology, linguistics, *see* Stone, *supra* note 4, at 5-12, social history, or what-have-you may have pedagogical and intellectual value, but those interdisciplinary approaches should at most supplement conventional approaches, not replace them.

7. The most prominent chapters in this regard include Chapter One, on the "Nature and Scope of Judicial Review," Chapter Seven on the "Protection of Individual Rights," and Chapter

Gunther's casebook,⁸ which tend to drive the reader toward a particular perspective through the device of rhetorical questions, *Lockhart* frequently creates the appearance of agnosticism with respect to particular outcomes and approaches.

The focus of the secondary material on which *Lockhart* relies similarly suggests the intellectual style of process-oriented pluralists.⁹ Doctrinal commentary and history done by constitutional lawyers are the mainstay of these efforts. It seems to me that this reflects, in large part, a view of law and constitutional history popular in the 1950s and 1960s but under assault ever since. Two assumptions characterize this view. The first is that law is a self-contained enterprise, in which sound decisional processes and careful thought will produce reasoned and just answers.¹⁰ The second, equally controversial assumption, is that constitutional history can be relied upon to generate strongly determined answers to many legal inquiries.¹¹

The pluralist and law-centered qualities of *Lockhart* are a generational phenomenon. Dean Lockhart came of intellectual age during the New Deal and its accompanying constitutional revolution. His generation transmitted to the next one, which reached intellectual maturity between the Second World War and the assassination of President Kennedy, lessons about the danger of judicial activism and related lessons about the triumph of the pluralist perspective. This generation of students, which included Choper and Kamisar, thus learned its constitutional law from teachers who had observed firsthand the death of dual federalism¹² and the temporary restoration of legislative supremacy.¹³ The substantive value-skepticism of Holmes¹⁴

Eight on "Freedom of Expression and Association," but virtually all of the chapters are peppered with citations and commentaries to diverse secondary sources.

8. See, e.g., G. GUNTHER, CONSTITUTIONAL LAW (11th ed. 1985).

9. Dean Choper's other work surely suggests the aptness of this label. See J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). The work of Professor Shiffrin, the new addition to the *Lockhart* line-up, suggests he may not share those views. See Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983).

10. This view was at the core of the so-called "Legal Process" school, led in the 1950s by, *inter alia*, Herbert Wechsler and Henry Hart. See, e.g., H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958).

In recent years, the idea of law as autonomous has come under withering attack from both the left, see, e.g., Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 14-19, 30-38 (1984), and the right, see, e.g., Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987). Others too have lamented the declining power of law and legal process as independent ideals. See, e.g., Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986).

11. For a recent attempt to rehabilitate that view to some extent, see Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986). See also Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987).

12. Compare *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), with *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

13. Compare *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), with *Lochner v. New York*, 198 U.S. 45 (1905).

and Hand,¹⁵ softened by an abiding faith in methods of and processes for reasoning about law, constituted the received constitutional faith in the first two post-war decades, and *Lockhart* to some extent yet reflects it.

The intellectual style and interdisciplinary leanings of *Stone* suggest intergenerational changes in scholarly perspective. Compared to *Lockhart*, *Stone* reflects a more complex view of the political process and a more substantive vision of the possibilities of social and political life.¹⁶ The former is manifested in the substantial reliance on interest group theory in the material on the dormant commerce clause (pp. 259-63, 296-97) and the equal protection clause (pp. 535-41); the latter is suggested by prominent invocation of material, early in the book and occasionally thereafter, on the republican tradition.¹⁷ This use of material from history, economics, and political theory is no mere adornment in the latest academic fashions;¹⁸ at a level of deep intellec-

14. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting) ("[T]he word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion . . ."). For a recent and intriguing effort at literary criticism of the Holmes dissent in *Lochner*, see Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1379-88 (1986).

15. See, e.g., L. HAND, *THE BILL OF RIGHTS* (1958).

16. The prior writings of several of the authors of *Stone* suggested the possibility that their casebook might be strongly influenced by the leftist politics and indeterminacy thesis associated with some members of the Critical Legal Studies movement. See, e.g., Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984). Those fears proved vastly disproportionate to the outcome; no fair-minded person could detect any strong tendencies in *Stone* in such directions. The book's predominant flavors are strongly doctrinal and moderately historical. Nevertheless, there are ways, explored above, in which the book appears to be responsive to Richard Parker's call for a constitutional law for his own generation. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

17. *Stone*'s first 17 pages are devoted to an exploration of the competing political theories that surrounded the adoption of the Constitution, including some brief and well-chosen excerpts from the *Federalist* papers. This material, if focused upon at the beginning of the course, can shape much of what comes after. The effort to facilitate student vision of the relationships between the goals of politics and the structures within which politics occurs seemed to me most admirable and useful. Later in the book, these concepts are invoked again, commonly in connection with other work by Professor Sunstein. See Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984), cited in *Stone* pp. 501, 510, 737, 744, 748, 1435, and 1461. See also Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127; Michelman, *The Supreme Court, 1985 Term, Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

Whether the neo-Republican vision of Sunstein and his collaborators in this book will be countered by a casebook from the neo-Federalists, see, e.g., Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982), remains to be seen. The possibilities seem intriguing.

18. That this is the case is evidenced by the paucity of attention paid in *Stone* to the recent focus on hermeneutics and literary theory in certain quarters of academic constitutional law. See, e.g., *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985). My own judgment is in accord with that implicit in the casebook: interest in economics and political theory will survive among constitutional scholars long after the interest in literary theory has waned.

tual structure, the book explores these paths in search of new methods of analysis and explanation in a field of law which recent theoretical work has thrown into disarray. Moreover, this reliance on social science and political theory to enrich the constitutional lawyer's vision is pervasive; it appears in virtually every chapter, and is relied upon in notes and questions situated in ways which demand attention.

The emphasis in *Stone* upon the relevance of this nontraditional material to the solution of legal problems is in tension with the law-centeredness and faith in legal processes of the preceding generation. This intellectual phenomenon has a variety of sources. One is the obvious diminution of respect, within and without the legal community, for legal institutions. The flight from (and by) academic Ph.D.s to the law schools suggests a socioeconomic explanation; would-be economists and political philosophers appeared on law faculties and began to make efforts toward bending the law towards their particular academic interests. Alternatively, and in constitutional law in particular, the disappointment of both right- and left-leaning scholars in their inability to capture the Supreme Court¹⁹ in the last fifteen years may have provoked an increased likelihood of external critique of judicial work, or an incentive to ignore such work altogether.

Whatever the genesis, the intellectual style of *Stone* presents perplexing problems of pedagogy. The casebook authors are inescapably present in the classroom. If the teacher's own intellectual style is at odds with that of the book, students will have to struggle to reconcile the competing messages they are receiving.

For example, the emphasis on interest group theory in Chapter Three of *Stone*, which focuses on dormant commerce clause problems, caused me some difficulty. I might have taught with it or against it, but doing either meant mastering some literature with which I was only vaguely familiar. Alternatively, I could have chosen to ignore the theoretical material, leaving the students in doubt and difficulty concerning whether to take it seriously. Ultimately, I moved halfway toward the material, trying in my classroom analysis to include it and suggest its limits, but not feeling entirely confident in either enterprise. For teachers not well-versed in this and other nonlegal literature, *Stone* will be both a challenge and a rich sourcebook.

At a more general level, the publication of *Stone* highlights an ongoing tension in the mission of the law school. I have noticed for some time an increasing chasm between those of my students with academic inclinations, who appreciate the turn to theory and interdisciplinary accounts, and the relatively more career-oriented ones, who

19. See generally THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983). I have elsewhere reflected on the flight from doctrinal concerns to more theoretical ones. See Lupu, *Constitutional Theory and the Search for the Workable Premise*, 8 U. DAYTON L. REV. 579 (1983).

prefer a doctrinal orientation. This gap, I suspect, is mirrored in an increasingly wide chasm between the more academic law schools and the bar. The consequences of the growing schism, to which a book like *Stone* may call attention, are disturbing for one like myself who for years has struggled to reconcile an academic view of law with the practical concerns of those who prepare for practice. Whether the effort to merge doctrine, history, social sciences, and political philosophy in a single casebook exacerbates or alleviates this tension may depend greatly on the teacher's method of using this book. For one who has the skill and training to exploit the advantages of the merger, *Stone* offers a rare opportunity to try to move the teaching of constitutional law to a new and higher level of the lawyer's art.²⁰

The other most striking contrast between *Lockhart* and *Stone* emerges from the sequential placement of the material on the Constitution and equality. The intergenerational evolution of the "idea of Equality"²¹ is complex. *Brown v. Board of Education*²² burst upon a country barely ready for the civil rights revolution the case portended. Three of the four authors of *Lockhart* had already graduated from law school when, after years of protests and violence, Congress enacted the civil rights legislation of 1964. By contrast, three of the four authors of *Stone* were teenagers in the early 1960s, and the fourth was in elementary school. For the generation reflected in the authorship of *Stone*, the quest for racial justice seemed historically, socially, and politically at the center of the quest for constitutional meaning.²³

Generational differences concerning the centrality of egalitarian themes appear to have shaped the sequencing choices in these books. *Lockhart*, perhaps reflecting an older characterization of equal protection as "the usual last resort of constitutional arguments,"²⁴ places that chapter at the very end of its substantive material concerning individual rights. In contrast, *Stone* introduces the concept of constitutional equality first among the individual rights material in the book. Material on implied fundamental rights, freedom of expression, the religion clauses, and state action all come after the equality material. This mode of organization suggests that equal protection is a first, not a last, resort of constitutional argument, and transforms the student's

20. Others in the academy have recently called for renewed attention to the relationship between intellectual life and the art of fine lawyering. See Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

21. Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966).

22. 347 U.S. 483 (1954).

23. My guess is that Supreme Court clerkships with Justice Marshall (Seidman, Sunstein, and Tushnet) and Justice Brennan (Stone) may have done much to reinforce this perspective. Moreover, the intergenerational disparity in the authorship of the two casebooks may also have influenced editorial judgments concerning the relative importance of feminism and its influence on the development of constitutional law. *But see* note 37 *infra*.

24. *Buck v. Bell*, 274 U.S. 200, 208 (1927) (Holmes, J.), cited in *Lockhart* p. 1131.

perspective on what appears thereafter in a variety of ways.²⁵

First, this sequencing suggests a communal perspective — the subordination of individuated entitlement rights to a sense of the general good. This message is a subtle one, because the equality chapter raises frequent questions about the tension between an individual rights focus and a group justice focus for equal protection adjudication. Nevertheless, the idea that individual entitlements might properly be made to yield to group-oriented remediation is introduced and defended here (pp. 605-07), and creates a useful backdrop for invocations of the concept in later material.²⁶

Second, the early presentation of the equality material permits a full development of the perspective that first amendment issues can be illuminated by equality concerns. Questions concerning speech and religion, for example, can often be framed in terms of equality, either in the sense of equal entitlements to speak or practice religion, or the related sense of limiting censorial discretion on the part of government officials. By emphasizing equality themes so early, *Stone* opens up avenues of discussion that a different organization would tend to inhibit.

In particular, this organization permits a close analysis of the relationship between the equal protection clause and the establishment clause. Adjudication under both clauses utilizes a complex methodology in which government purpose and policy impacts are significant.²⁷ Although the order can of course be reversed, it strikes me as more sensible to introduce students to the general case of equal protection before focusing on the more particular case of the equal religious liberty promised by the establishment clause.²⁸ Moreover, such an approach permits a reasoned and cogent escape from the recently resurrected originalist view that the establishment clause does no more

25. This systematic separation and prior presentation of equality materials has a cost in terms of chronological and historical coherence. In particular, the omission of the *Slaughterhouse Cases* from the student's first look at the substance of the fourteenth amendment troubled me, and I assigned that case from Chapter Six together with the note on "Reconstruction and Retreat" in Chapter Five. I think it quite important that the students be exposed early on to the possible tension between historically-based attention to racial equality and the more questionable assertions that the fourteenth amendment fastened free-floating notions of natural law upon the states.

26. The materials in Chapter Seven of *Stone* on pornography and feminism, pp. 1136-39, and group defamation, pp. 1082-86, are good examples of comparable tensions in other corners of constitutional law.

27. Compare *Washington v. Davis*, 426 U.S. 229 (1976) (discussing relevance of purpose and effect in equal protection theory), with *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (utilizing concepts of purpose and effect in establishment clause adjudication).

28. For elaboration of the relationship between equal protection and establishment clause methodology, see Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739 (1986). For different versions of the relationship, see Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986); Gedicks, *Motivation, Rationality, and Secular Purpose in Establishment Clause Review*, 1985 ARIZ. ST. L.J. 677.

than forbid government-created preferences among Christian sects.²⁹ Even if that were once the case, the concept of equal protection operates to generalize the principle of equal religious liberty, covering non-Christian as well as Christian religions,³⁰ and to fasten the principle upon the states.

Finally, placing the equal protection materials prior to *Roe v. Wade*³¹ has significant consequences for teacher and student. Thorough grounding in the equal protection struggle over gender issues, prior to confronting *Roe*, affects one's view of the case. Having struggled with whether the *Carolene Products*³² footnote reference to "discrete and insular minorities" contemplates women (or men), having contended with *Geduldig*³³ and *Michael M.*³⁴ and their problematic emphasis on biological aspects of gender, and having mastered the intricacies of levels of review including the intermediate standard of *Craig v. Boren*,³⁵ students using *Stone* approach *Roe v. Wade* with a rich collection of developed analytical tools and a sense of the Court's ambivalent attitude toward the liberation of women.

Compare the mind-set towards *Roe* created by the organization in *Lockhart*. If a teacher proceeds directly through the book, she will begin consideration of individual rights material with the chapter on "Substantive Protection of Economic Interests." This chapter includes the trip through *Lochner*-land, and it leaves an indelible mark in students' minds concerning the (im)propriety of judicial intervention in defense of unenumerated rights. Chapter Seven, which follows, opens with the debate on incorporation of the Bill of Rights, in which Justice Black prevails in both his affirmative campaign to impose Bill of Rights limitations on the states and his attack on the *Lochnerian* qualities he associates with the Frankfurter approach. The chapter then

29. *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). For cogent responses to this view, see L. LEVY, *THE ESTABLISHMENT CLAUSE* (1986); Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986).

30. Justice Story, on whom Justice Rehnquist relied in his *Jaffree* dissent, 472 U.S. at 104, recognized a more limited version of equal religious liberty in the clauses protecting free exercise and forbidding religious tests for office. 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 609 (4th ed. 1873) ("Thus . . . the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils without any inquisition into their faith, or mode of worship.").

31. 410 U.S. 113 (1973).

32. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

33. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (concluding that discrimination based on pregnancy was distinguishable from discrimination based on gender "as such").

34. *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (holding that distinction between male and female victims of underage intercourse is justified by capacity of females to become pregnant).

35. 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives" in order to withstand constitutional attack).

moves immediately to *Griswold* and *Roe*. This placement of *Roe* tends, I think, to highlight the arguments for its illegitimacy. Even though the book is scrupulously fair in its presentation of commentary for and against *Roe*, the absence of prior study of gender justice issues leaves *Roe* in the unmitigated glare produced by the temporary triumph of Black's brand of interpretivism³⁶ over other, less text-bound methodologies.³⁷

I had originally expected to find "evidence" of intergenerational disagreement about the contours of constitutional law lurking in the contrasting selection of "major" cases in the two casebooks.³⁸ In operation, however, this approach primarily revealed strong similarities between the books. To the extent discernible differences appear, they operate in conflicting directions in time. In some instances, *Stone* favors older cases that *Lockhart* does not. For example, one finds fuller treatment in *Stone* than in *Lockhart* of *United States v. Butler*,³⁹ *Home Building & Loan v. Blaisdell*,⁴⁰ and the *Civil Rights Cases*.⁴¹

In other, significant matters, however, *Stone* favors more recent cases than does *Lockhart*. In the material on the dormant commerce clause, for example, *Stone* reduces all of the pre-1970s cases to a series of long notes and focuses main attention on the major cases of the last fifteen years,⁴² while *Lockhart* retains a more traditional and historical focus in its case selection. At the beginning of the section on the rational basis standard in equal protection cases, *Stone* soundly opts for *New York Transit Authority v. Beazer*⁴³ while *Lockhart* remains with *Railway Express Agency v. New York*.⁴⁴ Because of its more developed factual record and its obvious connection with contemporary

36. See J. ELY, *DEMOCRACY AND DISTRUST* 2-9 (1980).

37. Reflecting on *Roe* highlights the all-male character of the authorship of all the existing constitutional law casebooks of which I am aware. This general state of affairs has not changed since Professor Sedler called attention to it in his review of seven casebooks some half-dozen years ago. See Sedler, *supra* note 2, at 1021 n.2.

38. By "major" cases I mean simply those cases printed at some length and with highlighted captions, as distinguished from "note" cases, which are given subsidiary treatment.

39. 297 U.S. 1 (1936) (holding Agricultural Adjustment Act of 1933 outside the scope of congressional power to spend for the general welfare). Compare *Stone* pp. 219-26 with *Lockhart* pp. 146-49.

40. 290 U.S. 398 (1934) (upholding Minnesota mortgage moratorium law against Contract Clause attack). *Stone* uses *Blaisdell* as a major case, p. 1430; *Lockhart* omits it, though it is discussed in the body of the opinion in the *Allied Structural Steel* case, pp. 420-26.

41. 109 U.S. 3 (1883) (holding that Congress lacks power under the fourteenth amendment to outlaw race discrimination in privately-owned places of public accommodation). Compare *Stone* pp. 1469-74 with *Lockhart* pp. 1410-13.

42. See *Stone* pp. 263-312 (focusing on *Philadelphia v. New Jersey*, *Hunt v. Washington Apple Commn.*, *Exxon v. Board of Governors*, and *Kassel v. Consolidated Freightways*). This choice seemed entirely explicable as a matter of editing strategy, rather than as the product of a view that more recent cases are of greater significance.

43. 440 U.S. 568 (1979).

44. 336 U.S. 106 (1949). What apparently does not change from one generation to the next is that — surprise! — rationality analysis begins in New York City.

problems about the relationship between drug use and employment, *Beazer* seems to me to be the more effective vehicle for introducing the myriad possibilities of equal protection review. At the opening of the establishment clause material, *Stone* makes what I found to be the undesirable choice of leading with, and thereby overemphasizing, the disastrous episode of *Lynch v. Donnelly*.⁴⁵ On this matter, my judgment is to rely, as *Lockhart* does, upon the germinal case of *Everson v. Board of Education*.⁴⁶

Case selection thus appears to be essentially a matter of editorial and pedagogical judgment, relatively uninfluenced by the author's position in chronological time.⁴⁷ The intergenerational thesis, it turns out, will only take us so far.

II

The intergenerational thesis is thus radically incomplete in its descriptive or explanatory power. A wide variety of matters independent of this thesis struck me as worthy of note. Limitations of time and space forced some arbitrary choices here, and I hope the authors will forgive and the reader will understand the inevitable randomness and unevenness with which these comments may fall.

In several places, the editors of each book have made editorial choices significantly different from those of the other. In the material on the dormant commerce clause, to start with an example noted earlier, *Stone* opts for a relatively short note on nineteenth- and early twentieth-century cases, and a primary focus on a series of decisions from the past fifteen years. Moreover, this material hangs on an organizational structure which bears a striking resemblance to the structure of equal protection adjudication — facial discrimination, discriminatory impact, search for forbidden motives, etc. By contrast, *Lockhart* adheres to a more traditional format for this material, presenting it chronologically and dividing it into sections based upon economic functions (regulation of transportation, trade, migration, and environmental concerns). Obvious tradeoffs exist between the two approaches. I found the *Stone* version vastly easier to teach than any other casebook's treatment of the material. Nevertheless, in doing so,

45. 465 U.S. 668 (1984).

46. 330 U.S. 1 (1946). Professor Marshall was also bothered by this. See Marshall, *supra* note 2, at 1515-16. It should be added that *Stone* retains a note on *Everson* at the beginning of the chapter, p. 1361, and that the questions and notes before and after *Lynch* work superbly to put it into context. My reaction to the treatment afforded *Lynch* is no doubt influenced by my passionate disagreement with its outcome. See generally Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770.

47. There are other concepts of time. See S.J. GOULD, *TIME'S ARROW, TIME'S CYCLE* (1987) (distinguishing between chronological and cyclical time).

I had trouble escaping the feeling that some texture and nuance had been sacrificed to order and modernity.

A more dramatic contrast of editing strategy arises from the placement of material on fundamental interests associated with the equal protection clause.⁴⁸ *Lockhart* continues to do what books have traditionally done; that is, it places this material within the chapter on equal protection, after the more "conventional" material on the propriety of various classifications (pp. 1316-402). *Stone* boldly departs from this convention by organizing a chapter entitled "Implied Fundamental Rights" (pp. 691-924) which includes economic due process, interests "fundamental" for equal protection purposes, privacy and familial rights, and a brief section on procedural due process. This separation of equal protection material on the permissibility of classifying along certain lines (*e.g.*, race or gender) from material on equality-based substantive interests comports fully with my own analytic approach,⁴⁹ and greatly facilitates exploration of the fundamental interest material. The ready juxtaposition of material on substantive rights and interests, despite the methodological and jurisprudential differences among them, invites close study of family resemblances and analytic or substantive disparities. Students can be taught to contrast weak entitlement rights,⁵⁰ strong entitlement rights,⁵¹ and strong comparative rights with substantive content⁵² much more easily when the materials concerning them are packaged together.

A price is inevitably to be paid for this sort of move, and in *Stone* the price is the separation of contract and takings clause material into a separate and subsequent chapter, entitled "Economic Liberties and the Constitution" (pp. 1427-65). Because economic due process material already appears in the "Implied Fundamental Rights" chapter, it obviously cannot be repackaged with the contract and takings clause material,⁵³ though it surely comports *better* with the chapter title ("Economic Liberties") than the material actually contained in the chapter. A small bit of creative syllabus preparation can solve this

48. Professor Marshall also commented on this aspect of *Stone*. Marshall, *supra* note 2, at 1512.

49. See Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979).

50. The requirement that governmental decisions be justifiable in terms of instrumental rationality creates entitlement rights, at least in those parties injured by the decision, but these rights tend to be quite weak because of the deference in the operative review standard. See, *e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

51. See, *e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973).

52. Strong comparative rights are generated by those opportunities which government is not constitutionally obligated to create, but which trigger strong equality claims if the state does create them. See, *e.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). See generally Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387 (1985). But see Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

53. *Lockhart* packages these three topics together in a chapter entitled "Substantive Protection of Economic Interests." Pp. 377-430.

problem in any number of ways, but its very existence highlights the obviously second-class qualities of economic rights in current constitutional law. No such rights are implied from the document — I exclude here the protections of the dormant commerce clause, which are not rights-based — and the explicit protections have been implemented in relatively weak fashion. In this regard, the constitutional revolution of 1937 has remained unshaken in its outcome.

On occasion, one book presents material on a topic altogether omitted by the other. *Stone* has a brief and provocative section on slavery in the opening of the equality chapter (pp. 435-44). This includes a very short version of *Dred Scott v. Sandford*,⁵⁴ a case that is fascinating to teach and that sinks the lesson of institutionalized racism into law students better than anything I have ever seen. Students tend strongly to respect the law and the Supreme Court; reading Chief Justice Taney's conclusions that masters have federal constitutional rights of property in their slaves, and that blacks — even blacks free under state law — are not among "the people of the United States" who framed the Constitution drives home the overwhelmingly racist character of American constitutional history and the utterly transforming quality of the post-Civil War Amendments.

Lockhart too has its unique offerings, including a unit on cruel and unusual punishment, with a near-exclusive focus on the death penalty (pp. 556-91). This material, frequently ignored in basic constitutional law courses, creates abundant opportunities for cross-fertilization with other themes in the course. Among these are the obvious tie-in to issues of equal protection in light of the arguably racial character of death penalty administration,⁵⁵ the tension between theories of original intention and the long-standing judicial prescription that the eighth amendment bars punishments inconsistent with evolving standards of decency,⁵⁶ and the role of social science data in constitutional decisionmaking.⁵⁷ Indeed, the death penalty cases are as good as any in all of constitutional law for illustration of the interplay among facts, values, and theories of constitutional adjudication.

In the genre of casebooks as chronicles of passing legal fancies, both books include short notes on the doctrine of irrebuttable presumptions.⁵⁸ Born of an amalgam of procedural due process, substantive due process, and equal protection ideas, the doctrine surfaced in

54. 60 U.S. 393 (19 How.) (1857).

55. See, e.g., *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987) (upholding constitutionality of the death penalty despite statistical evidence showing that those who murder whites are more likely to be sentenced to death than those who murder nonwhites).

56. See *Trop v. Dulles*, 356 U.S. 86 (1958).

57. See generally Davis, "There is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

58. See *Lockhart* p. 1402 and *Stone* p. 921.

1973⁵⁹ and was buried in *Weinberger v. Salfi*⁶⁰ in 1975. Working this through is a wonderful exercise for students; they can usually be made to see in about twenty minutes what it took the Supreme Court two years to figure out — that is, that irrebuttable presumptions are simply bright-line rules about what consequences are to follow from a given set of facts. Most constitutional law teachers probably ignore these cases because the doctrine is dead.⁶¹ As the date of its demise recedes into the past, one would expect this material to move from short section (*Lockhart*) to short note (*Stone*) to footnote and ultimately to the discard file. Because the doctrine has vanished from the law, some twenty-first century legal historian may well use works such as these to discover this obscure creature of law that lived and died at the end of the third quarter of the twentieth century. In casebooks and elsewhere, legal scholars create and preserve legal history.

The free speech chapters in each of these books deserve some focused attention, since both are new. The material here is massive, and each book does a unique and masterful job of presentation within four hundred pages. Still, the material is so vast, and linked internally in so many ways, that I have abandoned any effort to cover freedom of speech in a basic, four-hour survey course on constitutional law. The material on freedom of expression demands a course of its own.

What is most striking about these two efforts at organizing speech and press materials is how difficult a task it appears to be. This seems so for several reasons. First, methodological perspectives compete with substantive ones. Focus on prior restraints or the overbreadth doctrine, for example, will inevitably bump into concerns about obscenity, libel, or national security.⁶² Second, the ongoing controversy about the utility of the concept of content-neutrality⁶³ leads these authors in different directions — *Stone* relies on the idea of content-neu-

59. See *Vlandis v. Kline*, 412 U.S. 441 (1973). *Vlandis* represented a revival, rather than an original creation. See Soifer, *Parental Autonomy, Family Rights and the Illegitimate: A Constitutional Commentary*, 7 CONN. L. REV. 1, 37 & n.150 (1974) (tracing the doctrine to several cases, from the late 1920s and early 1930s, which invalidated state taxes on federal constitutional grounds).

60. 422 U.S. 749 (1975).

61. Skipping this material may have the unfortunate consequence of overlooking the significance of *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), a case that belongs, in my judgment, with *Griswold* and *Roe* in the evolution of the now well-entrenched doctrine of procreative choice (the right of "privacy" has always seemed to me a misnomer in describing this line of cases, and seems all the more so after *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986)). Both *Stone*, p. 614, and *Lockhart*, p. 1296 n.c, mischaracterize *LaFleur* as an equal protection case.

62. *New York Times Co. v. United States*, 403 U.S. 713 (1971), for example, raises questions about prior restraint as a method for suppressing speech, and about national security as a justification for doing so; *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) is about statutory overbreadth as well as the validity of substantive restrictions on political activity by public employees.

63. See, e.g., *Stone, Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); *Redish, The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); *Ely, Flag Desecration*, 88 HARV. L. REV. 1482 (1975); *Farber, Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); *Stephan, The First Amendment and Content Discrimi-*

trality as an organizational principle,⁶⁴ while *Lockhart* does not.⁶⁵

A more pervasive conceptual dilemma in the law of free speech, and one which produces strong differences in chapter organization, is presented by the companion ideas of "unprotected" and "less protected" speech. *Lockhart*, for example, views *New York Times Co. v. Sullivan*⁶⁶ as creating a standard that separates the protected from the unprotected (pp. 675-700), while *Stone* places the defamation material in a section concerned with "low" value speech (p. 1058). Issues of obscenity and sexually offensive speech create the most obvious problem in this regard. *Stone* treats the entire issue under the rubric of "low" value speech (pp. 1115-69). *Lockhart* places obscenity in its own category in a section on "what's protected" (pp. 709-41), returns to it shortly thereafter in another section on "harm to women and children,"⁶⁷ and makes a final pass at the problem in a subpart entitled the "near obscene" in a section on "less protected speech" (pp. 767-76). *Stone* ultimately "concedes" the organizational difficulties with a long, final section called "Additional Problems" (pp. 1244-360), including material as disparate as legislative investigations⁶⁸ and attempts by officials to control intramural speech by public schoolchildren.⁶⁹ Even within this section, struggles for coherent organization continue. In a subpart entitled "Equality and Free Expression," problems as seemingly unrelated as removal of public school library books⁷⁰ and subject-focused regulation of picketing⁷¹ appear. These cases are unquestionably about "equality and free expression," but so are, inter alia, *Cohen v. California*,⁷² *NAACP v. Alabama*,⁷³ *Cox v. Louisiana*,⁷⁴ and *Dennis v. United States*.⁷⁵ Why these and not

nation, 68 VA. L. REV. 203 (1982); *Stone, Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

64. Pp. 1169-244. Section three ("Symbolic Conduct") and section five ("Litigation and Association") of this chapter seemed to me ill-fitting with the concept of content-neutrality.

65. *Lockhart* puts the "public forum" cases — those most generally associated with the idea of content-neutral regulation — in a section entitled "Government Property and the Public Forum." Pp. 866-84. This fits well with Professor Shiffrin's general concern, expressed elsewhere, about the affirmative role of government in the system of free expression, see Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980), but operates to exclude from vision cases like *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding ordinance prohibiting the emission of "loud and raucous" noises by amplifiers in the public streets), which arguably fit well the traditional "time, place, and manner" formulation associated with the idea of content-neutrality.

66. 376 U.S. 255 (1964).

67. Pp. 754-65. This section, titled in a way that might offend some women (or compliment some children), sits in a chapter part entitled "new categories," and would work better, I think, if pushed back to the material on "the obscene."

68. See, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959), reprinted in *Stone* pp. 1316-18.

69. *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969), reprinted in *Stone* pp. 1269-70.

70. *Board of Educ. v. Pico*, 457 U.S. 853 (1982), reprinted in *Stone* pp. 1262-65.

71. *Police Dept. of Chicago v. Mosely*, 408 U.S. 92 (1972), reprinted in *Stone* at pp. 1244-46.

72. 403 U.S. 15 (1971).

73. 357 U.S. 449 (1958).

74. 379 U.S. 536 (1965).

those? *Lockhart* too falls prey to the tendency to create newly minted but insufficiently bounded categories in a brief section entitled "Closing Channels of Communication" (pp. 907-22), in which it places *Metromedia, Inc. v. San Diego*⁷⁶ and *Los Angeles City Council v. Taxpayers for Vincent*.⁷⁷ Aren't a great many free speech cases about government efforts to close some or all channels of communication?

For now, the dilemma of organizing a casebook chapter on freedom of speech appears insoluble. The cross-currents of substance, methodology, and constitutional perspective must inevitably upset any plan of organization. The inseparability of content and context aggravate the problem. The competition among overarching theories and justifications for free speech add a layer of difficulty. In the end, what amazes about these two chapters is how each in its own way has captured the present situation in free speech law. Whether constitutional lawyers should be proud of or troubled by this rich complexity is a question I do not address, although my inclination is to see this dense difficulty as inevitable.

III

Writing casebooks, and keeping them up to date, has long appeared to me to be a herculean task, and reviewing these two has done nothing to dispel that impression. The eight scholars whose work I have been discussing have performed a great service for their professional colleagues. Their careful organization, hard-nosed editing, substantive notes, and rigorous questions guide and provoke us. Their citations to and thoughtful discussions of a wide variety of primary and secondary sources frequently influence and surely enhance our scholarly endeavors. What changes from generation to generation is intellectual orientation, and judgment on the significance of various events, legal and otherwise, in the ever-receding past. What does not change is the inestimable value in the academy and the profession created by good faith effort, focused intelligence, and commitment to an often underappreciated task.

75. 341 U.S. 494 (1951). See generally Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

76. 453 U.S. 490 (1981).

77. 466 U.S. 789 (1984).